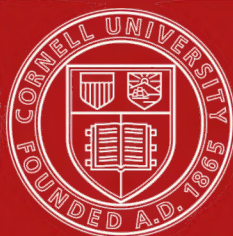




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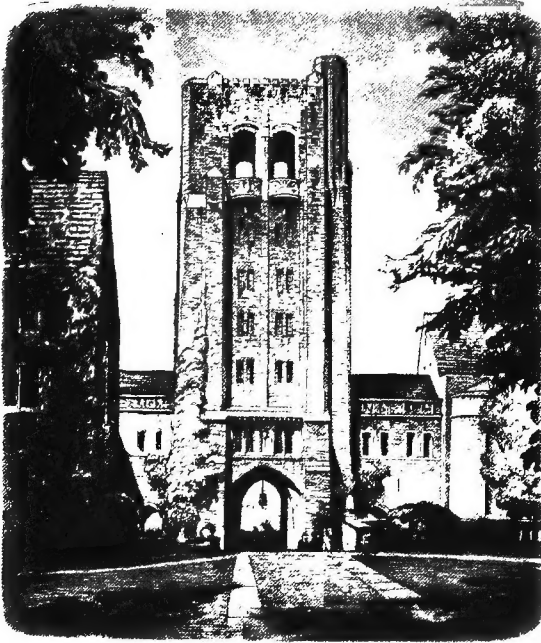
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[From the AMERICAN LAW JOURNAL]

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[From the HARTFORD DAILY COURANT.]

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[From the NEW YORK COMMERCIAL ADVERTISER.]

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[From A. J. PARKER.]

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[From the COMMERCIAL ADVERTISER.]

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PREFACE TO THE PRESENT EDITION.—In preparing this edition of the Revised Statutes, the

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[From the NEW YORK LEGAL OBSERVER.]

We have for some time past intended to direct the attention of the legal profession to the Hon. E. Fitch Smith's "Commentaries on Statute and Constitutional Law and Constitutional Construction." Instead of a review of these Commentaries, we have concluded to present to our readers some of the many testimonials which, at our request, the publishers have furnished us. In the *Belknap Gazette*, published in New Hampshire, we find these Commentaries thus alluded to:

"Mr. Editor,—Permit me, through the columns of your useful paper, to congratulate the profession upon the appearance of the Hon. E. Fitch Smith's 'Commentaries on Statute and Constitutional Law.'

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We understand the article above quoted emanated from the pen of the late attorney-general, a distinguished and learned constitutional lawyer.

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Our space will not admit of further extracts at present. We would add, in our opinion, the work of Judge Smith evinces an intimate and accurate acquaintance with constitutional law and other subjects of which he treats. We find in it the impress of a clear and discriminating mind, legal ability as a juridical writer, unsurpassed by few writers of the present day. From the learning and talent exhibited in the numerous judicial opinions of this author, which we have heretofore published, we had reason to expect that a work emanating from his pen would be one of real intrinsic merit. Our expectations in this respect have been fully realized.

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[From the NEW YORK EVENING POST.]

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PREFACE TO THE PRESENT EDITION.

ON the first hundred and forty pages of this volume will be found that part of the last edition of the text, omitted in the present tenth edition, devoted to the common-law rule in respect to the competency or incompetency of parties and witnesses, as affected by their interest in the event of the suit. The Notes of Messrs. Cowen and Hill, with some later additions distinguished as in the former volumes, are printed directly under the text.

The rest of the volume is reprinted as in the last edition, and the Notes, with additional references to the later decisions, are arranged immediately below the text to which they refer. The propriety of republishing this volume of evidence, applicable to the well known common-law forms of action, will be apparent to every lawyer who considers for a moment that nearly all of the decisions on the subject have been made under the old forms of suit and pleading, and that no *cause* of action has been abolished, or taken away by the later codes or systems of procedure. Now, as under the former practice, the cause of action or defence must be proved; and the principles of evidence remain unchanged.

It will be noticed that a few paragraphs have been inserted in the body of the text of this volume, and that these have been encircled in parentheses so as to designate them. This guarded freedom has been taken, with the view of directing attention to the change lately made in the practice and rules of pleading, where these affect questions of evidence.

DECEMBER, 1858.

PREFACE

TO THE SIXTH AMERICAN EDITION.

THE present edition of the text of this volume is a mere reprint of the last American, from the seventh English edition. The first part of the work—on the general theory and rules of Evidence—has been rewritten, and has reached the ninth edition; but the text of the seventh edition, of the part contained in this volume, remains intact. The Editor of this American edition has added to the Notes such new cases as he thought would enhance the value of the work to the profession. The new matter thus added is placed between double asterisks.

August, 1849.

ORIGINAL PREFACE

TO THE AMERICAN EDITION.

THE Notes to this Volume were undertaken, at the suggestion of Judge Cowen, and with the expectation of being supervised by him. The official avocations of the Judge, however, were such, that this expectation was early abandoned, and the work was continued on the sole responsibility of the present editor. The author, therefore, is no otherwise indebted to the Judge, than for the use of his office and valuable library.

The present volume was commenced before the appearance of Mr. Phillipps's 8th edition. On examining the latter, however, it was ascertained, as Mr. P. remarks in his preface, to be no more than "an enlargement of the first volume of the 7th edition." Of course, most that was material in the 8th edition would be properly embraced in the annotations to the first volume, by Messrs. Cowen & Hill. Indeed, it will be perceived, on examination, that that edition has passed under their review, and as they observe, that "about all the matter, and most of the English cases there added, will be found in their Notes." An extensive reference, therefore, to the 8th edition, in compiling this work, has been rendered useless.

It will also be seen, that a mere publication of the 8th edition, even with annotations, would have deprived the profession of the subject matter embraced in the second volume, and that the printing of the latter has been rendered absolutely necessary, to perfect this treatise on the Law of Evidence.

After the work had progressed nearly to a consummation, it passed into the hands of the present editor, by whom it has been revised, and such additions made as were deemed material. It is not claimed that the work is free from imperfection. But it is presented to the profession, with the hope that it may serve to lighten the labors of research, and be usefully connected, as a book of reference, with the valuable Notes of Messrs Cowen and Hill.

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PART SECOND.

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COMMON-LAW RULE

ON

THE COMPETENCY OF WITNESSES.

OF THE INCOMPETENCY OF WITNESSES FROM INTEREST.

THE common law holds persons who are interested in the event of an action, incompetent as witnesses to influence or determine that event.

The rule is, that all persons interested in the event of a cause are to be excluded from giving evidence in favor of that party, to which their interest inclines them.(1) This rule is founded upon a presumed want of impartiality in an interested witness. "When a man," says Chief Baron Gilbert, "who is interested in the matter in question, comes to prove it, it is rather a ground for distrust, than any just cause of belief; for men are generally so short sighted as to look at their own private benefit, which is near to them, rather than to the good of the world, which is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such biased testimony than to believe it."(2)

A general interest or mere bias of feeling does not disqualify.(3)

(1) NOTE 619.—This common-law rule, excluding witnesses as incompetent, on the ground of interest, is not applicable to prize causes in the admiralty, where even the captors, or any other interested person, may be received to testify. The objection goes merely to their credibility. *The Anne*, 3 Wheat. 445; *Id.* 438, and the cases there cited in the margin. But the rules of competency on the instance side of the admiralty are, in general, the same as at common law. *Boston, &c.*, 1 Sumn. R. 328, 343. See the qualification as to salvors, arising from necessity. *Id.* 328, 344; *Henry Ewbank, &c.*, *Id.* 401, 432.

(2) *Evid.* (3d edit.) 122.

(3) NOTE 620.—The cases in this country are uniform, that a mere interest in the question does not in general disqualify the witness. They need not all be cited. The following are some of them; but the doctrine will be found also to run through almost all the cases which are cited in other notes on the subject of interest. *Van Nuys v. Terhune*, 3 John. Cas. 83; *Phelps v. Winchel*, 1 Day, 270; *Pettingal v. Brown*, 1 Cain. Rep. 171; *Baker v. Arnold*, *Id.* 376; *The People v. Howell*, 4 John. R. 302; *Stewart v. Kip*, 5 John R. 256; *Fairchild v. Beach*, 1 Day, 266; *Bulkley v. Storer*, 2 Day, 531; *Wakely v. Hart*, 6 Binn. 316; *Farrell v. Perry*, 1 Hayw. 2; *Por-*

ter v. M'Clure, Id. 360; State Treasurer v. Nall, Tayl. 5; Den ex dem. Beatty v. ———, Id. 9; Baring v. Reeder, 1 Hen. & Munf. 165, 168; Miles v. O'Hara, 1 Serg. & Rawle, 32, 36.

That a mere bias of feeling or interest in the question, was no objection; but to disqualify a witness, he must have a direct and certain interest in the event, or the verdict must be evidence for or against him, see numerous cases in the notes now cited; also Miller v. Field, 3 A. K. Marsh. 706; Day v. Green, Hardin, 117; State v. Woodward, 4 Halst. 21; Caston's Ex'rs v. Ballard, 1 Hill, 406; Hayes v. Grier, 4 Binn. 83; Bowman v. Willis, 3 Bing. N. C. 669; Benedict v. Hecox, 18 Wend. 490; Anderson v. Passman, 7 Car. & Payne, 193; Fitch v. Boardman, 12 Conn. R. 345; Phebe v. Prince, Walker's R. 131.

We shall state various other cases. On a plea of non-joinder of a plaintiff, the person named as not joined is competent for the defendant to prove the plea. Davis v. Evans, 6 Carr. & Payne, 619. In a suit against an agent to recover back money paid him, on the ground that nothing was due to the principal, the latter is competent for the defendant. Leidel v. Peckworth, 10 Serg. & Rawle, 442. One co-heir and tenant in common, is a witness for or against another, in ejectment. Nass v. Van Swearingen, 7 Serg. & Rawle, 192. A grantor without warranty is competent to support the title. Dornick v. Reichenback, 10 Serg. & Rawle, 84; Connelly's Heirs v. Chiles, 2 A. K. Marsh. 442, 443; Krause v. Reigel, 2 Whart. 385; Swishers' Lessee v. William's Heirs, 1 Wright, 754; O'Neill, J., in Cates, Adm'r v. Wacter's Heirs, 2 Hill, 444, and case of Sims v. De Graffenreid, there stated. And this, though he conveyed with a parol understanding that the property was still to continue his, the suit being conducted at the expense of the grantee. Dornick v. Reichenback, 10 Serg. & Rawle, 84. In case, for obstructing a way claimed by the plaintiff, over the defendant's land, the grantor of the land to the defendant, with general warranty, at a time when the way ran across it, the deed making no mention of the way, was held a competent witness for the defendant. Greenwall v. Horner, 6 Serg. & Rawle, 71. Though an interest in the fund in question in the cause will disqualify the witness, yet it must not be remote, but immediate. Thus, the surviving husband of a wife, administratrix, is a competent witness for her surety in an action on her administration bond. Willis' Ex'r v. Britton, 1 Har. & John. 478. In trespass *quare clausum fregit*, a witness was held competent for the plaintiff, though he answered that he expected a lease of the *locus in quo* from the plaintiff. Baker v. Pierce, 4 Har. & M'Hen. 502. And see Day v. Green, Hardin, 117; Seaver v. Bradley, 6 Greenl. 60. In one case, the surety was denied to be competent for his executor, plaintiff. The surety had acted as agent, making large collections for the estate, but released his commissions and all reward, yet denied to be competent. Bean's Ex'r v. Jenkins' Adm'r, 1 Harr. & John. 135. *Quere*: for the witness came to support no right of his own; nor could the recovery benefit him, or a failure injure him, with any degree of certainty. And this case was accordingly disregarded, and appears to be overruled by Ferguson v. Cappeau (6 Harr. & John. 395, 402). In this last case, it was held that he would not be liable on his bond for the costs of the suit. Id. 402. The liability for these, even of the principal himself, is at least uncertain and contingent; for he may generally reimburse himself out of the estate. Id. It was said, that a witness for the state was not incompetent, merely because he was entitled to a premium on the conviction of the prisoner; but he was rejected on other grounds. State v. Bennett, 1 Root, 249.

A vendor with warranty against his own acts, and those of his co-heirs, and those claiming under them, is a competent witness for his grantee, the plaintiff or defendant in ejectment, against one who claims not under those to whom the warranty extends. Connelly's Heirs v. Chiles, 2 A. K. Marsh. 243, 244; Porter's Heirs v. Robinson, 3 Id. 253, 256, 257; Burns v. Lyon, 4 Watts, 363, 366; Beach v. Sutton, 5 Verm. R. 200, 214; Beidleman v. Foulk, 5 Watts, 308. A minor son is a witness for his father, in an action for the wages of the son. Keen v. Sprague, 3 Greenl. 77, 80. That a promise by the plaintiff to pay his witness a debt out of the fund recovered, does not disqualify the witness, with the reason and authorities, see Seaver v. Bradley, 6 Greenl. 66, 63, 64, per Mellen, C. J. In assumpsit, for wheat sold and delivered under a contract to deliver a certain parcel, a witness who was, after the contract, received by the plaintiff to participate in it, and deliver a part for and in the name of the plaintiff, and on his credit, at the original contract price, and whom the plaintiff had paid, was held clearly competent for the plaintiff. Barstow v. Gray, 3 Greenl. 409. In an action against a sheriff, for not levying on goods of a firm which he had attached for a debt against one of the firm, the defence was, that attachments and claims for partnership debts against the firm, had exhausted all their

property. Held, that a creditor of the firm was a competent witness for the defence. *Commercial Bank v. Wilkins*, 9 Greenl. 28, 39. A master is a competent witness for his indented servant, or black boy, holden to service under the abolition law, on trial for a capital offence. *State v. Aaron*, 1 South. 231. In assumpsit, a third person, or, if he be dead, his executor and legatee, is a competent witness for the defendant, to prove that such third person paid the debt, at the request of the defendant. *Henarie v. Maxwell*, 5 Halst. 297. In trover for slaves, the plaintiffs claimed under a division, by consent between joint tenants. A person who claimed and held other slaves under the same division, was offered as a witness for the plaintiff, to prove the fact of division, but was rejected as incompetent. *Starkey's Administrators v. McClure*, Mart. (N. C.) R. 73. But this case (A. D. 1797) would doubtless not be followed at the present day, for the interest was in question only. In an action against the vendor on a warranty of soundness, or a defence to an action by him for the price of the article, grounded on a breach of such warranty, the vendor who sold to him with a like warranty of soundness, is a competent witness for him, to prove soundness. The case was one of the warranty of a horse. The court said, the record could not be evidence as in case of the warranty of title; for the horse might have been well when the witness sold him. *Duncan v. Bell*, 2 Nott & McCord, 153, 156; *Johnson v. Harth*, 2 Bail. 185, per Harper, J., and the cases there cited by him. A. assigned to B. all his interest in certain property deposited in the hands of C., for which the latter was bound to account to A. and B. jointly. In an action by B. against C., on C.'s promise to account to B. alone, made subsequent to the assignment, A. was held to be a competent witness for B. *Lang v. Fiske*, 2 Fairf. 385, 390. In trespass, *quare clausum fregit*, by one claiming under the witness's prior unregistered deed with warranty, against another claiming under his subsequent deed of quit claim, registered prior to the other, the witness was held competent for the plaintiff to prove that the subsequent grantee took with notice of the first deed. *Adams v. Cuddy*, 13 Pick. 460, 463, 464. A grantor, without warranty, is competent to support his vendee's title, though the latter have not paid the purchase money. *Krause v. Reigel*, 2 Whart. 585, 587. In an action for a nuisance to the land by an assignee of a mortgagee in possession, his assignor is competent for him, inasmuch as the record would not be evidence in respect to the title, especially when the pleadings do not put that in issue. *Hall v. Fuller*, 7 Verm. R. 100, 106. A wife, though she join her husband in the execution and acknowledgment of a deed, containing a covenant of warranty, is not bound by the covenant. The object was merely to bar her dower, and she may, therefore, on her husband's death, be received as a witness to sustain the title. *Chambers v. Spencer*, 5 Watts, 404.

In an action by a *quasi* corporation, *e. g.* a road commissioner, in his own name, on a contract made with his predecessor, the latter is a competent witness for the plaintiff; the witness, though remotely interested, yet being competent within the various cases, *passim*, in these notes, respecting the competency of municipal corporators. *Cox v. Way*, 3 Blackf. 143. An action was brought on the promise of the defendant, to pay, at maturity, a note which the plaintiff made for the accommodation of one Shaw, to secure a debt due by him to one Hart. And Hart was held to be a competent witness for the plaintiff, to prove the defendant's promise, though the plaintiff had not yet paid his note to the witness, and the latter had indorsed it; and anticipated that the avails of a recovery by the plaintiff in the pending suit, would be appropriated to discharge his liability as indorser. The objection was, that the witness would be, in equity, entitled to the benefit of the recovery, within *Phillips v. Thompson* (2 John. Ch. R. 418), which held that the holder was entitled to the benefit of collateral securities given by the maker to the indorser. But the court held that the doctrine applied only as between assignor and assignee, in which case the latter is held to be a purchaser, not only of the principal debt, but of all collateral securities. And the witness here was not an assignee, but a mere payee of the plaintiff's note, and a purchaser of nothing but the maker's responsibility. The witness, therefore, had no legal nor equitable interest. *Robertson v. Stewart*, 5 Watts, 442, 445, 446. A creditor is a competent witness in favor of his debtor, though a recovery will increase his substance, and means of paying the witness. *Gibson, C. J.*, in *Robertson v. Stewart*, 5 Watts, 445, 446. See *Paul v. Brown*, 6 Esp. R. 34; *S. P.*, *Noel v. Davis*, Barn. & Adol. 96. But note the distinction between these cases, and the one just put. There, the creditor came to increase a fund on which his debt was a lien; and, therefore, *quere*. *Seaver v. Bradley*, 6 Greenleaf, 60, 63, 64.

Any interest, so remote, or of such a nature, that it cannot be released, will not disqualify a witness. *Henderson, C. J., in State v. Kimbrough, 2 Dev. 439.* In case for building a dam on land held as tenant in dower, by A.'s widow, and diverting a watercourse to the damage of the plaintiff, the husband of A.'s heir is competent as a witness for the defendant. *Adams v. Butts, 9 Conn. R. 79.* And see *Leach v. Thomas, 7 Carr. & Payne, 327.* The reversioner is a competent witness for the particular tenant. *Id.* But *quere*, if so in ejectment. A witness merely requesting another to become security for the plaintiff's costs, who does so accordingly, without engaging to indemnify the surety, does not disqualify the witness to testify for the plaintiff, though the witness may deem himself bound in honor to indemnify. *Mulkevan's Executors v. Gillespie, 12 Wend. R. 349:* In assumpsit, by a vendee, to recover back money paid to his vendor of land, founded on the defendant's breach of the contract to convey, one who had covenanted to convey the same land to the defendant, was yet held to be a competent witness for him. *Reed v. McGrew, 1 Wright, 105; S. C. but not S. P., 5 Ham. 375.* In an action by a jailor for jail fees, the sheriff is, *prima facie*, a competent witness for the plaintiff. It will not be intended that the sheriff is interested, as a sharer in the fees, merely because he has deputed the plaintiff to keep the jail. *Saxton v. Boyce, 1 Bail. 66.* The plaintiff took a note of T., on which C. was surety. T. assigned property to the plaintiff in payment, which one W. seized on his *fi. fa.* against T., alleging the assignment to be fraudulent; the plaintiff, therefore, sued the sheriff. Held, that C. was a competent witness for the plaintiff; for the note was paid by the assignment, whether fraudulent or not. *Terry v. Belcher, 1 Bail. 568, 571.* In an action on a bond against an administrator, one who had indorsed for the accommodation of the intestate, was offered as a witness for the defendant. He was held competent, though he admitted the estate was insolvent, and that a recovery on the bond would exhaust the assets. *Ogier v. Holmes, 1 Bail. 473, 475, 476.* In ejectment by a devisee, a residuary legatee of the estate is competent for the plaintiff, though a suit in favor of the estate be pending against the defendant, for use and occupation of the *locus in quo.* *Summer v. Murphy, 2 Hill, 488.* In an action for the infringement of T.'s patent of a machine, the defendant relied on a patent to P. for the same machine, who assigned it to the defendant. P., the assignor, was held to be a competent witness for the defendant. *Treadwell v. Bladen, 4 Wash. C. C. R. 703, 704.* And see *Derosne v. Fairlee, 1 Mood. & Rob. 457.* In an action by A.'s administrator against B.'s administrator, for money had and received from C.'s administrator, to the use of the plaintiff's intestate, the administrator of C. is a competent witness for the plaintiff. *Wiggin's Adm'r v. Pryor's Adm'r, 3 Porter, 430.* In trover, for negroes, by a trustee, claiming them under a bequest to the plaintiff, in trust for an infant for life, remainder to his heirs, the uncles of the infant, now next of kin, are competent witnesses for the plaintiff. *High v. Stainback, 2 Stew. R. 24.* In assumpsit, the defence was, that the plaintiff had received a note made by A. in satisfaction. Held, that A. was a competent witness for the plaintiff, to prove the note a forgery. *Hickman v. Nance, 1 Stew. R. 354, 373, 374.* In detinue for a slave, the defendant offered W. as his witness, who had sold the slave with warranty, to M., from whom it had passed with warranty, through several sales to the plaintiff. Held, that W. was competent. *Martin v. Kelly, 1 Stew. R. 198.* The father is a competent witness for his son. *Smith v. Wiggins, 3 Stew. R. 221.* Where the defendant contracted with A., B., C., &c., severally; in an action by one for a breach of the contract, another was held a competent witness for the plaintiff. *Wadhams v. The Litchfield, &c., T. P. Co., 10 Conn. R. 416, 420, 421.* In ejectment, a witness is not incompetent for the plaintiff, merely because he claims other land depending on the same location and boundary, which the plaintiff is seeking to establish. *Woodard v. Speller, 1 Dana, 179, 181.* So if he claim as heir of B., and be offered to defeat the plaintiff, who also claims as heir of B. *Doe ex dem. Bath v. Clarke, 3 Bing. N. C. 429.* In Kentucky, a replevin bond with surety, duly acknowledged, had the force of a judgment. In an action against a constable for not returning an execution on such a bond, the surety is a competent witness for the defendant. *Williams v. Hall, 2 Dana, 97.* In an action against an administrator, his surety is admissible as a witness for him, there being, in the cause, no suggestion of a devastavit. *Bennington v. Parkin's Adm'r, 1 Harringt. 128; Spencer's Adm'r v. Brooks, 1 Wright, 178.* In an action by the vendor for the rescission of a sale of land, on which, upon rescission, a judicial mortgage [judgment] of the witness would attach and become a lien; he was, notwithstanding, held competent for the plaintiff. *Russell v. Sprigg, 10 Lou. R. (Curry) 421, 424, 425.* In an action by a holder against the surety, a maker

of a note, the principal, a co-maker, not sued, was received as a competent witness for the defendant, the court saying his interest was balanced. *Freeman's Bank v. Rollins*, 1 Shepl. 202, 205. *Quere.* In a like case, he was released. *Harman v. Arthur*, 1 Bail. 83. In case for flowing the plaintiff's land, by the defendant's dam, the owners of mills below, though benefited by the dam, were held competent witnesses for the defendant. *Inhabitants of China v. Southwick*, 2 Fairf. 341.

One Tenny, by a foreign attachment, recovered judgment against M., and a debtor to M. by note, not negotiable. Afterward, the debtor gave Tenny his, the debtor's, note for the judgment debt. Then one A. claiming to be a *bona fide* assignee of the first note, sued the debtor upon it in M.'s name. Held, that Tenny was a competent witness for the debtor, now defendant. *Matthews v. Houghton*, 2 Fairf. 377, 380. In trover, for goods sold to and obtained by M., on a fraudulent pretence that he would pay cash, others from whom he had obtained goods in the same way, were held competent witnesses for the plaintiffs. *Rowley v. Bigelow*, 12 Pick. 307, 311. In assumpsit, by a mortgagor of land, for use and occupation, the mortgagee is a competent witness for the defendant, to prove that the mortgage has been foreclosed by his entry, and that he demised to the defendant. *Plympton v. Moore*, 13 Pick. 191. In assumpsit on an account, the defence was, that A. sold a horse to the plaintiff, a part of the price to be in part satisfaction of the account, the defendant agreeing to pay the residue to A., which he had done; A. was held a competent witness for the defendant. *Burt v. Nichols*, 16 Pick. 560. In an action on a covenant of warranty, one who had conveyed the land in question to others with warranty, was held a competent witness for the plaintiff, to prove that he entered as the agent of his grantees, and evicted the plaintiff. *Burrage v. Smith*, 16 Pick. 56, 60. A witness is competent for a plaintiff in ejectment, though he, being in possession of lands depending on the title in question, admits that he prefers the plaintiff should succeed, hoping to purchase from him on better terms than from the defendant. *Jackson ex dem. Hopkins v. Leek*, 12 Wend. 105, 108. An attorney sues an assignee for costs upon his retainer; the assignor is a competent witness for the plaintiff. *Watson v. Smith*, 13 Wend. 51, 52. On a bill filed to avoid a judgment binding the plaintiff's land, held, that persons claiming under him, as purchasers of parts of the same land, were competent witnesses for him; because the decree would not conclude them. *Johnston v. Hubbell*, 1 Wright, 69. *Quere.* for a perpetual injunction would protect them. In case, for a false representation against the vendor of land, one who had purchased part of the same land from the plaintiff, at the original price of his purchase, is competent for him, to prove the fraud. *Wilkinson v. Root*, 1 Wright, 686. In replevin, by A., for goods distrained by the defendant, as those of B. his tenant, and issue on a plea of property in A., the tenant B. is competent for A. to prove the plea. *McConahy v. Kepler*, 3 Pennsylv. R. 467. On a bill filed by a surety, to be relieved of his suretyship, the principal was held to be a competent witness for the complainant. *Gass v. Stinson*, 2 Sumn. 453, 458. *Quere.* See *Jordan v. Trumbo*, 6 Gill & John. 103, *contra.* However, *Freeman's Bank v. Rollins* (*supra*) supports *Gass v. Stinson*, on the ground that the witness's interest is balanced. *Quere.* It was held, that, in ejectment, the defendant's landlord might be a witness for him. *McGee v. Eastis*, 5 Stew. & Port. 426, 433. *Quere.* By a successful defence, his tenant retains his possession, which is his landlord's, and by an eviction, the landlord loses his rent. See also per Ruffin, C. J., in *Rogers v. Mabe*, 4 Dev. 197, who says, "nor can a landlord testify for his tenant." And see *Lodge v. Patterson*, 3 Watts, 74, 76. In assumpsit, to recover money advanced to the defendant, on his contract to convey land to the plaintiff, on the ground that the defendant had previously conveyed to A., who had paid the purchase money, and was in possession; A. was held to be a competent witness for the plaintiff. *Devere v. Lloyd*, 3 Watts, 94. Prejudice in the witness's mind is no ground of exclusion, though he be called to impeach a witness, and request to be excused because he is prejudiced against the witness. *Cook v. Miller*, 6 Watts, 507. In assumpsit for money advanced on an auction purchase of two lots as disincumbered, on the ground that one was subject to common in favor of the inhabitants of a parish; the right not being directly in question, Lord Kenyon received one of the inhabitants as a witness for the plaintiff, though he confessed on his *voir dire* that he claimed a right of common. *Gibson v. Spurrier*, Peake Add. Cas. 49. See *Adams v. Butts*, 9 Conn. R. 79. In trespass *quare clausum fregit* against a mortgagor, the mortgagee was held competent for the defendant on a plea of *liberum tenementum*. *Simpson v. Pickering*, 5 Tyrw. 143. This was, of course, on the ground that the verdict could not affect the witness. In

To render the person called incompetent as a witness, he must have a legal interest—a direct and certain interest in the event of the cause, inclining him against the party objecting.(1)

ejection against the heir, his mother, though entitled to dower, was held admissible for him. Doe dem. Nightingale v. Malsey, 1 Barn. & Adolph. 439. See Ward v. Wilkinson, 4 Barn. & Cress. 410.

In an action for toll of a public road, persons who have refused to pay are competent for the defendant, from necessity. Lancum v. Lovell, 9 Bing. 465.

It should be noted as to exclusion on account of liability over, that the liability must be legal, not merely honorary or moral; for where one agreed to indemnify the defendant against the publication of a libel, Lord Tenterden yet inclined to receive him as competent for the defendant. Humphreys v. Miller, 4 Carr. & Payne, 7. His Lordship hesitated; but can there be a doubt that the inclination of his mind accorded with settled principles? An illegal contract is void at law, and binds only in honor; and we have seen at several stages of these notes, that such an obligation is regarded as of no influence in working the exclusion of witnesses. It has been so considered by several late cases in the Supreme Court of New York, arising out of transfers of property to defraud creditors. And see our remarks, *passim*, on the admissibility of execution debtors on questions of property between their vendees, sheriffs, &c.

An officer who takes a statute bond to the plaintiff for the defendant's appearance in a suit, is a competent witness for the plaintiff in an action on the bond, though he may be personally liable to the plaintiff, for neglect in his proceedings as an officer. Smalley v. Vanorden, 2 South. 811; Day v. Hall, 7 Halst. 303; Graecen v. Allen, 2 Green, 74.

In detinue by a mortgage of slaves, against the vendee of the mortgagor, the latter was held to be a competent witness for the plaintiff. Miller v. Dillon, 2 Monroe, 73.

(1) NOTE 621.—That is to say, has an interest which may incline him to testify favorably to the party who calls him. See Cotchet v. Dixon, 4 M'Cord, 311.

A person interested in the event of the cause is competent, when his interest is adverse to the party calling him. Thus, in an action of ejection, the defendant claimed the premises under a deed from J. S. The plaintiff then called J. S. to invalidate the deed; and it was held, that although interested, his interest was against the party who called him; that a person interested in a cause, is an objectionable witness, only when he comes to prove a fact consistent with his interest; but if he be called to give evidence contrary to that interest, he is the best possible witness, and no objection can be made to him. Jackson ex dem. Youngs v. Vredenburg, 1 John. Rep. 159. And see Work v. Maclay's Lessee, 2 Serg. & Rawle, 415; Salmon v. Rance, 3 Id. 311; Scott v. Shepherd, 3 Verm. Rep. 104, 109. So where the plaintiff brought an action of trespass against the defendant for taking away a number of sheep, claiming them as his own. D., who had sold them to the plaintiff, was held to be a competent witness for the defendant; for being interested to support the title of the plaintiff, his vendee, his interest was hostile to the defendant who called him. Hurd v. West, 7 Cowen's Rep. 752. So the indorser of a promissory note is admissible for the maker, in an action brought by the indorsee, to prove that before the indorsement to the plaintiff, the witness and the defendant submitted all matters of difference between them, including the note, to arbitrators, who had awarded thereon. Webster v. Lee, 5 Mass. Rep. 334. So the indorser of a bill is competent for the drawer, to prove that the plaintiff, the indorsee, had no interest in the bill. Barker v. Prentiss, 6 Mass. Rep. 430. So in an action against one of two joint debtors, the debtor not sued is a competent witness for the defendant, after being released by him; for his interest is manifestly hostile to the party calling him; since a recovery and satisfaction against his co-debtor would be a bar to a future action against the witness, and the release will protect him against a claim by his co-debtor for contribution. Leroy v. Johnson, 2 Pet. Rep. 186. So a widow is competent to prove the promise of her husband in an action against his executors; for her interest is against the plaintiff. Beveridge v. Minter, 1 Carr. & Payne, 364. So a member of a society, for whose benefit a suit is brought, may testify for the defendant that he, as a party in interest, received the money in question. Field v. Field,

9 Wendell, 394. So a second indorser of a promissory note is, in point of interest, an admissible witness for the first indorser, in an action against him by the second indorsee, for his interest is adverse to the party calling him. *Powell v. Waters*, 8 Cowen's Rep. 669. The principal is competent for the creditor against the surety; having either a balanced interest, or one against the creditor. *Bigelow v. Benedict*, 6 Conn. Rep. 116. So a distributee called to testify against the administrator. *Levesque v. Anderson*, 6 Mart. Lou. Rep. 293. In North Carolina, on an issue to try whether a husband gave an instrument intended as a deed or a mortgage, the widow is competent to prove that he intended to give a mortgage; for either would cut off her dower; and her interest would be to swear in favor of the deed, for the personal estate must go to pay the mortgage; and her interest therein thus be diminished. *Price v. Joiner*, 3 Hawks, 418. The indorser is competent for the maker in a suit by the indorsee against the maker. *Smith v. M'Dow*, 1 Rep. Const. Court, 277; *Crayton v. Collins*, 2 M'Cord, 457; *Nichols v. Artman*, 1 Harp. 285, 287. On a feigned issue between A. & B., judgment creditors of C., awarded to try whether certain moneys raised by sale of land and paid into court, should be paid over to A., the elder, or B., the junior judgment creditor, it was held, that the constable who had levied on goods of C. and paid the money to A. in satisfaction of his judgment, was a competent witness for B. to show that fact; for his interest was rather against B. than for him, he, the constable, being liable for the money to A. should it turn out that he had not paid it over. *Johnson v. Ramsay*, 16 Serg. & Rawle, 115, 116, 117. In a Pennsylvania ejectment by the vendee on an agreement to convey to him, against one claiming by deed of date subsequent to the agreement, both instruments being executed by the same vendor, the surety for the performance of the agreement was held to be a competent witness for the defendant to show that the first vendee had relinquished the agreement; for his interest was against the party calling him, and in favor of the plaintiff. *Hawthorn v. Bronson*, 16 Serg. & Rawle, 269, 280. It is said in *Lampton v. Lampton's Ex'rs* (6 Monroe, 618), that a defendant in an execution is competent to prove that property seized under it does not belong to himself, but to another. A witness, in an action on contract, is admissible for the defendant, to prove that the contract was made with him (the witness), not with the defendant. *Carman v. Foster*, 1 Ashm. Rep. 133.

Where one of several joint debtors was sued, on the trial the plaintiff offered another of the joint debtors as a witness. The defendant objected to his competency, and proved that the witness was one of a stage company to which the defendant belonged, and that in a settlement with the company the witness had charged, and was credited, for money paid the plaintiff, on account of the plaintiff's demand. The court said, if the witness had any interest, it was in favor of the defendant. If he had received the money from the company to pay the plaintiff's demand, and the plaintiff recovered it of the defendant, the witness would be obliged to refund. *Gay v. Cray*, 9 Cowen's Rep. 44.

Though the civil code of Louisiana declared that all witnesses interested directly or indirectly should be excluded, yet held that the statute could not have intended witnesses who were interested to swear against the party calling them; or, in other words, witnesses called to swear against their own interests. *Rochelle v. Musson*, 3 Mart. Lou. Rep. 73, 86. Thus, in an action as heirs for property which the defendant claimed as purchaser adversely to the plaintiffs, a witness who had purchased other property as belonged to the deceased, was held competent for the defendants, as she was interested to show that the title was in the deceased, and so far to defeat the defendant's claim. *White v. Holsten*, 4 Mart. Lou. Rep. 471, 472, 473. So the plaintiff cannot object that his own agent is called by the defendant, on the ground that the agent is answerable to the plaintiff for an excess of his authority. *Peytavin v. Hopkins*, 6 Mart. Lou. R. 256, 258, 259. So in an action against an executor or administrator, the plaintiff may call any one interested to prevent a recovery against the estate. *M'Micken v. Fair*, 4 Mart. Lou. Rep. (N. S.) 172.

In an action against the personal representatives of a deceased partner, on a contract made by the firm, a surviving partner is a competent witness for the defendants to prove the partnership; for the personal representatives of a deceased partner are, *at law*, discharged from all liability for the debt of the firm, and the survivor alone can be sued; therefore, the interest of the witness is adverse to the defendant; as, by establishing the partnership, and thus defeating the plaintiff's action, he makes himself personally responsible. *Grant v. Shurter*, 1 Wend. Rep. 148. And so when nine persons signed a bond, to be delivered on certain terms and conditions, and five of

them subsequently delivered the bond without the knowledge or consent of the remaining four, on terms and conditions different from those originally stipulated; and an action was brought on the bond against the four who did not participate in the delivery, without joining the five obligors who did deliver the bond; it was held, that one of the five not sued was a competent witness for the defendants, to prove the circumstances of the delivery; for by establishing the facts he was called to prove, he would increase his own liability, and was therefore interested against the party calling him. *Lovett v. Adams*, 3 Wend. Rep. 380. And in an action against an officer, for a voluntary escape of a defendant in execution, the latter is a competent witness for the officer; for his interest, if any, is against the party calling him. *Waters v. Burnet*, 14 John. R. 362. In this case the court said, if the escape was voluntary, the officer could not recover against the prisoner, who was therefore interested to procure a verdict in favor of the plaintiff, by which he would be discharged from all liability to the plaintiff, on the original indebtedness. So in an action brought by a creditor upon his debtor's bond, given for the jail liberties, the sheriff is a competent witness for the defendant to prove he was discharged from imprisonment by consent of the creditor. If the creditor should bring an action against the sheriff for the escape of the prisoner, he could not make use of the verdict in this cause to prove the consent of the creditor, but would be obliged to make out that fact by other testimony; but a recovery by the plaintiff in this cause would protect the sheriff against any future action for the escape; therefore his interest was against the defendant. *Bridge v. McLane*, 2 Mass. Rep. 520.

And so as to husband and wife, though where one is a party, the other cannot be received to testify against him or her, yet where the one is competent by reason that his or her interest is against the party calling the witness, the other is equally so. Per Walworth, Ch., in *City Bank v. Bangs*, 3 Paige, 37, 38. Thus where the husband had indorsed his wife's note, given to her *dum sola*, and guarantied the payment, she was yet held receivable for the maker to prove payment to her *dum sola*. *Fitch v. Hill*, 11 Mass. Rep. 286.

In foreign attachment, the debtor is a competent witness for the garnishee. His interest is against the garnishee; for if the latter be compelled to pay, this discharges the debtor. But he is not competent against the garnishee. *Enos v. Tuttle*, 3 Conn. Rep. 247.

[From the former edition. Sections IV, V, VI, and VII of Chapter V.]

SECTION IV.

Of the Rule on the Subject of Interest, considered with Reference to Persons not Parties to the Suit.

THE general principle, on which a witness interested in the event of a cause is incompetent to give evidence in support of such interest, has already been stated, and we have examined into the application of this rule, with regard to the persons who are, in general, most obviously and immediately interested in the event of a suit. We have now to consider the application of the rule with regard to ordinary witnesses; which will lead to a more extensive and complicated inquiry.

On this subject, it is scarcely possible to reconcile the earlier cases with those of a more recent date. "The old cases on the competency of witnesses," said Lord Mansfield, "have gone upon very subtle grounds: but of late years, the courts have endeavored, as far as possible, consistently with those authorities, to let the objection go to the credit rather than the competency of the witness."⁽¹⁾

The general rule is laid down by Gilbert, C. B., in these words, "The law looks upon a witness as interested, where there is a certain benefit or disadvantage attending the consequence of the cause one way."⁽²⁾ And Mr. Justice Buller, in the case of *The King agt. Prosser*, says, "I take the rule to be this, if the witness can derive no benefit from the cause before the court, he is competent."⁽³⁾

In inquiring into the competency of the parties to the record in civil suits, it has been seen, that in general they are incompetent to give evidence, by reason of a direct interest in the event of the suit. Many cases arise, in which persons not being parties to the record are open to the same objection. Thus, the nominal plaintiff on the record may sometimes have no real interest in the question at issue, and the action may be prosecuted solely for the benefit of a third person who is not a party to the record: and if at the trial such person were tendered as a witness for the plaintiff on the record, he would be obviously incompetent, by reason of the direct interest which he would have in obtaining a verdict for him; for such verdict, when obtained, would enure to his own benefit, and the witness therefore would have a much stronger interest than the plaintiff himself, in obtaining a favorable termination of the cause. The same

(1) 1 T. R. 300; *Walton v. Shelley*, cit. by Lord Kenyon, 3 T. R. 32. And see *R. v. Bray*, *Ca. temp. Hardw.* 360; *Burroughs v. U. States*, 2 Paine C. C. 569.

(2) *Gilb. Evid.* 106, 107; *Bogert v. Chrystie*, 4 *Zabr.* (N. J.) 57.

(3) 4 T. R. 20, and see *B. N. P.* 284.

principle would of course be equally applicable with regard to the defendant, as with regard to the plaintiff. And it would hold equally in the case of a partial, as well as an entire interest in the subject matter of the action. In all such cases, there would be a certain benefit or disadvantage directly resulting to the witness from a favorable or unfavorable verdict, and he would therefore be incompetent to give evidence, by reason of this direct interest in the event of the suit.

But a direct and immediate benefit or disadvantage from the result of the suit was not the only species of interest, which at one time rendered a witness incompetent to give evidence. For until the passing of a recent statute, which has effected a material alteration in the law in this respect, and the provisions of which will be fully stated hereafter,(1) witnesses who were neither parties to the record, nor had any direct interest in the event of the suit, were often rendered incompetent, by reason of an indirect interest in the record with regard to some subsequent suit. This description of interest has already been adverted to, in treating of the competency of a prosecutor, or party grieved, to give evidence in a criminal prosecution; with respect to whom an objection was formerly supposed to exist, on the ground that he might be able to avail himself of the record of a conviction as evidence in support of his own interest in some subsequent civil suit. But when it became a settled rule, that a judgment in a criminal prosecution, could in no case be used as evidence in a subsequent civil suit, on behalf of a party who had been a witness for the prosecution, the foundation of this objection failed, and it was then adjudged that the prosecutor and party injured were not disqualified by reason of this supposed indirect interest in the record. In like manner, with regard to the parties to civil suits, it will be found, upon an examination of the cases that have been decided with respect to their competency, that they are generally disqualified, by reason of a direct and immediate interest in the event of the suit, and that when they are free from this direct interest, no objection can be raised to their competency on the ground of such an indirect interest in the record.

But with respect to ordinary witnesses the case was often different, and they were, in many instances, open to the objection of an indirect interest, and on that ground excluded, in cases where they could derive no immediate benefit or disadvantage from the termination of the particular suit. Thus, if an action was brought by or against one of several persons claiming a customary right of common, or some other species of customary right, and the question of the existence and validity of the custom would be determined by the record, the judgment obtained in the action would be admissible evidence in a subsequent action, for or against a person claiming under the same general customary right, although he was a stranger to

(1) Stat. 3 & 4 Wm. IV, c. 42, §§ 26, 27.

the record in the former action : and therefore (before the passing of the above-mentioned act), if a person so situated were tendered as a witness in the first action, the courts used to hold that this circumstance, of the record being admissible evidence for or against his own claims in a subsequent suit, was an interest which, in general, would render him an incompetent witness.(1)

Thus, there used to be two distinct modes, in which a person, not a party to the record, might derive a benefit or advantage from the event of the suit, and in either case he became incompetent to give evidence. "This benefit," says Lord Chief Justice Tindal, in a late case (after citing the general rule in the words of Chief Baron Gilbert, already quoted in the text), "this benefit may arise to the witness in two cases : first, where he has a direct and immediate benefit from the event of the suit itself ; and secondly, when he may avail himself of the benefit of the verdict in support of his own claims in a future action."(2)

These were the only grounds, upon which a witness became incompetent from interest, and it was fully settled by many decisions, that all other objections on the ground of a supposed interest would not affect his competency, although they might affect his credit. This was the rule laid down and acted on in the case of *Bent v. Baker*,(3) which has always been considered a leading authority on this subject. And in the subsequent case of *Smith v. Prager*, Lord Kenyon, referring to the rule there established, said : "That case laid down a clear and certain rule, by which I have ever since endeavored to regulate my opinion. The rule there laid down was, that no objection could be made to the competency of a witness on the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest."(4) So also Lord Ellenborough, in giving judgment in a case which has been cited in the preceding chapter,(5) recognizes the authority of *Bent v. Baker* and *Smith v. Prager*, and observes, that the rule was well laid down and established in those cases, "That where a party is not immediately interested in a cause, nor has any interest in the event, in support of which the verdict in that cause may be given in evidence by him in any other proceeding instituted by or against him, he is a competent witness."

(1) See 1 T. R. 302 ; 3 T. R. 32 ; B. N. P. 283 ; *Hockley v. Lamb*, 1 Lord Raym. 731 ; *Anscomb v. Shore*, 1 Taunt. 261 ; *Lord Falmouth v. George*, 5 Bing. 286. The rule had an exception where all the subjects of the king are interested, and where no other evidence can reasonably be expected. See *Lancum v. Lovell*, 9 Bing. 470 ; B. N. P. 289. See *Hill v. Miller*, 2 Swan, (Tenn.), 659.

(2) *Doe v. Tyler*, 6 Bing. 394 ; *Harvey v. Anderson*, 12 Geo. 69 ; *Green v. Pickering*, 8 Foster (N. H.), 360.

(3) 3 T. R. 27.

(4) 7 T. R. 62.

(5) *R. v. Boston*, 4 East, 581, *supra*.

A material alteration has lately been effected in the law of evidence, with regard to witnesses, who were once considered incompetent on the ground of an indirect interest which might accrue from the use of the record as evidence for or against them in some subsequent suit. By the stat. 3 and 4 Wm. IV, c. 42, § 26, it is provided, that in cases where witnesses are objected to upon this ground, they shall nevertheless be examined, but that in such a case a verdict or judgment by or against the party for whom the witness shall be examined, shall not be admissible in evidence by or against the witness or any person claiming under him. The effect of this enactment is to remove the objection to the competency of the witness in civil suits, by removing the interest out of which the objection arises; and the principle upon which the statute is founded, appears to be in some degree analogous to that of the rule adverted to in the preceding chapter with reference to criminal proceedings—namely, that a witness in a criminal prosecution shall in no case be allowed to avail himself of a conviction, where he has himself been called as a witness in support of the indictment. The supposed interest of the witness is removed by putting an end to all possible interest in the record, and by preventing his deriving any benefit or sustaining any loss with reference to the use of the record, and the termination of the suit in favor of either party.

The particular provisions of this statute, and the cases that have been decided upon it, will be subsequently stated. It is sufficient to observe at present, that the effect of it appears to be to remove one of the grounds of incompetency from interest which existed before the passing of the act; and to render all witnesses competent, as far as regards objections from interest, unless it can be shown that they have a direct interest in the event of the particular suit.

In pursuing the inquiry into the present state of the law with respect to the incompetency of witnesses from interest, it is proposed to show, in the first place, in what cases a witness will be disqualified; and secondly, in what cases he will not be disqualified from this cause. The first of these subjects of inquiry will occupy the remainder of the present section.

What is such an interest as will disqualify.

It is proposed now to show in what particular cases persons, not being parties to the suit, are incompetent on account of a direct interest in the event of a suit.

It is a general rule, that a witness will not be incompetent on the ground of interest, unless the alleged interest be certain in its nature; for if it be a matter of uncertainty whether the witness will gain or lose by the event of the cause, it cannot be said of him that he is in fact interested, and his testimony will therefore be received.(1)

(1) *R. v. Cole*, 1 Esp. 98.

It is also a rule, that the interest must be a legal existing interest; if it exist merely in the imagination, or belief, or expectation of the witness, he will not be incompetent, however strongly the objection may be urged with respect to his credibility.(1)

In all cases in which an objection is raised to the competency of a witness on the ground of interest, it lies upon the party making the objection to establish its existence and validity. The competency of a witness ought to be presumed, until the contrary be clearly shown; and in cases of doubt the courts are always disposed to receive the witness and to let the objection go to his credibility rather than to his competency.

If it be made to appear clearly that the witness is directly interested in the event of the particular suit, the exact amount of his interest is immaterial; however small and inconsiderable it may be, the witness is incompetent.(2) A person who loses or gains the smallest sum by the event of

(1) See cases on this subject, *post*, Sect. 5, p. 81.

(2) *Burton v. Hinde*, 5 T. R. 574; *per Cur.* *Dowdeswell v. Nott*, 2 Vern. 317.

NOTE 622.—*Per* Spencer, J., in *Marquand v. Webb*, 16 John. R. 93. And see *Gage v. Stewart*, 4 John. R. 293.

In respect to the interest of witnesses, the leading rule has been but recently established. *Bent v. Baker*, 3 T. R. 27, A. D. 1789. Its object was to rescue the law from the dominion of the old, and somewhat arbitrary authorities, and bring it back to the principle of a certain interest in the event of cause, to testify for the party calling the witness. Since that time, the courts, both English and American, have been engaged in reducing decisions, both old and new, to the line thus established. In performing this office, they have done much; but they have often encountered unforeseen difficulties, and occasionally been inconsistent. Perhaps no branch of judicial duty has proved more perplexing. The disproportion between the apparent simplicity of the rule, and that of the doctrine which has arisen from its practical application, may be collected in a general way, from the remarks of Senator Tracy, in *Gregory v. Dodge* (14 Wend. 607). These should, however, in their result, be taken with considerable qualification. When the learned senator throws out a doubt whether we are advanced "one inch beyond the original proposition," laid down in *Bent v. Baker*, he by no means appreciates the certainty which subsequent cases have already introduced into those branches of judicial business, where the proposition has come to be most frequently considered; nor the promise given by other cases, however conflicting, that the dominion of a certainty is in the steady progress of enlargement. This progress has been attended, in most respects, with the same discouragements which mankind have witnessed in every branch of the law, in every art, in every science. It is of the nature of each, to be progressive; to present its professors with perplexing points. These must be studied and understood and brought in as parts of the general system. Becoming discouraged in such a degree as to turn back and start on a new route, would be but to estrange us from those things with which the profession have become familiar, without clearing any single obscurity that would otherwise have attended them on their way. If the greatest minds have, in some measure, failed, after many years of labor, let us not too readily give in to the belief, that mankind can do better by starting on first principles; or complain that nothing has been done. If the profession can now with ordinary application, advise with tolerable certainty in nine hundred and ninety cases out of one thousand, let us rather try to secure the same degree of certainty in the ten remaining cases, than introduce the same degree of doubt, for many years, into the nine hundred and ninety, or a great part of them. While the principles of human veracity and credence are everywhere the same, the general rules of competency are widely different, under different systems of law. The civil law excludes witnesses for many causes, which the common law regards as merely affecting their credibility, while some speculative writers have advocated their indiscriminate ad-

mission. See *Best, C. J.*, in *Hovill v. Stephenson*, 5 Bing. 493. Mankind have so long adhered to a degree of exclusion, as to evince an opinion that the cause of truth and justice would, in the aggregate, suffer more from the falsehood of such as are directly interested, than it would gain by that occasional elucidation now lost by their incompetency. This is, perhaps, the highest evidence we can have, that human rights are not reasonably safe, unless, in some instances, they shall be placed beyond the reach of temptations to testify falsely. These instances must be pointed out by the general rules of law, as declared and applied by the courts. The common law has adopted the medium ground; and its decisions have already introduced such a degree of certainty, that, with forecast and diligence, aided by professional advice, the citizen can rarely fail in exhibiting the facts of his case to a court and jury. And see *ante*, for a further discussion of the principle on which interest should disqualify a witness.

We saw *ante*, that the cases which respect the competency of a witness believing himself interested, without being so in law, are conflicting. That he is incompetent, see the following cases: *Sentney v. Overton*, 4 Bibb, 445; *Elliott v. Porter*, 5 Dana, 304, 305; *Ewing, J.*, in *Commonwealth v. Gore*, 3 Dana, 476; *Phebe v. Prince*, Walker's Rep. 131; per *Robertson, Ch. J.*, in *Commonwealth v. Moore*, 5 J. J. Marsh. 656. That he is not incompetent, see the following: *Dellone v. Rehmer*, 4 Watts, 9, 10; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94, 101, 102; *Stall v. The Catskill Bank*, 17 Wend. 466. If he conceive himself disinterested when he is in fact interested, he is not competent. *Per Cur.* in *Dellone v. Rehmer*, 4 Watts, 10, note to *Phebe v. Prince*, Walker's Rep. 134.

A mere honorary obligation should not disqualify him. To this the cases are almost without exception, as we saw *ante*, and as may be seen by other cases: *Tilford v. Hayes*, 2 Yerg. 89; *Dellone v. Rehmer*, *supra*; *M'Causland v. Neal*, 3 Stewart & Port. 131, 133; *Mulheran's Ex'rs v. Gillespie*, 12 Wend. 349, 351; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94, 101, 102; *Commonwealth v. Gore*, 3 Dana, 474, 476; *Stall v. The Catskill Bank*, 18 Wend. 466; *Phebe v. Prince*, Walker's Rep. 131, and *Id.* 134, note.

NOTE 623.—The following are some of the cases which have been decided in pursuance of the principles laid down in the text, that in order to disqualify a witness, he must have some certain benefit or advantage depending upon the event of the suit, or the verdict to be rendered must be available by him, either as a defence to some action which may be brought against him, or in support of some claim to be made by him, or must be such as can be given in evidence against him in some action. Where the circumstances of the case do not bring the witness within some one of these principles, he is not incompetent on the ground of interest, as will abundantly appear from a perusal of the cases which follow.

In an action to recover the possession of lands, it was proved that the lands in question were conveyed to the wife of the tenant by E. B., widow of B. B., with a covenant of authority to sell, under a power contained in the will of B. B., to be exercised on complying with certain conditions. After the death of the wife of the tenant, the plaintiff caused the premises to be levied on and sold by virtue of an execution in his favor against the tenant, on the ground that the tenant was entitled to a life estate in the premises, as tenant by the curtesy, and the plaintiff became the purchaser. On the trial, it became a question whether the conditions mentioned in the will had been complied with by E. B., and it was held that she was a competent witness for the plaintiff to prove that she had complied with the conditions, as she could not be affected by the verdict in any action which might be brought against her on her covenants. *Roberts v. Whiting*, 16 Mass. R. 186. It is no objection to one, as a witness for the defendant in a suit for land purchased by the plaintiff of another, that the witness had released a mortgage which he held against the premises, on receiving payment thereof from the plaintiff. *Thompson v. Chauveau*, 6 Mart. Lou. R. (N. S.) 458. A grantor, with covenants of warranty, is a good witness for his grantee, who has never been in possession of the premises under the deed, in an action by the grantee to recover the possession of the lands conveyed; for a failure in the suit could not subject the grantor to any liability to the grantee. He would not be liable on his covenant of warranty, even if it appeared that he had no title when he conveyed, his liability attaching only in case of an eviction of the grantee after obtaining possession. But if the grantee had gone into possession under the deed, and an action had been brought against him by a third person for the premises, the grantor could not have been admitted to support the title of his grantee. *Jackson ex dem. Montessor v. Rice*, 3 Wend. R. 180. So where the grantor covenanted that

he had good right to sell the land, and to warrant the same against all persons claiming under him, in an action brought by the grantee against one who does not claim under the grantor, he is an admissible witness for the grantee, not having covenanted to warrant the land against those not claiming under him. *Twambly v. Henley*, 4 Mass. R. 441; *Gratz's Lessee v. Ewalt*, 2 Binn. 95; *Cain's Lessee v. Kinderson*, Id. 108; *Henry's Lessee v. Morgan*, Id. 500. So with warranty against himself and one other. *Sweitzer's Lessee v. Meese*, 6 Binn. 500. So wherever the grantor is not bound by his covenant, or is released by the party in whose favor he is interested. *Bridge v. Eggleston*, 14 Mass. Rep. 245. So where the grantor, who was a mere trustee, released and conveyed the legal estate to the *cestui que trust*, he was held competent to establish the title, although his deed contained words of implied warranty. *Shield's Lessee v. Buchanan*, 2 Yeates, 219. The father was received to prove a gift by him to his son, and to support it against the claim of his (the father's) creditors. *Smith v. Littlejohn*, 2 M'Cord, 362. A widow, who had executed a deed with her husband, is a competent witness to prove that the deed had been ante-dated; for, if ante-dated, an acknowledgment made by her at any time would bar her right to dower; and if not acknowledged, her signing was no bar, so that neither way was she interested. *Jackson ex dem. Griswold v. Bard*, 4 John. R. 230. A widow is a competent witness for the plaintiff in an action of ejectment, to recover the possession of land claimed by the plaintiff under her husband, though she be entitled to dower in the premises. The verdict could not be given in evidence, in a suit brought by her for the recovery of her dower. Id.; *Jackson ex dem. Van Dusen v. Van Dusen*, 5 John. R. 144; *Den ex dem. Beatty v. —*, Tayl. 9; per *Brackenridge, J.*, in *Sweitzer's Lessee v. Meese*, 6 Binn. 505. A judgment debtor, whose goods had been seized and sold on execution, was held competent in trespass against a third person who claimed and took away the goods, to testify for the plaintiff, he not standing in the relation of a vendor, and the record being no evidence for or against him. *Lothrop v. Muzzy*, 5 Greenl. 450. The grantor in a quit-claim deed is a competent witness for the grantee in support of the grantee's title. *Jackson ex dem. Weidman v. Hubble*, 1 Cowen R. 613; *Jackson ex dem. Howell v. Delancey*, 4 Cowen's R. 427; *Cain's Lessee v. Henderson*, 2 Binn. 108; *Baillet's Lessee v. Bowman*, 2 Binn. 162, n. a; *Johnston's Lessee v. Eckart*, 3 Yeates, 427; *Dorsey v. Jackman*, 1 Serg. & Rawle, 48. And in trespass, *quare clausum fregit*, a grantor with warranty is competent for his grantee, the plaintiff, to prove the trespass, though the defendant justify under a plea of right to the freehold. *Van Nuys v. Terhune*, 3 Johnson's Cases, 82. A father built a grist mill and made a parol gift of it to his sons, who took possession and occupied under the gift. They brought an action against the owners of a mill below for flowing the water back so as to injure their mill. Held, that the father was a competent witness in such action for the sons, on the ground that he was not entitled to any part of the damages recovered in this action. Held, also, that the miller who attended the mill, receiving half the tolls for his compensation, was a competent witness for the sons for the same reason. *Stiles v. Hooker*, 7 Cowen's R. 266. To the latter point, see *Sumner v. Tileston*, 7 Pick. R. 198. In assumpsit for work and labor, a witness is competent for the defendant to prove that he, the witness, was the person employed by the defendant to do the work, and not the plaintiff; and this, though the witness's (a bankrupt) assignees have received the money of the defendant; for the record will not be evidence in an action to recover the money of the assignees. *Wilson v. Gallatly*, 2 Carr. & Payne, 467. D. having purchased land of R. for which he had not paid, sold part of the land to W., from whom he took two mortgages of equal date for parts of the consideration, intending that one of the mortgages should be assigned to R. to secure the original consideration of the land, and that it should have priority, pursuant to an arrangement between R. and D. when the former conveyed. The mortgages were registered concurrently; but the one intended for R. was first assigned to him, and afterwards the other was assigned to S. in good faith for full value. Held, that in a suit by R. against S. to enforce the priority of the mortgage assigned to R., D. was a competent witness for him. *Stafford v. Van Rensselaer*, 9 Cowen's R. 316. The alleged assignee of the plaintiff of a pre-emption warrant in Kentucky, is a competent witness for the plaintiff to prove that the witness never was entitled to the land in controversy, and had never made an assignment of the survey purporting to have been made by him. *Wilson v. Speed*, 3 Cranch, 283. One of two lessees, after the expiration of the term, is a competent witness for the landlord to prove that the witness had no beneficial interest in the lease, but joined in its

execution merely as a surety for the payment of the rent by the co-lessee, who took possession under the lease and occupied during the term, and that the witness had never occupied the premises. *Jones v. Clark*, 20 John. R. 51. Held in assumpsit for use and occupation by the landlord against the real tenant, who held over under an agreement to continue at the same rent for which the witness was surety. A tenant who has fully executed the trust, and re-conveyed the estate to the *cestui que trust*, is a competent witness to prove the loss of the trust deed, in an action brought by the *cestui que trust*, against a third person. *Bayard's Lessee v. Ryerson*, C. C. U. S. N. J. April, 1820, MS. N. B.—In New York and some other states, this question cannot arise; for a party may prove the loss of his own paper; *a fortiori*, a third person, though interested. An executor who has accepted the trust and acted under the will, but derives no beneficial interest under it, is a competent witness to establish it. *Comstock v. Hadlye Ecclesiastical Society*, 8 Conn. R. 254.

Where the plaintiff intrusted the defendant with a sum of money which he promised to account for and pay over to the plaintiff's daughter, but which he neglected to do, it was held that the husband of the daughter was competent to testify for the plaintiff, in an action to recover the money. *Jackson v. Mayo*, 11 Mass. Rep. 147. Where A. and B. signed a joint note to C. for goods sold to A., who brought an action against C. for an alleged deficiency in the goods, B. was held competent to prove that he signed the note as surety only, and not as partner; for, the note not being in question, he had no interest in the event of the suit. *Hopkins v. Smith*, 11 John. Rep. 161. A joint maker of a promissory note, who signed as surety merely, is a competent witness for the other joint maker, in an action against him by the payee; for being a surety, he cannot be compelled to contribute, if the plaintiff should recover; and the verdict could not be used in evidence in an action against him. *Fox v. Whitney*, 16 Mass. Rep. 118. Where a note or bill is specially indorsed, to be at the risk of the indorsee, the indorser, not being responsible on his indorsement, is an admissible witness for the indorsee; as where he indorsed it thus: "J. H., agent" (*Mott v. Hicks*, 1 Cowen's Rep. 513); or thus: "For value received, I order the contents of this note to be paid to M. R., at his own risk" (*Rice v. Stearns*, 3 Mass. Rep. 226); or thus: "Pay J. B. or order, without recourse to us." *Barker v. Prentiss*, 6 Mass. Rep. 430. Where a note was made to J. H. or order, who indorsed it thus, "J. H., agent," though nothing appeared to show that he was in fact agent, it was held that he was not liable as indorser; that it was a special indorsement, and equivalent to declaring that the note should be at the risk of the indorsee; and therefore he was a competent witness for his indorsee, in an action by him against the maker. And one W. H. having agreed with M. (the indorsee) that if he would indorse the note to R., he (W. H.), on receiving certain glass of the makers, would deliver the same to M. to hold as an indemnity for his indorsement, and M. having indorsed the note accordingly; in a suit by M. against W. H. upon the guaranty, it was held that J. H. not being liable as indorser, was a competent witness for M.; but if he had been liable as indorser, he would not have been competent in either case; for, in the first case, if his indorsee should fail in his suit against the makers, he would be liable on his indorsement; and in the latter, he would not be indifferent between M. & W. H. on the ground that W. H. was a surety, and entitled to stand in the place of M., on paying the debt, and he would thus be liable to one of them, at all events; for W. H. would only be liable upon the condition of receiving the glass, as a fund for the payment of the note, which would bar a recovery by him against J. H. He, the witness, therefore, could not be liable to W. H., in any event; but his liability to M., in case M. should fail, in his recovery against W. H., would be direct and certain. *Mott v. Hicks*, 1 Cowen's Rep. 513. In an action against the owners of a vessel for unskillful stowage of a cargo by the mariners, the master and mariners are competent witnesses for the owners. The master was released by the owners. But the mariners were not. *Arnold v. Anderson*, 2 Yeates, 93. The master of a vessel, by whom stores had been purchased, and against whom an action was depending for the price, was held to be a competent witness to prove the sale and delivery, in an action against the owner of the vessel. *M'Indoe v. Lunt*, 1 Browne, 85. In an action on a policy of insurance, the master of the ship owning part of the cargo, which was insured by other underwriters, who refused to pay until the determination of this suit, was sworn on his *voir dire*, and declaring himself disinterested, was admitted as a witness. *Wallace v. Child*, 1 Dall. 7. Where the defendant had claimed and received a sum of money from the owner of a vessel, as having been shipped in the vessel of which the plaintiff was master, which sum the plaintiff sub-

sequently reimbursed the owner, and brought his action against the defendant, on the ground that the money had never been shipped in the vessel, nor received by the plaintiff; it was held, that the owner was a competent witness for the plaintiff; for although the owner of a vessel is liable in the first instance for the default of the master, yet having paid the money claimed by the defendant, he was no longer liable to him; and the master, having *voluntarily* reimbursed the money to the owner, had no claim upon him. He must be considered as having acted as the agent of the master, who, by the payment of the money, had recognized his acts, and discharged him from all responsibility and from all interest, either as a party or witness. *Cortes v. Billings*, 1 John. Cas. 270. Action against the defendant as an underwriter on a valued policy of insurance, effected on goods shipped on board a vessel which was captured on her passage. To prove the loss and the other facts, the plaintiff offered the deposition of one of the joint owners of the vessel, which was objected to by the defendant on two grounds: first, that this being a valued policy, it was to be presumed that the freight was included in the insurance, and, therefore, the witness was interested; second, that he was interested to fix the loss on the underwriters, in order to get rid of the obligation imposed on him by the bill of lading, to deliver the goods at the port. By the court: There is nothing in the first objection, because, whether the freight was covered by the policy or not, the witness has no interest in the recovery of the plaintiff or his failure, since, if he has insured the freight, his right to recover cannot be affected. As to the second, should the plaintiff sue the owners on the bill of lading, the verdict would not be evidence in favor of the owners. *Ruan v. Gardner*, 1 Wash. C. C. Rep. 145. So the captain is competent for the same purpose. *Hicks v. Fitzsimmons*, 1 Wash. C. C. R. 279. Where an agent effected a policy of insurance for the plaintiff in his own name, on goods shipped on board a vessel which was captured on her passage, and being examined on the *voir dire*, said he had no interest in the event of the cause, he was received to testify. *Ruan v. Gardner*, 1 Wash. C. C. R. 145. Where a broker lent money and took a check for his principal, including his commissions in the check, he was held a competent witness for the principal in an action on the check. The recovery or failure of the plaintiff would not affect the claim of the broker on him for the commissions. *Mauran v. Lamb*, 7 Cowen's R. 174. The authorized agent of the plaintiffs contracted with the defendant, but without disclosing the names of his principals, for a quantity of goods for the plaintiffs, who brought this action against the defendants for the non-delivery of the goods. Held, that the agent had no interest, the plaintiffs (his principals) having affirmed the contract; and he was therefore admitted to testify for the plaintiffs. *Sewall v. Fitch*, 8 Cowen's Rep. 215.

A consignee of goods, refusing to receive them on his own account, and afterwards selling them as agent for the consignors, is a competent witness for the consignors, in an action by them against the purchasers for the price of the goods sold, although he have indorsed the bill of lading blank; especially if the plaintiffs, in their declaration, should admit him to be agent in the sale of the goods; for, in that case, they could not afterwards have recourse to him as the purchaser. *Brown v. Babcock*, 3 Mass. Reports, 29. Goods were consigned to W., an auctioneer, to sell. He sold the goods to the defendant, and committed them to the care of the plaintiff, to be delivered to the defendant on his performing certain conditions. The defendant, by artifice and without performing the conditions, obtained the possession. Held, that the auctioneer might be a witness for the plaintiff in an action for the goods. It was admitted by the court that the auctioneer was liable to the owner of the goods; but they said that the plaintiff and defendant were equally liable to the auctioneer; the former for having parted with the goods contrary to his instructions, and the latter because the auctioneer had still the right of property, the property not having been changed by the fraudulent possession of the defendants; and the auctioneer was wholly unconcerned in any suit between the present parties. *Harris v. Smith*, 3 Serg. & Rawle, 20. In New York, an attorney who appears for a party in a justice's court, is a competent witness to prove his authority, if by parol; and to prove its execution, if in writing. *Caniff v. Myers*, 15 John. R. 246; *Gaul v. Groat*, 1 Cowen's R. 113; *Tullock v. Cunningham*, Id. 256. An attorney who indorsed an original writ, according to the practice in Massachusetts, though liable for costs, is a competent witness for the original plaintiff, in the trial of the action on a writ of review; for the liability of the indorser of the original writ cannot be affected by any judgment on a writ of review which he did not indorse. *Ely v. Forward*, 7 Mass. Rep. 25. So, where there are cross actions, the indorser of the writ in one action

may be a witness for the party for whom he indorsed when defendant in the cross suit. *Id.* S. and T. being connected as partners in a contract, T. sold out his interest in the contract to S. and subsequently acted as the agent of S., receiving an allowance of two dollars a day for his services. It was held, in an action in which S. was plaintiff, growing out of this contract, that T. was a competent witness for S., having parted with all his interest in the contract. *Smith v. Allen*, 18 John. R. 245; *Clarkson v. Carter*, 3 Cowen's R. 84. A partner is a competent witness for his copartner, in an action to recover a penalty for the violation of a penal statute; thus, the society of Shakers, although they are partners in interest as to their concerns as a religious community, yet that copartnership cannot extend to such a case, and therefore any member would be admissible to testify for another in a penal action. *Wells v. Lane*, 8 John. R. 462. So a stockholder in a bank, who has assigned his stock, is a competent witness for the bank, although a provision in the charter, requiring a transfer to be recorded in the books of the bank, and all debts due from the vendor to the bank to be paid, before such transfer shall be valid, has not been complied with. This provision being intended solely for the benefit of the bank, the sale is valid as between the vendor and vendee. *Utica Bank v. Smalley*, 2 Cowen's R. 770; *Utica Ins. Co. v. Caldwell*, 3 Wend. R. 296, S. P. In an action of assumpsit, grounded not on a promise to the plaintiff's partner, nor to any implied promise resulting from the copartnership, but upon the express promise of the defendant to the plaintiff, the partner is a competent witness. Thus, where A. and B. were jointly interested in an adventure on board a ship, which adventure was consigned to the master for sales and returns, B. not being known to the master as a partner at the time of the shipment; and after the ship's departure, A. and B. had agreed to sever their interest in the adventure, and A. had given a written direction to the master to account with B. for a moiety, and upon the ship's return, B. showed the written direction to the master and demanded payment of him, who promised B. to pay him a moiety of the proceeds, if it belonged to him; in an action of assumpsit by B. against the master for the moiety, founded on this express promise, it was held that A. was a competent witness for B. to prove the partnership, and their agreement to sever their interest, and also the master's confession of the amount of the profits of the adventure. *Austin v. Walsh*, 2 Mass. R. 401. Where a part owner of goods, which were attached as the property of a third person, sold his share to the other part owner while they were under attachment, who brought an action against the attaching officer for the goods, it was held that the former was a competent witness for the plaintiff to prove his title in the property. *Smith v. Dennie*, 6 Pick. R. 262. A dormant partner who, before the commencement of the suit, has sold to his copartner all his interest in the subject matter of the suit, is a competent witness for the copartner. Thus, where A. sold to C. a quantity of flour, of which sale a memorandum was made, and the purchaser afterwards refused to pay for the flour and take it away, on which A. sold it to another at a less price, and brought his action for the difference; B., who, at the time of the sale, was jointly interested with the plaintiff in the flour, but sold his interest in it to the plaintiff before the commencement of the suit, was held admissible for the plaintiff. *Clarkson v. Carter*, 3 Cowen's R. 84. Where an attorney had collected a debt, in a suit against him by his client for the money, the debtor was admitted to prove payment to the attorney. *Gifford v. Coffin*, 5 Pick. R. 447. So, in an action by a surety against the co-surety for contribution, it was held that the principal debtor had no concern in the controversies of the sureties between themselves, and was therefore competent to prove a settlement between them as to the debt of the principal. *Leavenworth v. Pope*, 6 Pick. R. 419. In an action by the assignees of B., a discharged bankrupt, to recover a debt due B., it appeared that A., who was offered by the assignees as a witness, had proved a debt due him under the commission against B.; that A. had subsequently been discharged under a commission of bankruptcy, and that his estate would not pay more than twenty-five per cent. on the amount of his debts. Held, that his interest depending on there remaining a surplus of his estate after the payment of his debts, was too remote and contingent to affect his competency. *Phoenix v. The Assignees of Ingraham*, 5 John. R. 412. But it would have been otherwise, if his estate had not been assigned and he discharged; for in that case he would have had a direct interest to increase the fund for the payment of B.'s debts. *Id.* A creditor of a bankrupt is a competent witness to prove his debt in an action between third persons, in the event of which he is not interested; as where, in a real action, the tenant claimed under a sale by the assignee of a bankrupt, the creditor on whose debt the commission of bankruptcy was awarded, was held to be a competent witness to prove his debt, in order to

support the commission. *Farrington v. Farrington*, 4 Mass. R. 237. A creditor in a domestic attachment, wherein the creditors have sold and conveyed lands to another creditor under the attachment, and subscribed a receipt for the consideration money, may be a witness in ejectment by the other creditors to show that a former sale of the same lands by the debtor was fraudulent. *Erb v. Underwood*, 3 Yeates, 172. Held, though the witness declared, that his receiving of the money due to him depended on the success of the ejectment suit. *Quere*. In ejectment, one who held an unsatisfied judgment against the plaintiff's intestate, and had taken out a *scire facias* which had been served on the tenants of the land in dispute, was held to be a competent witness for the plaintiff, it appearing that the personal property was much more than sufficient to pay the debt, and there being no proof how the estate had been administered. But if it had clearly appeared that the payment of his debt depended on the plaintiff's recovery, as that there was no other property except the land in dispute for the payment of his debt, *it seems* he would have been incompetent. *Youst v. Martin*, 3 Serg. & Rawle, 423.

In an action *qui tam*, brought to recover the excess of interest above the legal rate, the borrower, having returned the loan, and the agreement having been canceled, is admissible for the plaintiff to prove the usury. *Pettingall v. Brown*, 1 Cain. R. 168. And see *Commonwealth v. Frost*, 5 Mass. R. 53. In Pennsylvania, it has been held that a witness, who is liable to an action by the party for whom he is called, in case he should not recover, but who is protected from such action by the Statute of Limitations, is competent. *Ludlow v. Union Ins. Co.*, 2 Serg. & Rawle, 119. It was objected in this case, that the Statute of Limitations was not an extinguishment of the cause of action against the witness, and he consequently remained liable and interested. But, per Tilghman, C. J.: "True, it is not an extinguishment, but it puts it in witness's power to defeat it, and that is sufficient to take off his interest. If a witness is interested, and the party who produces him offers a release, which the witness refuses to accept, his interest is no longer an objection, because it is owing to himself that he remains interested. On the same principle, he ought not to be rendered incompetent by liability to an action which he has the means of defeating; there is no reason to suppose that his testimony will be influenced by the fear of such an action." F. S. conveyed all his real estate to the plaintiffs, and afterwards made his will, in which he bequeathed a legacy to M. S., payable out of his real estate by the plaintiff. This action was brought by the grantees, to obtain possession of the lands which were in the possession of the defendant, who, on the trial, offered M. S. to prove the conveyance to the plaintiff fraudulent, and to have been unfairly obtained. Held, that she was competent, as on examination of the will, it appeared evidently to have been predicated on the supposition that the deeds were valid, and that the legacy to the witness could amount to no more than a recommendation, which was not binding on the plaintiff. *Shultz's Lessee v. Hahn*, 4 Yeates, 299. Note.—The objection was that the witness was interested in setting aside the deed, so as to let in her legacy upon the land.

See also the following cases: *Porter v. M'Clure*, 1 Hayw. 360; *Jacobson v. Fountain*, 2 John. R. 170; and *Bridge v. M'Lane*, 2 Mass. R. 520.

That to disqualify the witness, the verdict must be directly evidence against him, and not indirectly through another, see *Clark v. Lucas*, 1 Carr. & Payne, 156, and per Best, C. J., in *Radburu v. Morris*, 1 Mo. & Payne, 653, 654.

On this general principle it is that a grantor or vendor who has conveyed or sold with express or implied warranty, is not competent for his grantee or vendor to support the title. *Jackson ex dem. Caldwell v. Hallanbeck*, 2 John. R. 394; *Swift v. Dean*, 6 Id. 523; *Moon v. Campbell*, 1 Munf. 600; *Abby v. Goodrich*, 3 Day, 433; *Heermance v. Vernoy*, 6 John. R. 5.

A witness who is competent to answer any question, ought not to be rejected generally. Per *Ashurst & Buller, J's*, in *Bent v. Baker*, 3 T. R. 35, 36. Thus a witness who is interested to diminish certain items of the plaintiff's demand, but which are admitted by the defendant, is a competent witness for the defendant, to disprove other items of the plaintiff's account. *Smith v. Carrington*, 4 Cranch, 62.

In New York, however, an interest in any one item of the claim in controversy disqualifies the witness totally. Thus, in an action of trespass for taking several articles of personal property, it was held that a witness who was interested in one of the articles for which the action was brought, could not be admitted to testify as to any other in which he was not interested; for having an interest in the event, however small, he was wholly incompetent. *Gage v. Stew-*

art, 4 John. R. 293. But see *Williams v. Mathews*, 3 Cowen's R. 252, and *Barretto v. Snowden*, 5 Wend. 181.

In *M'Veaugh v. Goods* (1 Dall. 62), which was an information filed against certain goods, one *Scully* was called as a witness for the informant. On being examined on his *voir dire*, he stated that he assisted in making a seizure of the goods; and in case they were condemned, but not otherwise, he expected some compensation from M'Veaugh's generosity, though he had received no certain promise of that kind. By the court: "It nearly concerns the administration of justice that witnesses should be free from every kind of bias. It is true that *Scully* has no positive promise of reward; but we think the expectation which he acknowledges, in case the goods shall be condemned, must create such an influence in his mind as renders it improper for him to give testimony on this occasion." So in *Innis v. Miller* (2 Dall. 50), which was an action of replevin, the witness, on his *voir dire*, said that he was a creditor of the defendant; that he expected, if the defendant recovered, to be paid, at least a part of his debt; and that he did not know that the defendant had any other property than what was involved in the replevin to satisfy him; but, on the contrary, he believed that his payment depended on the defendant's recovery. And he was rejected by the court for the same reasons as stated in *M'Veaugh v. Goods*.

In a subsequent case, however, in the same state, it was held, that the attorney of the party, who expected a larger fee in case of a recovery, was competent for his client. *Miles v. O'Hara*, 1 Serg. & Rawle, 32. And see *Griswold v. Sedgwick*, 1 Wend. R. 126. And in *Boulden v. Hebel* (17 Serg. & Rawle, 312), it was held that the attorney was competent, though he had contracted with the party calling him for a certain sum in case of recovery, it not appearing that the contract was under seal, or capable of being enforced. In an action against the defendant in an execution, by a third person, who being a creditor of the plaintiff in the execution, caused it to be returned satisfied by an arrangement around, in consideration of the assumpsit of the defendant to pay him the amount, the sheriff is a competent witness for the plaintiff. *Caldwells v. Harlan*, 3 Monroe, 349, 350. It was said he could not be affected by the record, or anything done in this suit.

In an action against a sheriff for not assigning a bail bond taken on mesne process, to an execution creditor, the debtor being the principal in the bond, is a competent witness for the defendant. *Newall v. Hoadley*, 8 Conn. R. 381.

And see *Broussard v. Duhamel*, 3 Mart. Lou. R. (N. S.) 11; and *Flanagan v. Drake*, 2 Fox & Smith, 200, 205, 206. In the Supreme Court of the state of New York, this rule has been adopted to the full extent laid down in the text. In the case of *Van Nuys v. Terhune* (3 John. Cas. 82), the court held the following language: "The rule by which a witness is excluded on the ground of interest seems to have fluctuated at different periods; but on a careful examination of all the authorities, ancient and modern, the general rule will be found to be, that if a witness will not gain or lose by the event of the cause, or if the verdict cannot be given in evidence for or against him in another suit, the objection goes to his credit only, and not to his competency. Generally, therefore, an interest in the question alone will not disqualify the witness, but the objection goes to his credit only." And in *Stewart v. Kip*, (5 John. R. 256): "The general rule has been repeatedly recognized by this court, that an interest in the question is not an objection to the competency of a witness, but goes to his credit; and the test to decide whether he may testify, is whether the verdict can be given in evidence in another suit to be brought against the witness." And see *Lewis v. Manly*, 2 Yeates, 200, and *Fernesler v. Carlin*, 3 Serg. & Rawle, 130.

Where an action was brought against the master of a vessel, for negligently running foul of and injuring the plaintiff's vessel, the owner was admitted as a competent witness for the defendant. *Case v. Reeve*, 14 John. R. 79. And in an action or reconvention by one owner against the master for negligence, any of the other owners are competent witnesses for the one who claims damages. *Jordan v. White*, 4 Mart. Lou. R. (N. S.) 335, 337, 338. And in an action for the infringement of the plaintiff's patent for a machine, the question was whether the patent was valid; a witness who had used the same machine, and so was liable to an action for an infringement of the same patent, was offered on the part of the defendant, and was held to be competent. Story, J., says: "It is perfectly clear, that a person having an interest only in the question, and not in the event of the suit, is a competent witness; and, in general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not

exclude him." *Evans v. Baton*, 7 Wheat. 356. And see the report of the trial of this cause in 1 Peters' C. C. R. 222. So where the defendant offered a witness to prove the nature and character of the machine for which the plaintiff claimed a patent, with a view of showing that the machine had been in use before the plaintiff's alleged discovery, and consequently to invalidate the plaintiff's patent, and it appeared that an action in favor of the plaintiff against the witness for using the same machine was then pending, it was held that he had an interest only in the question, and therefore was competent. *Evans v. Hettick*, 7 Wheat. 453. And where a vessel was libeled for seamen's wages, and the defence was that certain property shipped on board the vessel had been embezzled, for which the respondents claimed a right in the master to retain the wages of the crew by way of indemnity for the embezzlement, some of the crew were introduced as witnesses for the libelants, and were held to be competent. *Spurr v. Pearson*, 1 Mason, 104. So where the defence was that the wages of the complainant were withheld as a penalty for not rendering himself on board at the hour set down in the articles, another seaman, who also had a controversy with the owners for the same offence, was held to be a competent witness for the complainant. *Thompson v. The Philadelphia*, 1 Adm. Decis. 210, 211.

In a suit in the admiralty for wages, the master was held a competent witness for the owners, though the mariners had their election to proceed against him or the owners. *Lady Ann, Wardell*, 1 Edw. Adm. R. 235. And in replevin against one of two brokers, partners, who took the goods, the partner not sued was held competent for the defendant. *Duncan v. Meikleham*, 3 Carr. & Payne, 172. And in case for a libel against a member of a society whose members had mutually agreed to contribute to all law expenses, though the libel was published in the course of the business of the society, Lord Tenterden strongly inclined to receive another member as a witness for the defendant. *Humphreys v. Miller*, 4 Carr. & Payne, 7. So where process was issued against three joint trespassers and two only served, the other trespasser never having appeared or pleaded, he was held to be an admissible witness for the defendants; and the court say that "the incompetency of a witness on the ground of interest must be confined to a legal, fixed interest in the event of the suit." *Stockham v. Jones*, 10 John. R. 21. So if, after service of process, the plaintiff proceeds to issue and trial against some without ruling the others to plead, the latter may be witnesses for the former. *Wakely v. Hart*, 6 Binn. 316. But *quere* in those states where the rule is to exclude parties, unless indeed there be no evidence against those who do not plead.

In trespass, the father of the defendant (an infant), by whose order the trespass was committed, is a competent witness for the defendant; for the son can have no suit over against him as a co-trespasser, nor for obeying his illegal order. *Alderman v. Tirrel*, 8 John. R. 418; *Hasbrouck v. Lown*, Id. 377, S. P. And the rule is general that one co-trespasser, or indeed any joint wrongdoer not sued, is a good witness for another. *Curtis v. Graham*, 12 Mart. Lou. R. 289; *Harang v. Dauphin*, 4 Id. 27; *Duncan v. Meikleham*, 3 Carr. & Payne, 172; *Humphreys v. Miller*, 4 Id. 7; *Flanagan v. Drake*, 2 Fox & Smith, 200, 205, 206; *State v. McDonald*, 1 Cox, 332, 333. And so where the plaintiff has brought separate actions against several joint trespassers or wrongdoers, one is competent for the other. *Johnson v. Bourn*, 1 Wash. Virg. R. 187; *Wilson v. Clark*, 1 South. R. 385; *Holler v. Firth*, 2 Penningt. R. 723; *Reid v. Powell*, 2 Murph. 53; *Curtis v. Graham*, 12 Mart. Lou. R. 289, 290. See the case of *Cuthbert v. Gostling*, in connection with what was said in *Flanagan v. Drake*, 2 Fox & Smith, 205, 206, by *Bushe, C. J.*

In one case it was held, that only one partner being served with process, though both were sued, the plaintiff might use the one not served as a witness, though he was not compellable to swear. *Norman v. Norman*, 2 Yeates, 154. But *quere* of this, unless it be to prove matter other than the joint liability. *Purviance v. Dryden*, 3 Serg. & Rawle, 42. Yet, in England, in *assumpsit* against one of two partners, the plaintiff may call the other. *Fawcett v. Wrathall*, 2 Carr. & Payne, 305; *Hall v. Curzon*, 9 Barw. & Cressw. 646. And one of several contractors is of course competent against another, on a separate agreement with the plaintiff to pay him in several proportions, they being individually and not jointly liable. *Taylor v. Cohen*, 12 Mo. 219.

In an action by a mariner against the owner of a vessel for wages, another seaman who served on board the same vessel is a competent witness for the plaintiff, though he may have a common interest with the plaintiff as to the point in controversy. The objection goes only to his credit. *Hoyt v. Wildfire*, 3 John. R. 518. And see *Powell et al. v. Ship Betsey*, 2 Browne's R. 335. So where, in an action of ejectment, the question as to the validity of a will, under which the de-

fendant claimed as devisee, a co-devisee, not in actual possession, was held to be a competent witness for the defendant. *Jackson ex dem. Hogarth v. Neilson*, 6 Cowen's R. 248. See also, *Owings v. Speed*, 5 Wheat. 420.

Although a commoner cannot be a witness to support the right of his fellow commoner, nor an inhabitant of a particular place to prove a prescriptive right, common to *all* the inhabitants of that place, yet one may be a witness to support a right by prescription, in respect to another's estate, though the witness claim to prescribe for a like right, in respect to his own estate, upon the same facts he is called to establish. Thus, the inhabitants of Lloyd's Neck claimed *individually* by prescription an exclusive right of fishing for oysters opposite their *respective* farms, in an arm of the sea; in an action by one of them for a violation of this right, another, who was interested as a remainderman, in a farm adjoining the *locus in quo*, at Lloyd's Neck, was offered as a witness for the plaintiff, and held to be competent. *Gould v. James*, 6 Cow. R. 369. And see *Lufkin v. Haskell*, 3 Pick. R. 356; and *Jacobson v. Fountain*, 2 John. R. 170. So in trespass, on the general issue, and a justification by pleading common of estovers, a commoner was received for the defendant, to prove a title to the exclusive possession in him. *Pearce v. Lodge*, 12 Mo. 50. The rule excluding the inhabitants of a particular place or town from being witnesses to establish a right common to all the inhabitants of that place, does not apply to the case of a public right in all the inhabitants of a state, any citizen of which is a competent witness to establish such right. Thus, in an action of trespass, the plaintiff claimed by prescription an exclusive right in all the inhabitants of Lloyd's Neck to fish for oysters opposite their respective farms, in an arm of the sea. The defendant, an inhabitant of the town of Huntington, lying opposite Lloyd's Neck, claimed that the *locus in quo* was a free fishery of any of the inhabitants of the state. On the trial, the defendant offered to introduce other inhabitants of the town of H. to establish a public right of fishery in the *locus in quo*, in all the citizens of the state, and they were held to be competent witnesses for that purpose. The reason for this distinction is stated to be, that in the case of a prescriptive right in all the inhabitants of a town or particular place, the right is claimed by them, not in their individual capacity, but as *inhabitants* of that particular place or town; and the right, if it exists at all, depends on residence exclusively. But where a public right in the inhabitants of a whole state is set up, there is no right of common, no right of fishery, in the inhabitants of one town or place, more than in those of any other in the state. The right set up by the defendant is claimed by him in his individual capacity, and does not depend at all on residence. The witnesses in this case were no more interested than any other citizens of the state, or of the United States. And see *State of Connecticut v. Bradish*, 14 Mass. R. 296. The rule is the same, although the witnesses offered had fished in the same place, and were liable to an action for so doing, if the plaintiff should succeed in establishing his right; and the rule is general, that in trespass *quare clausum fregit* against one, other trespassers on the *locus in quo*, or in other places, the title to which depends on the same question, may be witnesses for the defendant; for the verdict will not be evidence for or against them, and their interest, if they have any, is in the *question* alone, and not in the event of the suit. *Gould v. James*, 6 Cowen's R. 369. The latter question arose in the case of *Marsh v. Berry*, 7 Cowen's R. 344. The plaintiff there brought an action of *trespass quare clausum fregit* against two trespassers, who acted under B. At the trial, B. was offered as a witness by the defendant, and it was held that he was admissible, although liable to an action for the same trespass; for the verdict and judgment against the defendants, without satisfaction, would not be a defence in an action against him. And see *Fowler v. Collins*, 2 Root, 231; and *Phelps v. Winchel*, 1 Day, 269.

A person who is connected with the plaintiff in the same transaction out of which the action arose, and who has actually commenced an action against the same defendant for the same injury, is, notwithstanding, a competent witness for the plaintiff. *Bliss v. Thompson*, 4 Mass. R. 488. In this case, A., B. and C. held land as tenants in common, the title to which failed. C. was deputed by A. and B. to settle with the grantor, who had warranted the title, and received from him the value of the land, on agreeing to procure from the other grantees a release of the covenants in the deed. This release he obtained from A. and B., but paid to them but a small portion of the money he had received from the grantor, representing to them that the grantor was insolvent, and that he had not been able to obtain from him a larger sum. A. and B. having discovered the fraud, brought separate actions against C., and the court held that they were com-

petent witnesses for each other. "No objection," say the court, "on an account of interest, can exclude a witness, unless he be interested in the event of the suit. In this action the witness had no such interest, and the verdict cannot be given in evidence for or against him, in any action in which he may be a party; and though his demand may arise out of the same transaction, this case cannot be stronger than that of an action against one underwriter on a policy of insurance, in which another underwriter on the same policy may be a witness for the defendant." See also *Fairchild v. Beach*, 1 Day, 266. So in an action against a certificated conveyancer for negligence in managing the purchase of an annuity for the plaintiff, a joint purchaser is a competent witness for the plaintiff. *Rothery v. Howard*, 2 Stark. R. 68. And in a case of *Cornogg v. Cornogg's Ex'rs* (1 Yeates, 84), the plaintiff claimed a specific legacy, devised to him by his father's will. The defence was, that the plaintiff and the other children and the devisees had submitted the distribution of the testator's estate to arbitrators, who had made their award, by which the plaintiff ought to be concluded. The plaintiff contended that the arbitrators had made a prior award, different from that set up by the defendants, and that, understanding that the arbitrators were about to reconsider the same and make a new award, the plaintiff, and one Francis, who had married a daughter of the testator, had revoked the authority of the arbitrators, and directed them not to proceed further. Francis being offered by the plaintiff as a witness to prove these facts, he was objected to by the defendants, but held competent by the court; for although he was interested in the question to be tried, yet, having no interest in the event of the suit, the objection went to his credit, and not to his competency.

In an action of ejectment to recover possession of an undivided third part of certain lands, plaintiff offered to introduce a witness who claimed another undivided third part of the same premises, but was not in possession; held, that he was an admissible witness for the plaintiff. *Gibson, C. J.*, who delivered the opinion of the court, said that, "Although the case of the witness be, in every point and particular, the case of the party by whom he is called to testify; although he expect a benefit from the event; and, in short, although he be subject to as strong a bias as can influence the understanding and actions of men; yet, if he be not implicated in the legal consequences of the judgment, he is competent. The plaintiff having elected to sue alone, what would the witness gain by his recovery? Not possession of his own freehold; but for that he would be driven to his separate action, in which the verdict in this cause would not be competent evidence." *Bennett v. Hethington*, 16 Serg. & Rawle, 193. And a tenant by the curtesy is competent for the plaintiff who, as heir at law, brings ejectment. *Jackson ex dem. Bradt v. Brooks*, 8 Wend. 426. So a tenant in dower. *Doe ex dem. Nightingale v. Malsey*, 1 Barnw. & Adolph. 439. But see *Gully v. Bishop of Exeter*, 2 Moor. & Payne, 266. In an action for the recovery of lands, the defendant introduced two witnesses to prove the lines and corners by which he claimed, and it was objected by the plaintiff that the witnesses claimed land by the same lines and corners, and were therefore interested to establish them as true; but the Court of Appeals of Virginia held that they were not by that circumstance disqualified; for the judgment in this cause could not be evidence for them in any other suit in which they might be parties. They had an interest in the question alone. *Richardson v. Carey*, 2 Rand. R. 87; *King v. Tarleton*, 3 Har. & M'Hen. 473; and *Green v. Watson*, 1 Bibb's R. 105, S. P.

On the trial of a complaint for flowing the complainant's land by means of a milldam, it appeared that the respondent owned one half of the dam in question, and that O., a witness for him, owned the other half. They held in severalty, each owning the dam on his own side of the stream to the centre. This witness was objected to by the complainant on the ground of interest. Held, that he was not interested in the event, and therefore competent. *Clement v. Durgin*, 5 Greenl. R. 9.

In an action of slander, the defendant introduced a witness against whom the plaintiff had an action pending for speaking the same words, and he was held competent. *Fowler v. Collins*, 2 Root, 231. See *contra*, the previous cases of *Bacon v. Minor*, 1 Root, 258; *Merriman v. Way*, Id. 283; *Pride v. Peters*, Id. 331; *Talmadge v. Northrop*, Id. 455; the principle of which is overruled by *Fowler & Collins* and the subsequent cases in the Supreme Court of Errors of Connecticut. Thus, where in an action for a fraud, the plaintiff offered a witness who had similar claim against the defendants for the same fraud (*Fairchild v. Beach*, 1 Day, 266), and where a witness offered by the defendant had been connected with the defendant in the same fraudulent

acts complained of by the plaintiff (*Phelps v. Winchel*, 1 Day, 269), the witness in both cases were held competent. The court, referring to the previous cases in the Superior Court, where the contrary doctrine had been held, said that the error which had crept into practice was that of mistaking, in certain cases, bias for interest. In this case, the witness offered was neither to gain nor lose by the event of the suit. The verdict which his testimony might have affected, could never have been given in evidence for or against him.

Where a witness was called by the defendant to prove the soundness of a slave sold by the defendant to the plaintiff, it appeared that the plaintiff had sold the slave to the husband of the witness, and he had sold her to another person, and it was contended by the plaintiff that the witness was interested to establish the soundness of the slave, as her husband might be sued for a fraud in selling the same slave; but, *by the court*, the verdict in this cause, to which the husband of the witness is no party, cannot possibly ever be given in evidence for or against him in any cause to which he shall be a party, and therefore she is clearly a competent witness. *Porter v. M'Clure*, 1 Hayw. R. 360; *contra*, *Madox v. Hoskins*, Id. 4, overruled.

In an action for fraudulently procuring the plaintiff to bet on a horse race, another who bet on the same side is a competent witness for the plaintiff. *Criswell v. Gaster*, 5 Mart. Lou. R. (N. S.) 129.

In an action by the warrantee against the warrantor of title to personal property, the vendee of the warrantee is a competent witness for him, especially where he has settled and paid the witness all damages for the breach of the like warranty to him. *Armstrong v. Percy*, 5 Wend. 535.

An owner of goods, who permits his agent to sell them as the agent's own goods, is a competent witness for the agent in an action in his own name for the price, the agent having paid the owner for the goods. *Outwater v. Dodge*, 6 Wend. 397.

It was held in *Fitch v. Hill* (11 Mass. R. 286), that the wife might be a witness for the plaintiff, although her husband had guaranteed the recovery of the demand sued for. But *quere*.

In chancery, where a bill was filed against several persons, but no relief was prayed against some of them, those against whom no relief was sought were held competent witnesses for the others. *M'Donald v. Neilson*, 2 Cowen's R. 139. So if it appear that some, made defendants in the bill, have no interest in the controversy. *Warren v. Sproule*, 2 Marsh. Kent'y R. 529.

There must be a legal and fixed interest, a certain benefit, in order to disqualify a witness. *Stockham v. Jones*, 10 John. R. 21; *Marquand v. Webb*, 16 John. R. 89. A remote or contingent interest affects his credit only. *Stewart v. Kip*, 5 John. R. 256; *Falls v. Belknap*, 1 John. R. 491; per Kent, J., in *Baker v. Arnold*, 1 Cain. R. 276; *Peterson v. Willing*, 3 Dall. 508; *Phelps v. Hall*, 2 Tyl. 399; *Carman v. Foster*, 1 Ashm. R. 133; *M'Call v. Smith*, 2 M'Cord's R. 376, per Johnson, J.; *Pratt v. Flowers*, 2 Mart. Lou. R. (N. S.) 333, 334; *Ten Eyck v. Bill*, 5 Wendell, 55.

To disqualify a witness because the verdict will be evidence against him, it must be directly so, and not against another, a record against whom would be evidence over against the witness. Thus, in an action against a sheriff for a false return of *nulla bona*, the servant of the deputy, who had charge of certain goods levied on, but who let them go, was held competent for the sheriff, though he would not be in an action by the sheriff over against the deputy; and though the record in the action now pending would be evidence against the deputy, and thus over against the servant. *Clark v. Lucas*, 1 Carr. & Payne, 156. So, if the witness be interested as vendor, the verdict must be evidence against him as immediate vendor; not first against A., who may recover over against the witness as a remote vendor. Per Best, C. J., in *Radburn v. Morris*, 1 Mo. & Payne, 653, 654. In an action against a sheriff for a false return of *nulla bona*, the party against whom the execution issued is a competent witness for the plaintiff, to show that the witness has property sufficient; for a recovery against the sheriff will not necessarily bar a further proceeding against the party. *Taylor v. The Commonwealth*, 3 Bibb, 356. The liability of ratable inhabitants has often been held to raise too remote and contingent an interest to preclude their being witnesses for the town, *e. g.* in actions on bastardy bonds (*Falls v. Belknap*, 1 John. R. 491), and in *qui tam* actions for penalties. *Corwein v. Hames*, 11 John. R. 76; *Bloodgood v. Overseers of Jamaica*, 12 Id. 285. This was formerly held otherwise in England

as to *rated*, though not as to *ratable* inhabitants, or those liable to be rated. But the former are now competent by stat. 54, Geo. III, c. 170, § 9, set forth 1 Mann. & Ryl. 650, note, and cited *post*, 128. *Marsden v. Stansfield*, 1 Mann. & Ryl. 669; S. C., 7 Barnw. & Cressw. 815.

Where the plaintiff, being indebted to the witness, promised him an order on the fund in question when recovered, this was held not to render him incompetent; otherwise, it seems, where an order is given. *Ten Eyck v. Bill*, 5 Wend. 55.

Where, in an action against a sheriff for the default of his deputy, the question was whether the execution had been delivered to the deputy in due season, the plaintiff offered the attorney who issued the execution as a witness to prove the delivery. To his admission the defendant objected that the attorney must answer to the plaintiff for his negligence, if the execution was not delivered in due season. But, held, that his interest was too contingent and remote to affect his competency. *Phillips v. Bridge*, 11 Mass. R. 242. And in an action against the sheriff for the escape of the defendant in an execution, the latter is competent for the sheriff. *Waters v. Burnet*, 14 John. R. 362. On the defence of lunacy to an action on a bond, the lunatic's creditors are competent for him, unless indeed where both the plaintiff and creditors have judgments for their respective claims, or the like, and the event may thus let in specific liens of creditors. *Hart v. Deamer*, 6 Wend. 497. And a creditor of a decedent's estate was received as a witness in behalf of the estate, to protect it against a recovery which would diminish the fund, he stating that he believed the estate amply sufficient to pay all debts. *Thompson v. Chauveau*, 6 Mart. Lou. R. (N. S.) 458. And see *Hewes v. Lauve*, 6 Mart. Lou. R. (1st series) 502. In an action on a mortgage bond, a subsequent mortgagee is competent for the defendant; for that the judgment will be levied on the land, depends on the contingency of a defect in the personal property; otherwise, had the suit been directly on the mortgage. *Enters v. Peres*, 2 Rawle, 279. In an action against the principal, the surety is a competent witness for the former. *Baker v. Briggs*, 8 Pick. 122. The interest of witnesses to a will which devises for the benefit of a church and school, to be formed by persons residing in a particular place, the devise to take effect after the death of another, they residing in that place when the will is executed, is contingent; for the institutions may not be formed, or, if formed, the witnesses may not be members, or in any way benefited, and they may neither survive nor reside in the place, so that the devise can take effect as to them. *Hawes v. Humphrey*, 9 Pick. 350.

In replevin for a negro, held no objection to a witness for the plaintiff, that he had formerly been the plaintiff's guardian, and once had the negro in possession. *Watts v. Garrett*, 3 Gill & John. 355.

The liability of an assignee of a chose in action to pay the defendant's costs is too remote to disqualify him as a witness for the plaintiff, if his interest be otherwise removed, *e. g.*, by assignment over to a third person, although he may have commenced the action himself; for his liability is contingent. *Soulden v. Van Rensselaer*, 9 Wendell, 293.

The plaintiff declared that the defendant, knowingly and fraudulently, induced the plaintiff to enter into a copartnership with J. B., representing him to be solvent, when in fact he was utterly insolvent and owed the defendant a large amount, and that the defendant, after the copartnership was formed, procured J. B. fraudulently to make notes under the partnership name, for debts from him to the defendant before the partnership, whereby the plaintiff was ruined in his circumstances; and offered J. B. to prove these facts. Held, admissible on the ground that he would have no right to share in the damages which might be recovered by the plaintiff in this suit; nor would the judgment in this suit be a bar to an action by the plaintiff against the witness for the frauds complained of; and although the amount recovered in this suit might possibly go to mitigate the damages in an action against the witness, yet such an interest was too contingent and uncertain to exclude him. *Bean v. Bean*, 12 Mass. R. 20.

But the uncertainty whether the judgment *will be* used against the witness will not make him competent. His competency does not depend on the certainty of using the evidence against him hereafter; but on the certainty, that it may be used, if wanting. Per *Mills, J.*, in *Lampton v. Lampton's Ex'rs*, 6 Monroe, 619. And *vide Wallace's Ex'rs v. Twyman*, 3 J. J. Marsh. 461; and *Collett v. Wiley's Heirs*, 2 Bibb, 467.

In an action against a sheriff for the escape of a prisoner in execution from the jail liberties, the deputy sheriff and jailer who had taken the bond for the liberties, was held to be competent for the defendant. *Stewart v. Kip*, 5 John. R. 256.

So, where a bill was filed against several persons, but no relief was prayed except against one, the defendants against whom no relief is sought, are competent witnesses for the other defendant. *McDonald v. Nilson*, 2 Cowen's R. 139. Whether a decree could pass against the defendants who were admitted as witnesses is extremely doubtful; but admitting that it might, it would still be a contingent liability, and therefore not such an interest as will disqualify a witness. See also *Beebe v. The Bank of New York*, 1 John. R. 529.

K. and another, as the agents of W. and F., gave a note to C. for merchandise, in which K. was interested; C. brought an action on the note against W. and F., alleging it to have been made by them, by the procurement of their agents. W. and F. also had an action depending against C. for damages on the same goods for which the note was given, and it was agreed that whatever damages W. and F. might recover should be set off against the note. It was held that the interest of K. in the suits between W. and F. and C. was too remote to exclude him from being a witness; and that the objection went to his credit, and not to his competency. *Willings v. Consequa*, 1 Pet. C. C. R. 301. In this case it was contended by C., who objected to the competency of the witness, that being interested in the goods purchased, he was a dormant partner of W. and F., and that if W. and F. should not succeed in recovering against C. damages sufficient to discharge the note, and if W. and F. should be unable to pay it, the witness would be liable to be sued by C. as such dormant partner, and be compelled to pay all that should remain due on the note; and that he was, therefore, interested to increase the damages in this suit. But it was held, that a recovery against a part of the persons jointly liable to pay, would be a bar to any future action to be brought against all the joint debtors, and if an action should be brought against K. alone, he might plead the non-joinder of the others in abatement, and so defeat the action. He was therefore not interested in that point of view. It should be observed, that he had been released by the plaintiffs, W. and F., and so was not liable to them for contribution.

Where a witness was a partner of the attorney of the plaintiff, interested in the costs, and probably expecting higher fee as counsel, in case of success; it was held that his interest was too uncertain and contingent to affect his competency. *Griswold v. Sedgwick*, 1 Wend. R. 126; *Miles v. O'Hara*, 1 Serg. & Rawle, 32, S. P. In this latter case the attorney was sworn; and in an older case it was held that the counsel of the party was competent, although his judgment fee depended on his success. *Newman v. Bradley*, 1 Dall. 240. The reason of this decision is not stated, and it is difficult to perceive why the witness was not incompetent, if, as the case states, his judgment fee depended on the event of the cause. In Massachusetts and New York, it has been frequently held, that the attorney was not competent, when he was liable, as he is in certain cases in those states, for costs. See *Chadwick v. Upton*, 3 Pick. Rep. 442; *Brandigee v. Hale*, 13 John. Rep. 125; *Chaffee v. Thomas*, 7 Cowen's Rep. 358. Agents are admitted from necessity, but that necessity cannot exist in regard to the counsel of the party.

The defendants and R. conveyed lands to the plaintiff, and also certain privileges of using water on other lands belonging to the grantors. Subsequently R. sold his share of the land remaining to them to the defendants, who, by erecting dams, obstructed the water, and injured the plaintiff, for which he brought his action. R. was held a competent witness for the defendants, having no interest in the land, and not having participated in the defendants' act. *Revere v. Leonard*, 1 Mass. Rep. 91.

Where a devise of lands to A. provided that if he aliened the lands to any other than certain persons named in the will, he should pay one-fourth of the value of the lands devised, to the testator's residuary legatee, in an action between A. and one claiming a title paramount to the devise, it was held that the residuary legatee was a competent witness for the plaintiff. *Lessee of Galbraith v. Scott*, 2 Dall. 95.

In an action by a wife's trustee to recover moneys belonging to her, and vested for her separate use, her husband was held a competent witness for her, for his interest was contingent. *Richardson v. Learned*, 10 Pick. 261. But *quere* whether this case can be supported; and especially on the principle not adverted to there, that the husband shall not be a witness for the wife. She was the *cestui que trust*, the real party, and yet her husband was received to testify for her.

Although the verdict may not affect, in another suit, the person offered as a witness, yet wherever the verdict may create a new responsibility, which the law would recognize and render available, in favor of or against the witness, or increase or decrease an existing one, he ought to

be rejected. Per Gibson, J., in *Conrad v. Keyser*, 5 Serg. & Rawle, 371. And see *Hillhouse v. Smith*, 5 Day, 432. The plaintiff promised the witness, his vendee, that if any one succeeded in obtaining his land on the *Wallace contract*, which the plaintiff was contesting in the suit, he would make a deduction from the agreed price. The witness was held incompetent for the defendant. *Robinson v. Eldridge*, 10 Serg. & Rawle, 140, 143. In an action against one who became surety to stay execution, the principal is not a competent witness for the defendant. *Milliken v. Brown*, 10 Serg. & Rawle, 188. The defendants' intestate had promised to pay back to the plaintiff the amount of a bond against R., if the plaintiff failed in any attempt to set it off against R. In a suit brought on the ground that it was disallowed as a set-off, held that W., who was a surety in the bond, was not a competent witness for the defendants; for their success would prove that the bond had been paid by a set-off; and their failure would, as a consequence, subject the witness as a surety at their suit. *Reigart v. Bicks*, 14 Serg. & Rawle, 134. One who has given his bond and judgment as collateral security for an indorser, is not competent for him. *Sterling v. Marietta, &c., Trading Co.*, 11 Serg. & Rawle, 179. In assumpsit by the county treasurer, for taxes paid to his agent, by B., the person assessed, he was held incompetent for the plaintiff. *Hayes v. Grier*, 4 Binn. 80. In assumpsit for use and occupation, C., the plaintiff's witness, swore that the plaintiff had demised to him, the lease not being yet ended. Held he was incompetent to prove that he had let the defendant into possession; for the plaintiff's recovery would discharge him of so much as should be recovered. *Hodgson v. Marshall*, 7 Carr. & Payne, 16.

In an action by a lessee for market toll, whether one who has refused to pay toll, be a witness for the defendant, *quare*; for the verdict may be evidence against him. *Laucum v. Lovell*, 6 Carr. & Payne, 437.

That a vendor of goods is not competent to support the title of his vendee, on account of his implied warranty, we saw in note 636, *post*. There are various other cases to the same effect, as also in regard to an express warrantor of goods or land. *Mockbee's Adm'r v. Gardner*, 2 Harr. & Gill, 176; *Giese v. Thomas*, 7 Har. & John. 458; *Hale v. Smith*, 6 Greenl. 416, 420; *Harwood v. Murphy*, 4 Halst. 215; per Nott, J., in *Duncan v. Bell*, 2 Nott & M'Cord, 153, 156; *Lowrey v. Summers*, 7 Halst. 240; *Brewster v. Curtis*, 3 Fairf. 51; *Baxter v. Graham*, 5 Watts, 418; *Saunders v. Addis*, 1 Bail. 49, 50; *Richardson v. Dorr*, 5 Verm. Rep. 9; *Swisher's Lessee v. Williams' Heirs*, 1 Wright, 754. But it should be noted that the doctrine of implied warranty of title does not extend to sales by sheriffs, executors, administrators, and other trustees, who are therefore competent. *Stone v. Pointer*, 5 Munf. 287; *Brent v. Green*, 6 Leigh, 29; *Mockbee's Adm'r v. Gardner*, 2 Harr. & Gill, 176; *Petermans v. Laws*, 6 Leigh, 523, 529. Though they may make themselves liable by an express warranty. *Richardson v. Dorr*, 5 Verm. Rep. 9, 17.

In assumpsit, a witness offered by the defendant was held incompetent to prove that he, the witness, had paid the debt for the defendant, by drawing an order on the plaintiff in favor of the defendant, which was accepted by the plaintiff as payment. *Huntington v. Champlin*, Kirb. 166-*Quere*; for the record would not be evidence, for or against the witness. All his rights would still depend on other proof as before.

Indemnitors of an officer levying on goods under their respective executions are not competent for him in an action for the levy. And it was held *a direction* by them to levy on specific goods, raised a contract of indemnity; and neither was, therefore, competent, though his debt were afterwards satisfied out of other estate. *Bulkley v. Richards*, Kirb. 203. Bnt an indemnitor against neglect to serve an execution was held competent; for his contract is void for the illegal consideration. *Hodson v. Wilkins*, 8 Greenl. 113.

In a suit to recover of B. on the ground of a lien by the plaintiff on money in the defendant's hands for a debt of A. due to the plaintiff, A. was held incompetent as a witness for the plaintiff. *Alsop v. Magill*, 4 Day, 42.

In ejectment [*disseizin*] by one tenant in common, held that another was incompetent for the plaintiff. *Barrett v. French*, 1 Conn. Rep. 354. Reasons given by Swift, Chief Justice, page 364, which compare with *ante*, note 623, a case *contra* with the reasons by Gibson, Chief Justice, there given, and *Nass v. Van Swearingen*, 7 Serg. & Rawle, 192. Swift, C. J., says: "One tenant in common recovers for the benefit of the whole." So a tenant in common with the defendant cannot be a witness for him. *Den ex dem. Rogers v. Mabe*, 4 Dev. 180, 196. At page 197, the same reason is given as by Swift, C. J., *supra*. So it was held that the defendant's

setting up an outstanding title in A. and B. neither of these were competent as witnesses in support of it. *Lodge v. Patterson*, 3 Watts, 74. A tenant in common with the defendant is admissible, *e. g.* a co-devisee.

In a *scire facias* against the defendant as the debtor of A. to compel the defendant to pay to the plaintiff his judgment against A., the defendant contended that he owed the debt in question to one P., in his own right. The plaintiff insisted that it was due to P. in trust for A., and the wife of the latter was held incompetent as a witness for the defendant; because, though her husband A.'s interest was balanced as to the principal sum, yet he was moreover liable to the plaintiff for costs. *Beach v. Swift*, 2 Conn. R. 269, 275. On a bill filed by the principal, for relief against a judgment on a bond, the surety in the bond is not a competent witness for him. *Shelby v. Smith's Heirs*, 2 A. K. Marsh. 508. In an action by a town treasurer on collector's bond given to his predecessor for moneys received by the collector, the defendants produced the receipt of the plaintiff's predecessor for the money. Held, that the predecessor was not a competent witness for the plaintiff. It was likened to an indorser offered as a witness for the indorsee against the maker. *Pingree v. Warren*, 6 Greenl. 457. In a suit commenced by attachment of the defendant's land, the defendant's grantee pending the suit is not competent for him. *Schillinger v. McCann*, 6 Greenl. 364. The party injured is not a competent witness for the state, in a prosecution for a forcible entry and detainer under a statute; for, on a conviction, he is entitled to restitution. *State v. Fellows*, 2 Hayw. 340. In assumpsit by a levying officer against a receptor of property, who left it with the person against whom the attachment issued, the latter was held incompetent as a witness for the defendant, because he was bound to indemnify him, not only against damages, but all costs. *Davis v. Miller*, 1 Verm. R. 9, 13. One who has contracted to pay a part of the costs of the suit, if the plaintiff should fail, is incompetent as a witness for the plaintiff. *Lowrey v. Summers*, 7 Halst. 240; *Bell v. Smith*, 7 Dowl. & Ryl. 846; S. C., 5 Barn. & Cress. 188; *Benedict v. Brownson*, Kirb. 70. One owing taxes turned out a cow to the collector, as his own. Held, that he should be holden to warrant the title, and was therefore incompetent as a witness for the collector, in an action of replevin against him, by one claiming to be the true owner. *Brewster v. Curtis*, 3 Fairf. 51, 53. In an action by the assignee of a bail bond, the sheriff (the assignor) was held incompetent for the plaintiff, the court saying that he was a warrantor by implication, that the bond was regularly taken, and executed properly. *Baxter v. Graham*, 5 Watts, 418, 419. In assumpsit for work and labor, the defence was that one hundred dollars had been paid by the defendant on the demand in question; to which the plaintiff answered, that the one hundred dollars had been paid by the defendant, not on the demand in question, but was paid to the plaintiff to reimburse him that sum paid by him as a second indorser of a note of three hundred dollars. This note, he averred, was made by the now defendant, and indorsed first by one W., and then by the plaintiff, both indorsements being for the defendant's accommodation; that the note being protested, the now plaintiff paid one hundred, and W. the other two hundred dollars. W. being offered by the plaintiff to prove that the one hundred dollars in question was intended and applied by the defendant to satisfy the same sum so paid by the plaintiff, as indorser, and having disclosed his situation in respect to it, on his *voir dire*, was held incompetent, because such an application of the payment, sealed by the verdict and judgment, would discharge himself as first indorser for so much. *Rhodes v. Lent*, 3 Watts, 364. In an action against a town for special damage arising from the non-repair of a bridge, the surveyor of highways in the district where the bridge is situate is an incompetent witness for the defendant. *Yuran v. Inhabitants of Randolph*, 6 Verm. R. 369, 373. Whether, on trial, for a capital offence, one entitled to an estate expectant on the prisoner's death, be a competent witness against him? *Quere. Stato v. Kimbrough*, 2 Dev. 431, 438, 439.

A direct interest merely in the costs renders the witness incompetent. *Lowrey v. Summers* and *Bell v. Smith*, *supra*; *Beach v. Swift*, 2 Conn. R. 269, 275, also stated *supra*; *Barnwell v. Mitchell*, 3 Conn. R. 101, 105, 106; *Bill v. Porter*, 9 Id. 23, 29; *Seymour v. Harvey*, 11 Id. 275. In case for a false return to the plaintiff's *fi. fa.*, the sheriff defended, on the ground that he had properly applied the proceeds of goods, partly on a prior *fi. fa.* of A. and B., and partly in paying the debtor's landlord his rent. Although B. assigned, and was released as between him A. and the sheriff, he was still held incompetent, because he was a real party, liable over to the plaintiff for costs. *Quere* of this, since *Miller v. Adsit*, 19 Wend. 672. And as to the landlord,

it was doubted whether he was not competent, although a different opinion was entertained at *Nisi Prius* in England (3 Camp. 593). *Benjamin v. Smith*, 12 Wend. 404, 406, 407.

In an action against the principal alone, the surety is not competent for the defendant. This was said in *Cochran v. Dawson* (1 Miles, 278, 279). But *quere*. In trespass against the sheriff for levying, the surety in a bond to indemnify him is not a competent witness for the defendant. *Terry v. Belcher*, 1 Bail. 568, 571. In trover, one claiming the property as delivered to him and the defendant under a contract by the plaintiff to deliver it absolutely in payment to them, but the plaintiff claiming that the delivery was on a condition not fulfilled, and taking this as the ground of his action, such joint claimant is not a competent witness for the defendant. *Caldwell v. Cole*, 1 Shepl. 120. In assumpsit for goods sold, a witness for the plaintiff said he received the goods from the plaintiff on account, and in pursuance of directions by the defendant; but it appearing that the goods never came to the hands or use of the defendant, the witness was rejected as incompetent. *Winslow v. Kelley*, 3 Fairf. 513. In trespass and plea of a right of way for all the inhabitants of M., one of the inhabitants is not a competent witness to prove the plea. *Odiorne v. Wade*, 8 Pick. 518. In trespass against a deputy sheriff, for attaching and selling horses, &c., at the suit of, and by direction from, several creditors under their several and respective process, one of them, though his suit be discontinued, is still incompetent; for, though it may be doubtful whether he be an indemnitor, yet by losing the property he loses a fund which will pay the expenses of the sale. *Boyd v. Moore*, 11 Pick. 362, 366. But he was, beside, an indemnitor by joining in the request. *Bulkley v. Richards*, *supra*. It seems, that in a suit against the administrator, the heir is not a competent witness for the defendant, in a case where the exhaustion of the personal assets is necessary, before the plaintiff can resort to the real estate. *Scott v. Young*, 4 Paige, 542. In assumpsit by a bank for alleged overdrawing by the defendant, through the carelessness of the cashier, the surety of the cashier was rejected as an incompetent witness for the plaintiff, as a recovery would diminish *pro tanto* his liability as surety. *State Bank v. Littlejohn*, 2 Dev. 381. The defendant in ejectment having taken a conveyance of the *locus in quo* under an agreement to pay the debts of A. and B., their creditor is not a competent witness for the defendant. *Paull v. Mackey*, 3 Watts, 110, 124. In case for a nuisance on the defendant's land by damming and flowing water back upon the plaintiff, it was held that one who, pending the suit, purchased the land and succeeded to the defendant's right of possession, was not a competent witness for him; and so of one who is special bail for the defendant in a subsequent action for continuing the nuisance; for the record would be evidence against the first in respect to his privity of estate, and against the principal of the bail in respect to the identity of parties and subject matter. *Miller v. Frazier*, 3 Watts, 456, 458, 459. In assumpsit by a legatee to charge the estate of one out of two executors, because assets had come to the hands of the former, the other executor is not a competent witness for the plaintiff. *Doebler v. Snively*, 5 Watts, 225, 228, 229. In trespass *de bonis*, &c., a witness offered by the plaintiff had purchased the goods from the defendant with condition not to pay, if the defendant failed to establish his title in the action, and was therefore rejected as incompetent. *Jones v. McNeil*, 2 Bail. 466, 471, 472, 473. In assumpsit for money received under pretence of being the plaintiff's assignee of a debt, the debtor was held incompetent as a witness for the plaintiff. *Penniman v. Patchin*, 5 Verm. R. 346, 354. In an action by the vendee on a warranty that a vessel was seaworthy, the plaintiff offered the master to prove her not so, in consequence of which she was lost while under his care. Held incompetent. *Newbold v. Wilkins*, 1 Harringt. 43. In ejectment, one who occupies a part of the premises in question, though not a party, is not a competent witness for the defendant; for one result of a recovery would be a liability of the witness for mesne profits. *Boyer v. Smith*, 5 Watts, 55. See *Doe v. Preece*, 1 Tyrwh. 410. The defendant holding as lessee under the witness, the latter is of course not a competent witness for the defendant. *Tindal, C. J.*, in *Doe ex dem. Bath v. Clarke*, 3 Bing. N. C. 429.

We saw *ante* (note 639), that in ejectment by a grantee with general warranty, who had never been in possession, his grantor was said to be competent for him; because, though he might fail, it would not be a breach of the warranty, which can only be broken by ouster from a possession actually taken. The contrary was held in *Randolph v. Meek*, Mart. & Yerg. 58, 61. The court rely on *Hamilton v. Cutts*, 4 Mass. R. 349; and *Duval v. Craig*, 2 Wheat. 46, 61, 62.

In the case of *Briggs v. Crick* (5 Esp. R. 99), it was held that the former proprietor of a horse, who had sold with warranty of soundness, was, in an action against his vendee on a like war-

a suit, whatever may be his rank, fortune, or character, is incompetent to give evidence, as one who may be interested to the amount of thousands.(1)

ranty, competent to prove the soundness without a release, as a witness for his vendee. *Baldwin v. Dixon*, 1 Mood. & Rob. 59, S. P.; *Duncan v. Bell*, 1 Nott & M'Cord, 153, 156, S. P.; *Lightner v. Martin*, 2 M'Cord, 214, S. P.; per *Harper, J.*, in *Johnson v. Harth*, 2 Bail. 185, S. P. But *Alderson, J.*, held *contra* in *Biss v. Mountain*, 1 Mood. & Rob. 302. And see *post*, note 636. The cases cited in these notes are those of a warranty of title. The reason given in *Biss v. Mountain* was, that the effect of a verdict for the defendant would be to relieve the witness from an action at his suit; a result obvious enough if unsoundness in the hands of the witness be in issue. If it confessedly occurred after he had parted with the horse, the verdict could in no event affect the witness. See per *Harper, J.*, *ut supra*.

When a suit is commenced by attaching property which the debtor has sold after the levy, though with warranty, the vendee is not a competent witness for the defendant in the cause, even though he may have sold to another with warranty. The result of the suit may deprive his vendee of the specific property, and he would be liable on his warranty; and the court in Maine will not allow that his interest shall stand balanced by his remedy over against his own warrantor. *Kendall v. Field*, 2 Shepl. 30.

It is not necessary, in order to render a witness incompetent, that the record in the pending cause should be evidence for or against him in a subsequent suit. It is enough that a decision of the cause in favor of the party calling him will prevent the witness's liability to a subsequent suit. See the several cases cited by Chancellor Walworth, 6 Paige, 81. Accordingly, where two of three copartners in a mercantile firm sold and assigned all the partnership property and effects to W., their copartner, and D. W., as his surety, joined with him in a bond to B., one of the retiring partners, to pay the debts of the firm, and indemnify him against any liability on account of such debts; and a bill in chancery was afterwards filed by W., as such assignee, against S., to recover a demand claimed to be due from him to the firm, and also to bar a claim against the firm on the part of S.; which he by his answer alleged to be due and claimed to have allowed to him against the copartnership; held that D. W. was not a competent witness for the complainant, to establish his claim against S., and to disprove the claim set up by the latter against the firm; as a decision in favor of the complainant establishing or increasing the amount of the company claim against S., or diminishing the amount of the claim sought to be offset by the defendant, would discharge or diminish the liability of the witness on the indemnity bond *pro tanto*. *Woods v. Skinner*, 6 Paige, 76. *Quere*. Would not the witness be competent as having a remedy over against his principal for whatever he might have lost by a decree against his surety, within the principle of *Benedict v. Hecox* (18 Wend. 490)? We have adverted to this principle several times in the course of these notes.

(1) NOTE 624.—Where a corporation is a party, or immediately interested in the event of a suit, no member of it can be a witness to support the interests of the corporation. *Doe ex dem. Mayor & Burgesses of Stafford v. Tooth*, 3 Younge & Jervis, 19; *Republia v. Richards*, 1 Yeates, 480. Held *contra*, in a suit by The City Council of Charleston v. King, for the penalty due to the corporation; and this on common-law principles. *City Council v. King*, 4 M'Cord, 487. And *vid.* *Falls v. Belknap*, 1 John. R. 486; *Bloodgood v. The Overseers of the Poor of Jamaica*, 12 Id. 285, S. P. And see also *Corwein v. Hames*, 11 John. R. 76. In New York, a member of a corporation aggregate, not named on the record, is admissible to testify against the corporation. 2 R. S. 407, § 81. A stockholder in a bank was held incompetent as a witness for the bank. *Bank of Kentucky v. M'Williams*, 2 J. J. Marsh. 256, 260, 261. A surety for a corporation was held competent to testify for the corporation, in respect to another debt, for which they were sued. *Miller v. Mariner's Church*, 7 Greenl. 51. And the member of an eleemosynary corporation, having no pecuniary interest, seems to be competent for the corporation in a suit directly against it. *Id.* In Louisiana, members of certain corporations are by statute admitted for the corporation. *Polies Jury v. M'Donough*, 7 Mart. Lou. R. 8, 19, (N. S.); and 3 Mart. Dig. 482. But a stockholder is not so admissible. *Lynch v. Postlethwaite*, 7 Mart. Louisiana R. (1st series), 69, 211.

This is the unavoidable consequence of the general rule. If interest be allowed to disqualify in any case, it must in all; as it is impossible by any scale to measure the different effects which it may have on different minds.

The interest may be either in the subject, in issue, in the action, or in the costs; for, as we have seen, in treating of the evidence of the parties to the suit, a plaintiff or defendant, who has no actual interest in the action, but merely sues or defends for the benefit of a third party, will be incompetent, if he be liable to be called on for costs. And, of course, the same rule applies to witnesses not being parties to the suit.(1)

Where the witness is so situated, that he is interested on both sides, his competency will depend upon the equality or inequality of the adverse interest. If they should be exactly equal, one will counterbalance the other, and the witness will be competent;(2) but if there should be any ex-

As to what are called quasi corporations, or the civil divisions of the country, where the question to be decided involves an increase or diminution of the corporate means or funds, so as to add to or lighten the burden of taxation upon the individual, the English courts have holden that his mere *liability* to be rated constitutes an interest too remote and contingent to operate as the ground of exclusion, though it is said to be otherwise if he be *actually rated*. *Rex v. Prosser*, 4 T. R. 17, 19, 20; *Rex v. South Lynn*, 5 Id. 664, 667; *Rex v. Little Lumley*, 6 Id. 157. Several cases in New York profess to go on the same ground; and they no doubt go as far. *Falls v. Belknap*, 1 Johns. R. 486, 491; *Corwein v. Hames*, 11 Id. 76. And in *Bloodgood v. Jamaica* (12 Id. 285), the objection was disregarded, though the witness was actually rated for the general support of the poor, but not for the *particular pauper* in question. These cases go very far towards, if not quite up to the cases in Connecticut, stated *quere*, which receive the inhabitant without regard to the question whether he be *ratable* or *actually rated*. The *City Council v. King* (4 M'Cord, 487), went on the cases of *Johnson (supra)*, and seems to go the whole length with the Connecticut authorities. (See *Trustees, &c., v. Cowen*, 4 Paige, 510; *Hunter v. Trustees, &c.*, 6 Hill R. 407.)

(1) NOTE 625.—One having given bond to indemnify the plaintiff against the costs of the suit, is not competent for him. *Butler v. Warren*, 11 John. Rep. 57. And an executor plaintiff, in a feigned issue to try the validity of a will, is not a competent witness in its support, being liable for costs. *Vansant v. Boileau*, 1 Binn. 444; (*Ware v. Jordan*, 21 Ala. 837; *Wills v. Judd*, 26 Verm. 617.)

(2) NOTE 626.—See *Marquand v. Webb*, 16 John. Rep. 89; *Baring v. Reeder*, 1 Hen. & Munf. 154, 164; *Field v. Field*, 9 Wendell, 394, 398; *Smyth v. M'Dow*, 1 Rep. Const. Court, 277.

D. lent a horse to V., to be re-delivered whenever D. thought proper. V. sold the horse to M.; and in an action by D. against M., the wife of V. was declared to be a competent witness for D.; V. being at all events liable to the losing party, his interest was balanced, and his wife was competent to testify whenever he himself would have been. *Marshall v. Davis*, 1 Wend. Rep. 109. The principal is competent for the creditor against the surety, having either a balanced interest or one against the creditor. *Bigelow v. Benedict*, 6 Conn. Rep. 116. So, on offering a will for probate, the surety in a bond given by an administrator, *pendente lite*, is competent to support the will; for he is liable equally to the executors, if the will be established, or to the administrators, if not. *Martin v. Hough*, 2 Hawks, 368. And on an issue to try whether the husband had deeded or only mortgaged the land, the widow was received for the complainants who set up that it was mortgaged, because, whether deeded or mortgaged, her right to dower (say the court) was gone. *Price v. Joiner*, 3 Hawks, 418. Note.—This case went on the law of dower in North Carolina, which would seem to differ from that in some of the other states. A debtor, who had made a general assignment of his property, was received as competent in a suit

between creditors, in which one sought preference of another on the ground of usury. *Moffat v. Cochran*, 1 M'Cord's Ch. Rep. 434. An agent of A., to draw bills on A., who promised to accept, was held to possess a balanced interest between the payee and A., in an action on a bill drawn by the agent on A.; and it was held that he might show A.'s constructive acceptance; for if he acted without authority, he would be liable to A., if the sum be recovered of A.; and if not, he would be liable to the payee. *Lowber v. Shaw*, 5 Mason, 241. A debtor assigned property to his creditor with warranty, which was afterwards attached by another creditor; the witness was held competent between them, his interest being balanced. And such seems to be the usual case of a debtor assigning his effects to a favored creditor, and which are afterwards attached by another creditor on the ground of fraud. Here is the implied covenant of the right to assign or sell. If the assignment stands, it pays his debt, but leaves him in debt to the attaching party. If it be avoided, he is still indebted. It only changes the creditor. Nor is his liability to costs greater or other than in the usual case of transfer of property by failing debtors. There is no direct liability on his part for costs; and a covenant of title or right to sell in the assignment cannot make him liable beyond the amount of his debt; for which he would be liable without the covenant, if the property intended to secure it to be taken away by a superior or legal title. *Prince v. Shepard*, 9 Pick. 176, 183. It should appear affirmatively, where the interest may be balanced, that it is not. Thus, on an issue whether a certain messuage was situated within a chapelry, a person who occupied ratable property would, at common law, be incompetent to prove that it was, as he might thus lessen his share of chapel rates. But at the same time, as his interest might have been balanced by increasing the number of claimants for seats and sepulture, and thus add to his burden and balance his interest, *Bayley, J.*, said that it should appear negatively, that he would not be thus burdened. *Marsdon v. Stansfield*, 7 Barnw. & Cress. 815. In an action for work done for the defendant on A.'s house, he having retained the defendant to rebuild, A. is a competent witness for the plaintiff to prove that he did the work, A. having paid neither; for it is immaterial to him whether he pay the plaintiff or defendant. *Goodman v. Love*, 1 Carr. & Payne, 76. Where the witness contracted to sell lands to the defendant, and to sell the same lands to the plaintiff, he was held competent; for, *per Curiam*, if the plaintiff succeed, the defendant will sue the witness on his contract to convey to him. If the defendant succeed, the plaintiff will sue him on his contract to convey to him. Thus, being equally bound to both, he stands indifferent between them. *Nessley v. Swearingen*, Addis. 144. Where A. had executed a usurious mortgage with covenants of warranty, and subsequently sold and conveyed the mortgaged premises by deed with warranty to a third person, taking back a mortgage to secure the purchased money, and assigned this mortgage to another; in an action of ejectment by the assignees of the second mortgage, against a purchaser under a statute foreclosure of the usurious mortgage, A. was held a competent witness to prove the usury; for the verdict would not be evidence for or against him. If the title of the plaintiff failed, the witness would be liable on the covenant in his deed with warranty, which was given at the same time with the mortgage to him, and of which the lessors of the plaintiff were the assignees. If the defendant should be evicted, the witness would be responsible on the covenants of warranty in his mortgage. *Jackson ex dem. Skinner v. Packard*, 6 Wend. 415. The servant of a party who had been bargaining for the purchase of a chattel, came to the owner and said that his master desired to look at it, and would keep it if approved of. The chattel was in consequence delivered to the servant, but it was neither purchased nor returned. In trover by the owner against the servant, held that the master was competent for him to prove authority for the message; for, if the verdict had gone against the defendant, the master would be liable to him on the ground of deceit in the message, while, if it discharged the servant, it made the master liable. *Grylls v. Davies*, 2 Barnw. & Adolph. 514. The first indorser of a negotiable promissory note is competent without a release, in a suit by the holder against a second or subsequent indorser, to prove that the defendant indorsed a note merely for the accommodation of the maker, and that the maker negotiated it fraudulently. *Hall v. Hale*, 8 Conn. Rep. 336. Where both parties, in a real action claimed the land under the same title, the grantor, from whom the title was originally derived, was admitted to testify, both parties being equally interested in the covenants in the deed. *Roberts v. Whiting*, 16 Mass. Rep. 186. On a bill filed by sureties to avoid their contract, on the ground of indulgence granted to the principal, he was held competent for them. *Reid v. Watts*, 4 J. J. Marsh. 440, 441.

The mortgagor of a vessel is a competent witness for the mortgagee who is sued as owner for

repairs, to show that the transfer, apparently absolute, was in fact conditional; for though the defendant be charged as mortgagee in possession, the witness would be liable to him for no more than the debt. He should have paid it without suit, and cannot therefore call on the witness to account for costs; and if he succeed, the witness is liable for the plaintiff for the same sum. *Ring v. Franklin*, 2 Hall's R. C. P. N. Y. 1. P., having sold goods to H., subsequently sold the same goods to F.; in an action brought by H. against F. for the goods, P. was held an admissible witness for H., being equally liable on his implied warranty of title to both parties. *Frost v. Hill*, 3 Wend. 386; *Miller v. Little*, 1 Yeates, 26. So in a sale of lands. *Inhabitants of Worcester v. Eaton*, 11 Mass. Rep. 368. But it is otherwise where the question is one of boundaries, not of title, and the witness is called by the second grantee, for him, to prove that the first deed does not, on a true location, interfere with the second. *Jackson ex dem. Caldwell v. Hallenback*, 2 John. R. 394. On a bill of foreclosure by a mortgagee against a levying creditor on the same land, the original debtor is a competent witness for the plaintiff; for it is equal to him, whether the land pay the plaintiff's or defendant's debt. *Carter v. Champion*, 8 Conn. R. 549, 560. A. sold a vessel to B., who in consideration, agreed to pay A.'s debt to C. In assumpsit by C. against B., held that A. was a competent witness for the plaintiff; for if the plaintiff succeeded, the witness's debt to him would be extinguished for so much; if not, the witness would recover the same sum from, or have it allowed by the defendant. *Brown v. Atwood*, 7 Greenl. 356, 357. Trover for a negro. The negro in question had been purchased by the plaintiff from the defendant's son, who had executed a bill of sale of him to the plaintiff. The defendant introduced the son to prove that the negro was the property of the defendant, and that he had been sold without any authority. Held, that the witness had an equal interest each way, and was therefore competent. *Stump v. Roberts*, 1 Cooke, 350. A., having a promissory note made by B., delivered it to C. to collect. C. sold the note to D. for a valuable consideration, which he applied to his own use, and D. received the money due on the note from the maker. In an action by A. against D. to recover the amount of the note, as for so much money had and received, C. is a competent witness for D., the defendant, for he is in every event liable to the losing party. *Cushman v. Loker*, 2 Mass. R. 106. But it was said that an agent, authorized to receive money for the plaintiff, and who had given a receipt for the money, was not competent, in an action for the money against the debtor, to prove that no money was in truth received; for the plaintiff would, on failure, have an immediate cause of action against the witness, which a recovery in this suit would bar. But the witness would not be liable to the defendant, without his showing not only that he had paid the money, but that the witness had broken his trust. *Fuller v. Wheelock*, 10 Pick. 135. A., as agent for the defendants, purchased property, which was received by them, and gave his note to the vendor, for the defendants, for the consideration money. He was afterwards allowed the amount of the note, in settlement with the defendants. In an action by the vendor against the defendants to recover the amount of this note, A. was held to be a competent witness for the plaintiff; for, if the plaintiff recovered, the defendants having allowed A. the amount in settlement, he would be liable to refund to them; and if the plaintiff failed, he would be accountable to him for the value of the property; and so stood indifferent between the parties, being liable at all events to the losing party. *Emerson v. The Providence Hat Manuf. Co.*, 12 Mass. R. 237. An agent who had received several sums of money, on account of trespasses alleged to have been committed, on the lands of his principal, and which he had promised to refund in case his principal did not recover in an action against one of the alleged trespassers, was held a competent witness in that action. His interest was balanced between the parties. If the plaintiff prevailed, he would be absolved from his agreement to refund the money, and be liable to pay it over to his principal. If the defendant prevailed, he would be obliged to refund, according to his agreement. *Renaudet v. Crocken*, 1 Cai. 167. An agent or broker who was authorized to purchase goods on certain specified terms, is a competent witness for the principal, in an action brought by the vendor against the principal, in relation to the purchase of the goods; for, if he exceeded his authority, he is liable at all events to the losing party; and if he did not, he is liable to neither. *Bailey v. Ogden*, 3 John. 399, 420. D. and M. being indebted to C., he attached money in the hands of B., belonging to M. In an action brought by C. against B. to recover the money so attached and held by him, it was held that D. was a competent witness for the plaintiff; for though the recovery of the plaintiff would go far in discharge of the debt due from the witness, yet he would be liable over to M. for the same amount, so that his interest was balanced between the parties. *M'Leod v. Johnston*, 4 John. R.

126. A master of a vessel, who had loaned money for necessary expenditures for the voyage, was held to be a competent witness for the lender, in an action by him for the money lent, against the owner, though the master had drawn a bill on his owner in favor of the lender, which bill was not accepted; for his (the master's) interest was held equal between the parties. *Milward v. Hallett*, 2 Cain. R. 77. Action of replevin. The defendant being deputy sheriff, and having an execution against A., levied upon the goods in question as the property of A. and B. The defendant offered B. as a witness to prove the property of the goods in himself and A., and he was held competent. It was indifferent to him which party succeeded, being in every event entitled to his moiety of the goods. *Page v. Weeks*, 13 Mass. R. 199. A., being indebted both to the plaintiff and B., consigned property to the former, the proceeds to be applied in the payment of his debt due the plaintiff. The defendant attached the property at the suit of B., and the plaintiff brought this action to recover the value of the property. Held, that A. was a competent witness for the plaintiff, because, if the plaintiff should prevail, the property would be applied towards his demand. If the defendant prevailed, it would go to pay the demand of the attaching creditor. A., therefore, stood indifferent between the parties. *Rice v. Austin*, 17 Mass. R. 197. In trover by a sheriff who had levied on the goods of a tenant without notice of rent in arrear, against the landlord, who distrained the goods after the levy, the tenant is competent for the plaintiff. He is entirely disinterested, for it is indifferent to him whether the goods go to pay the execution or the rent. *Alexander v. Mahon*, 11 John. R. 185. Where a master of a vessel, who had a lien on the vessel and cargo for advances which he had procured to be made for the use of the vessel, brought an action of trover against the defendant, who had by the owner's direction, converted a part of the cargo, it was held that A., who made the advances and to whom the master had given his note for the money advanced, was a competent witness for the master; for whether the plaintiff recovered or not, could not affect the rights of the witness, or the liability of the plaintiff to him. *Ingersoll v. Van Bokkelin*, 7 Cowen's R. 670. The assignee of a chose in action, assigned as a pledge to secure a debt due from the assignor to the assignee, with an agreement that if the pledge should not produce sufficient to satisfy the debt, the assignor was to pay the deficiency, is a competent witness for the assignor in an action in his name to recover the debt assigned. *Locke v. The North American Ins. Co.*, 13 Mass. R. 61. In an action against the surety, the maker of a promissory note, it was held that the declarations of the co-maker and principal were not admissible against the defendant, because he was a competent witness for either party. But *quere* of the reason, for the principal would be liable for costs to his surety. His interest, therefore, was in favor of the defendant. *Baker v. Briggs*, 8 Pick. 122. The drawer of a bill of exchange was held not a competent witness for the indorsee against the acceptor, because, should the indorsee fail, the witness would be liable to him not only for the amount of the bill, but for charges, interest and costs; whereas, if he succeeded, the witness would be bound to account with the acceptor for the amount of the bill only. *Scott v. McLellan*, 2 Greenl. 199, 204.

That the witness has a remedy over against another, to indemnify him for what he is to lose by the failure of the party calling him, has often been held to make him competent, by equalizing his interest. Thus, where the witness, the defendant's agent, had accepted a bill for the money claimed by the plaintiff, yet the witness was held competent for the plaintiff, though, by sustaining the action, he would pay his own debt as acceptor; for should the plaintiff fail, and the witness be obliged to pay the bill, he would have his remedy over against the defendant, his principal, for whom he, as agent, had thus paid the debt. *Martineau v. Woodland*, 2 Carr. & Payne, 65. So in an action by the second indorsee of a bill of exchange against the drawer, the first indorsee was received as a witness for the plaintiff. *Hewitt v. Thompson*, 2 Carr. & Payne 372, in connection with what was said by Thesinger, *arguendo*, in *Cropley v. Corner*, 4 Carr. & Payne, 21, and Bayl. on Bills (Boston ed. 1826), p. 374. So in trover for goods against A., the witness (the vendor), who sold them to the plaintiff on the terms of taking them back if not paid for, was held competent for the plaintiff; for his remedy for the price and the return of the goods in specie were held equal to the witness. *Banks v. Kain*, 2 Carr. & Payne, 597. The attorney who sues for a non-resident plaintiff, and in various other like cases, is personally liable for costs and so interested and incompetent as a witness for the plaintiff (see *Brandigee v. Hale*, 13 John. R. 125), yet, if he be indemnified and consider that he has ample security, he is competent for the plaintiff. *Chaffee v. Thomas*, 7 Cowen's R. 358. So if the witness declare he is liable for

the plaintiff's costs, but has funds in his hands to pay them. *Collins v. M'Crummen*, 3 Mart. Lou. R. (N. S.) 166, 168, 169. See also *Hall v. Hale*, *supra*; *Brown v. Atwood*, *supra*; *Ridley v. Taylor*, 13 East, 175; *Buckland v. Tankard*, 5 T. R. 579; Bayl. on Bills (Bost. ed. 1826), 374.

But this mode of balancing interest is denied in other cases. In Kentucky it is denied, though the money to indemnify the witness be deposited with a receiver appointed by the court; for he may fail or be faithless. *Wallace's Ex'rs v. Twyman*, 3 J. J. Marsh. 457, 460, 461. So in England, in actions against sheriffs, for the acts of their deputies for levying on goods under executions. That the creditors in whose behalf the levies are made, have indemnified the deputies, will not make them competent witnesses for the sheriffs. *Whitehouse v. Atkinson*, 3 Carr. & Payne, 344. See also *Owen v. Mann*, 2 Day, 309. But *quere*, of these last cases.

Competency is presumed till the contrary is shown. See notes 1 and 2, *Hall v. Gittings*, 2 Harr. & John. 112, 120 and 121, and the case cited by Chase, C. J., at the last page; *Stoddard v. Manning*, 2 Harr. & Gill, 146; *Callis v. Tolson's Ex'rs*, 6 Gill & John. 80, 91; *Saxton v. Boyce*, 1 Bail. 66; *Smith v. White*, 5 Dana, 382, 383; *Savage*, C. J., in *Jackson ex dem. Howell v. Delancy*, 4 Cowen, 427, 430.

But the interest once being established, it should be clearly removed; and the witness leaving the question doubtful on the facts stated, and the judge at Nisi Prius rejecting him, the court in bench refused to grant a new trial. *Seymour v. Beach*, 11 Conn. R. 275, 281, 282; *McManagih v. Ross*, 20 Pick. 99, 103. These cases, in short, with many others (see *Witter v. Latham*, 12 Conn. R. 392, 400, and the cases there cited, especially *Donelson v. Taylor*, 8 Pick. 390, see *Coleman v. Wolcott*, 4 Day, 388, *contra*), hold, that it is for the court alone to try and determine the question of competency, both as to the law and the fact, wherein it comes in place of a jury; and a new trial will not be granted where there is a fair conflict of evidence, even though the court may find against a slight preponderance. The rule here does not apply, that the court shall decide the law, and the jury find the facts. All this was also fully considered and expressly determined in *Townsend v. The State*, 2 Blackf. 151, 162. And see *High v. Stainback*, 1 Stew. R. 24. And above all, error does not lie for a finding, one way or the other, upon the facts. *Taylor v. Taylor*, 2 Watts, 357, 358. After the court has determined the question, it is not proper to submit it to the jury. *Witter v. Latham*, *supra*. Though it is said that where the point depends on the decision of an intricate question of fact, judges occasionally, in practice, take the preliminary opinion of the jury. 8th ed. Phil. Ev. by Amos and Phillips, p. 2 and note there.

It is no ground for a new trial, that on a preliminary examination as to the competency of a witness, the judge allows, in order to prove interest, improper evidence to be given in the presence of the jury; he, in the end, properly receiving the witness on the merits, and submitting his credit to the jury. *Ackley v. Kellogg*, 8 Cowen, 223.

Under what circumstances it shall be said, that the jury are, on the merits, to find the law and fact, either in civil or criminal cases, was much and ably inquired in *Townsend v. The State*, *supra*. The trial was on an indictment under the excise law, for selling spirituous liquors without license. A license was offered in evidence; but appearing on its face to be in consideration of a sum less than the statute required (50 cents instead of \$5), the court pronounced it void, excluded the evidence, and directed the jury that it was not their province to determine the law. On error, it was held that the jury are judges of the fact, both in civil and criminal matters, on such evidence as the court shall submit to them as competent. But they are not, in general, either in civil or criminal cases, judges of the law. They are bound to find the law as it is propounded to them by the court. They may, indeed, find a general verdict, including both law and fact; but if, in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oath.

The same thing was lately held by Story, J., in a capital case. *United States v. Battiste*, 2 Sumn. 240, 243. He stated it as the opinion of his whole professional life, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. He said, that in each case they had the physical, but not the moral right to decide the law according to their own notions or pleasure. That it is the duty of the court to instruct them as to the law, and of the jury to follow such instruction. That if the jury were to decide, it would render the law uncertain; it would be almost impracticable to learn what they did decide; the court would have no right to review their decision; that every person has a right to be tried according to the fixed law of the land.

cess of interest on either side, the witness will be incompetent to give evidence on the side where there is a preponderancy of interest; it is obvious, that he is interested to the amount of the excess, in procuring a verdict on that side.

It may be observed, that many of the cases, which might be cited in illustration of these general principles, do not belong to the present subject of inquiry, viz: what interest will produce disqualification, but range themselves under the next head of inquiry, viz: what interest will *not* produce disqualification. However, as both branches of inquiry are intimately connected, and the above division has been adopted merely for the purpose of convenience, it will be of material use to bear in mind the general principles, before laid down, while we enter in detail on the consideration of those decided cases, in which witnesses have been rejected as incompetent on the ground of interest. In some of these cases, the interest of the witness will be found to be perfectly clear and direct; in others, some nicety will be required in distinguishing between direct interest in the event of the particular suit, and interest in the record as matter of evidence; in other cases again, it will be found difficult to discover, whether the witness has any interest whatever in the event of the suit. The method, we shall in general pursue in examining these cases, will be, to commence with those in which the interest is most obvious and direct, and in which the situation of the witness approaches nearest to that of a party in the proceedings.

1. Rule with respect to bail and sureties.

The bail for the defendant are incompetent witnesses for him, being directly interested in the event of the suit; for if the verdict be given against the principal, the bail become immediately answerable, and they are immediately relieved from this liability by a verdict in his favor.(1)

If he thought the jury were judges of the law, he should hold it his duty to abstain from stating the law to them. And to this it may be added, if the law give the right to the jury, why should it run into the inconsistency of requiring the court to determine the admissibility of evidence? But all the leading arguments and authorities on the question will be found fully and ably considered by Holman, J., in *Townsend v. The State*, 2 Blackf. 156, *et seq.* He cites Addison, J.'s charges (Suppl. Add. R. 53 to 63, No. 6), and *Pennsylvania v. Bell* (Add. R. 156), and *The Same v. McFall* (Id. 255), which go strongly to uphold the same doctrine. The learning of the question is perhaps exhausted in charge No. 6 of Judge Addison, p. 57, *et seq.*, and his arguments such as it is difficult for the legal mind to resist.

The admission of slaves and free blacks as witnesses, is generally a matter of state regulation, as we saw *ante*, note 3. See also the following cases: *Rusk v. Sowerwine*, 3 Harr. & John. 97; *Sprig v. Negro Mary*, Id. 491; *Cox v. Dove*, Mart. N. C. R. 43; *State v. George*, Id. 40; *Winn v. Jones*, 6 Leigh, 74.

(Where the interest of the witness is balanced, he stands indifferent between the parties, and is therefore competent. *Scott v. Propeller Plymouth*, 6 McLean, 463; *Bridger v. Bell*, 13 Miss. 69; *Adams v. Gardner*, 13 B. Mon. 197.)

(1) See 1 T. R. 164, by Buller, J.; *Piesley v. Von Esch*, 2 Esp. 605.

NOTE 627.—The defendant's bail cannot be a witness for him, the judgment against the defendant being conclusive evidence of the amount in an action against the bail. *Niles v. Bocket*, 15 Mass. R. 378; *Owens v. Collinson*, 3 Gill & John. 25, 33; *Grey v. Young*, 1 Harper, 38, 40. Nor the bail to the sheriff, who has not justified, though he believes other bail had justified, he

Upon the same principle, a person who has deposited in the hands of the sheriff, in lieu of bail, a sum of money, which by rule of court is made to abide the event of the suit, is not competent for the defendant.(1) Whenever the husband of a witness would be incompetent to give evidence on account of his interest in the cause, it necessarily follows that the wife will also be excluded, having an unity of interest with her husband; and the wife of the bail is, therefore, incompetent to give evidence for the party on whose behalf her husband has become bound.(2).

having done nothing to get himself discharged. *Hawkins v. Inwood*, 4 Carr. & Payne, 148. And the bail being incompetent, his wife is so. *Leggett v. Boyd*, 3 Wend. R. 376.

This rule, excluding bail, of course applies to a surety in a replevin bond (*Wallace's Ex'rs v. Twyman*, 3 J. J. Marsh. 461; and see *Collett v. Wyley's Heirs*, 2 Bibb, 467); and it has also been extended to a surety in an injunction bond, who is not a witness for the complainant (*Wickliffe v. Mosely*, 4 J. J. Marsh. 172): and to securities in an administration bond, in a suit by a distributee. *Owens v. Collinson*, 3 Gill & John. 25. So a surety in a sequestration bond (answering nearly to our replevin bond) is not competent witness for the plaintiff. *Lane v. Deppester*, 7 Mart. Lou. R. 373.

In Vermont, it was held that an objection before auditors against the bail being a witness, which was a fact appearing on the records of the court, though it was not verified in any way to the auditors, was well made; and on the coming in of the report, it should have been rejected by the court for that reason. The witness, on his *voir dire*, had forgotten it. *McConnell v. Pike*, 3 Verm. R. 505.

(1) *Lacon v. Higgins*, 3 Stark. N. P. C. 182.

(2) *Cornish v. Pugh*, 8 D. & R. 65.

NOTE 628.—See *Leggett v. Boyd*, 3 Wendell, 376.

This rule is not so broad as to exclude the wife in all cases where the husband would be incompetent. Thus, where father and son were jointly indicted, but tried separately, for murder, on the trial of the father, before the son's trial, the wife of the latter was held a competent witness for the father. *State v. Anthony*, 1 McCord, 285.

"Where the husband is disqualified by reason of interest, the wife is also incompetent. 1 Ld. Raym. 744; 2 Str. 1095; *Snyder's Lessee v. Snyder*, 6 Binn. 483." Per Marcy, J., delivering the opinion of the court in *Leggett v. Boyd*, 3 Wend. 378. And see *Pipher v. Lodge*, 16 Serg. & Rawle, 214; *Daniel v. Proctor*, 1 Dev. 428, 430, per Henderson, J., who explains the principle of this rule; and *Forrester v. Guerrineau's Creditors*, 1 McCord, 304.

And the contrary follows, that where the husband or wife is competent, the other is also competent (*Porter v. McClure*, 1 Hayw. R. 360); as where the interest of the one is against the party offering the witness, the other may be received. Per Walworth, Ch., in *The City Bank v. Bangs*, 3 Paige, 37, 38. Thus, where the husband had guaranteed the payment of a note belonging to the wife before marriage, and which he indorsed to the plaintiff, she was received for the maker to prove that it was paid to her before marriage, his liability being contingent. *Fitch v. Hill*, 11 Mass. R. 286. So, where the husband's interest is balanced, the wife is competent. *Baring v. Reeder*, 1 Hen. & Munf. 154; *Marshall v. Davis*, 1 Wend. 109. So, if the husband release his interest, this makes the wife competent. *Brayfield v. Brayfield*, 3 Har. & John. 208. And see *Miller v. Frazier*, 3 Watts, 456, 458, 459. The doctrine in the cases above cited, and in various others, has been applied to sureties in a replevin bond. *Bailey v. Bailey*, 1 Bing. 92; S. C., 7 Moore, 439; *Sanderson's Ex'rs v. Marks*, 1 Harr. & Gill, 255; *Morton v. Beall's Adm'r*, 2 Id. 136; *Hall v. Baillies*, 15 Pick. 51. The indorsement of a writ, in several states, makes the indorser a surety for costs, and so incompetent (*Roberts v. Adams*, 9 Greenl. 9; *Beckley v. Freeman*, 15 Pick. 468; *Clark v. Kensell*, 1 Wright, 480); and held, that in Ohio the attorney's clerk might bind his principal by indorsement, if he have special authority. Id. The receiptor of goods attached is not a competent witness for the defendant in the attachment suit, where he has allowed them to pass into the hands of the latter; but his competency was restored by the de-

When a material witness for the defendant has become bail for him, the court will allow his name to be struck out, on the defendant adding and justifying another bail instead of the witness.(1) And even at the trial, the judge will allow the witness's name to be struck out of the bail piece, if the defendant deposit with the associate a sufficient sum, as a security for the debt and costs.(2) Of course, immediately the name of the bail has

posit of a sum of money in his hands equal to the greatest amount for which he stood liable on the receipt. *Allen v. Hawks*, 13 Pick. 79; *Beckley v. Freeman*, 15 Id. 468. The bail for one who appears from a justice's court, is not competent for the appellant in the appellate court. *Craven v. Updike*, 3 Blackf. 272. And see *Lavender v. Pritchard*, 2 Hayw. 337, and *McCulloch v. Tyson*, 2 Hawks, 336. The surety in an attachment bond to secure the defendant his damages and costs, is not a competent witness for the complainant. *Miller v. Henshaw*, 4 Dana, 325, 333. And see *Garmon v. Barringer*, 2 Dev. & Bat. 502. So in an attachment bond conditioned to return the property attached and pay the judgment. *Stowe v. Sewall*, 3 Stew. & Port. 67, 74.

(1) *Whatley v. Fearnly*, 2 Chit. Rep. 103; *Tidd's Pr.* (9th ed.) 259.

(2) *Baillie v. Hole*, Mo. & Ma. N. P. C. 289; 3 C. & P. 560; *Pearcey v. Fleming*, 5 C. & P. 503. In the former of these cases, the sum deposited was the amount sworn to, together with a further sum to cover the costs: in the latter case, double the sum sworn to was deposited.

NORR 629.—The defendant may avail himself of the testimony of his bail, by substituting and justifying new bail instantar at the circuit. This is a matter of right which cannot be denied by the court. *Leggett v. Boyd*, 3 Wend. Rep. 376. And the right extends to the case of a surety for the party on appeal from an inferior court. *Tompkins v. Curtis*, 3 Cowen's Rep. 251; *McCulloch v. Tyson*, 2 Hawks, 336. And of security to procure an adjournment or postponement of the trial in a justice's court in the state of New York. *Irwin v. Cargell*, 8 Johns. Rep. 407.

The undertaking of a surety for costs upon the record may be stricken out, and a new and sufficient surety, in the discretion of the court, substituted, to make the first surety a witness for the plaintiff. *Stimmel v. Underwood*, 3 Gill & John. 282; *Butler v. De Hart*, 1 Mart. Lou. Rep. (N. S.) 184, 185, 186.

In South Carolina, it was held that the circuit judge had no power to allow a substitution of new bail on the trial, so as to restore the competency of the first bail. The plaintiff might have released, or the bail might have surrendered the principal; and this would make him competent. *Grey v. Young*, 1 Harper, 38, 40. Or bail may be substituted at bar on motion. *Anon.*, Sty. 385. It was held, we have seen, in *Leggett v. Boyd* (3 Wend. 376), that the bail may be discharged at the circuit. This supposes a full power in the circuit judge to receive new bail and order an *exoneretur* to be entered on the original bail pieces without any surrender, though a doubt of this is expressed in 13 John. Rep. 126; otherwise the decision in that case would be nugatory. Indeed, this power of a circuit judge has recently been recognized in England. On depositing a sum of money sufficient to cover all the plaintiff's claims, Lord Tenterden made an order for striking the witness's name from the bail piece; and it was said that Lord Chief Justice Best had done the same thing before. *Bailey v. Hole*, 3 Carr. & Payne, 560. It seems, by the report of the same case in another book, that the sum deposited was equal to the sum sworn to and costs. *Baillie v. Hole*, 1 Mood. & Malk. 289. Auditors do not possess the power to discharge bail; and it is no objection that they refuse to give time to move the court. *Newton v. Higgins*, 2 Verm. Rep. 366.

In an action of assumpsit, the plaintiff's attorney was called as a witness, and objected to by the defendant, for the reason that the plaintiff being a non-resident, and no security for costs having been filed in pursuance of the 14th rule of January term, 1699, he was, therefore, liable for costs. A bond was then drawn and executed by three persons, conditioned to pay costs to the defendant in case the plaintiff should fail in the action; the bond was tendered to the defendant's counsel, who admitted the sufficiency of the security, but refused to receive it. Held,

been struck out of the bail piece by competent authority, his liability ceases, and his interest is therefore removed; but his incompetency will continue, where it does not distinctly appear that his liability has terminated.(1) Thus, where a witness stated on the *voir dire* that he was bail to

that the defendant having admitted the sufficiency of the sureties, the competency of the attorney was restored. *Brandigee v. Hale*, 13 John. Rep. 125.

The witness is now by statute rendered competent in New York in such a case by filing security, and the sureties justifying, if excepted to, and giving notice to the defendant. 2 R. S. 621, § 8.

So, if the attorney be indemnified, and fully secured for the costs, he is competent for his client. *Chaffee v. Thomas*, 7 Cowen's Rep. 358.

A surety in a replevin bond on a Kentucky replevin upon a *fi. fa.* is not competent for his principal on a bill filed by him to avoid the original judgment, even though the principal has paid in the whole money recovered by the judgment to a receiver appointed by the court, in order that it might abide the decree. To make him competent, he must be absolutely released, which is not the effect of the payment. *Wallace's Ex'rs v. Twyman*, 3 J. J. Marsh. 461. And see *Collett v. Wyley's Heirs*, 2 Bibb, 467.

The competency of special bail may be restored on motion to add and justify other bail. *Whitley v. Fearnley*, 2 Chit. Rep. 103. And it was restored at Nisi Prius by an order to strike his name from the bail piece on depositing with the marshal of the lord chief baron £200, he being bail for £100. *Pearcey v. Fleming*, 5 Carr. & Payne, 503, *cor.* Lord Lyndhurst, C. B. The surety for a plaintiff on his appeal from an award of arbitrators, was discharged by the court, and he received as a witness for the plaintiff. *Salmon v. Rance*, 3 Serg. & Rawle, 311, 314. The plaintiff, to restore the indorser of the writ (thereby becoming security for the defendant's costs), was allowed to deposit so much as, in the opinion of the court, would pay the defendant's costs, should he prevail; and thus render the indorser competent for the plaintiff. *Roberts v. Adams*, 9 Greenl. 9. So to deposit money with his sureties, equal to the penalty in a replevin. *Hall v. Baylies*, 15 Pick. 51, 53. So, the defendant to deposit money with the receiptor of goods attached, equal to their value. *Allen v. Hawks*, 13 Pick. 79; *Beckley v. Freeman*, 15 Pick. 468. The surety in a replevin bond may be rendered competent for the plaintiff by the substitution of other security. *Bailey v. Bailey*, 1 Bing. 92; S. C., 7 Moore, 439. And a witness for the plaintiff, who is liable to the defendant in a bond for the costs of the action, may be rendered competent by his depositing the penalty of the bond with the proper officer of the court. 1 Mood. & Rob. 329. Appeal bonds may be canceled, and others substituted, to let in the sureties as witnesses. *McCulloch v. Tyson*, 2 Hawks, 336; *Lavender v. Pritchard*, 2 Hayw. 337. So an attachment bond. *Garmon v. Barringer*, 2 Dev. & Bat. 502.

(That the surety is incompetent, see further *Cates v. Noble*, 33 Maine R. 258; *McCreeliss v. Hinkle*, 17 Ala. 459. And that he may be rendered competent by depositing the amount of the penalty of his bond in court, see *Cooper v. Bakeman*, 33 Maine R. 376.)

(1) NOTE 630.—The following are most of the American, and some of the late English cases, which present the various means of extinguishing or neutralizing interest, beside release and payment:

Cortes v. Billings, 1 John. Cas. 270; *Hooper v. Royster*, 1 Munf. 119. In an action by an indorsee against one indorser of a foreign bill of exchange, the person who indorsed to the defendant is not made competent for the plaintiff by striking his name off the 1st and 3d set, the 2d being alleged to have been lost; for though the witness's name be thus stricken from two sets, the second might have come to a *bona fide* holder, who could not be affected by the plaintiff's act. *Steinmits v. Currie*, 1 Dall. 269. One of three joint plaintiffs having assigned all his interest to the other two, who deposited costs with the clerk, covering his liability in this respect, he was received as competent for them. *Willings v. Consequa*, 1 Pet. C. C. R. 301. A guarantor of a debt is competent to prove the debt against the principal, on a surrender of the guaranty with permission to destroy it. *Merchants' Bank v. Spicer*, 6 Wend. 443. A witness incompetent by reason of an implied warranty, is made competent by a discharge from his debts

under the Insolvent Act. *Murray v. Judah*, 6 Cowen's R. 484. Where it did not appear how long the defendant in an ejectment had been in possession of the land in dispute, a lessee of the plaintiff under an old lease, who had probably been out of possession twenty years or more, and against whom no suit had been brought, was held, in the absence of further evidence showing liability for mesne profits, not to be incompetent as a witness for the plaintiff, on the ground of interest. *Unger v. Wiggins*, 1 Rawle, 331. A legatee who has assigned his interest to another is competent to prove the will, though the consideration of the assignment be a bond for a given sum, payable at a future day. *M'Iroy v. M'Iroy*, 1 Rawle, 433. In trespass, *quare clausum fregit*; pleas, the general issue and several justifications, including one that the premises are a free wharf for the inhabitants of O., one of these inhabitants is incompetent for the defendant; but may be restored on the defendant's waiving that branch of the defence. *Prewitt v. Tilly*, 1 Carr. & Payne, 140. The assignee of a chose in action (*e. g.* a promissory note) is competent for the plaintiff, if before trial he parts with his interest to a third person, although the action was commenced by his direction; notwithstanding his liability as assignee for costs to the defendant. *Soulden v. Van Rensselaer*, 9 Wend. 293. If a deed be attested through mistake or fraud by an incompetent witness, chancery will supply the defect, and establish it against the grantor on the same principle that it supplies the defective execution of a power. *Smith v. Chapman*, 4 Connecticut R. 344; *Carter v. Champion*, 8 Connecticut R. 549. After suit brought on a promise made to A. and B., administrators of D., in consideration of a devastavit (the release of two judgments due to D.'s estate), A. died, and his son, after having assigned all his interest in the suit, and offered to pay all costs, was offered as a witness for the plaintiff; yet he was held incompetent; for his father's estate was liable, to make good a share of the devastavit. *Kimball v. Kimball*, 3 Rawle, 469. One for whose benefit a suit is commenced is not rendered an admissible witness for the plaintiff, by an assignment of his interest, on the trial, to a third person, and a release by the latter. *Jarvis v. Baker's Adm'r*, 3 Verm. R. 445. *Quere*: The assignment was said to be defective. See *Soulden v. Van Rensselaer*, *supra*. A witness for the lessor of the plaintiff said he once had an assignment from the lessor, but had given it up, and never had possession; yet held interested; for that would not pass away his interest without a re-assignment. *Doe ex dem. Scales v. Bragg*, Ry. & Mood. N. P. Cas. 87. Where the witness had once been liable to the party, for his misconduct in the transaction about which he was called to testify; but that liability was barred by the Statute of Limitations, it was held that there was not a subsisting interest sufficient to disqualify the witness. *Ludlow v. Union Insurance Co.*, 2 Serg. & Rawle, 119. And see *United States v. Smith*, 4 Day, 121. An attorney who palmed a witness upon the court as disinterested, he being in truth interested by having retained the attorney, and agreed to pay him, was held discharged, the same as if a release had been given; and the attorney in a suit for his fees was consulted. *Williams v. Goodwin*, 11 Moore, 342. A witness who, by informing in a summary proceeding under the statute for suppressing vice and immorality, is entitled to a share of the penalty, cannot be restored to competency by assigning to another; for his interest is not assignable. *Commonwealth v. Hargesheimer*, 1 Ashmead's R. 413. Though a claim for a trespass *de bonis asportatis* has been held assignable for a like purpose. *North v. Turner*, 9 Serg. & Rawle, 244. So a policy of insurance (*Steele v. Phoenix Insurance Co.*, 3 Binn. R. 308), and a book debt, before suit brought. *Wistar v. Walker*, 2 Browne's R. 166. In a writ of entry against a stranger, by a mortgagee for land, the mortgagor of the land was received as competent for the demandant, on the latter releasing so much of the debt as should not be satisfied by the land mortgaged, and covenanting to resort to the land as the sole fund for payment. *Howard v. Chadbourne*, 5 Greenl. 15. A devisee *feme covert* who attested the will, was received to prove it, on assigning with her husband all their interest to another, and taking his release to the husband of all actions. *Kerns v. Soxman*, 16 Serg. & Rawle, 315. A witness swore he was liable for the costs, but had funds in his hands to meet the demand. Held competent. *Collins v. M'Crummen*, 3 Mart. Lou. R. (N. S.) 166, 168, 169. If a party interested only on account of costs, deposit, or offer to deposit with the clerk, such sum as shall be directed by the court, to cover the costs, *in case he shall be decreed to pay any*, he is still clearly interested. *Meeker's Assignees v. Williamson*, 8 Mart. Lou. R. (1st series,) 365, 370.

An English judge refused to put off a trial, to enable a bankrupt to obtain a certificate from the Lord Chancellor, in order to make the bankrupt a witness, though all the requisite steps had

the sheriff in the action, and that he did not justify, but that he had not done anything to get discharged from the liability which he had contracted by becoming bail, he was rejected as an incompetent witness.(1) And where an attachment had been granted against the sheriff for not putting in bail, but which was afterwards set aside on terms, one of which was, that the attachment should stand as security, the bail to the sheriff were ruled to be incompetent witnesses for the defendant.(2)

A surety in a replevin bond is interested in procuring a verdict for the plaintiff, in the same manner as bail are interested in procuring a verdict for the defendant, and is therefore incompetent; but if his testimony be required, the courts will permit the substitution of a new surety in lieu of the witness, in order that the latter may be rendered competent.(3)

In the cases which have just been stated, respecting the incompetency of bail and sureties, the situation of the witness was that of a party immediately connected with the proceedings in the action, and his interest in procuring a verdict, in favor of the party for whom he has become bound, is apparent from the proceedings themselves.

2. Rule as to witnesses jointly interested with a party in the subject matter of the suit.

When an action is brought by or against a person as a trustee for another, the person who is substantially interested in the action, though not nominally a party, is incompetent by reason of a direct interest. Therefore, in an action on a policy of insurance, where the declaration averred that the policy was made in the names of the plaintiffs as agents for the sole use and benefit of A and B, who were interested in the goods insured, neither of the persons so interested is a competent witness for the plaintiffs. And even their release to the plaintiff, of all actions for any sum recovered by them on the policy, will not restore their competency; for it must be presumed, until the contrary be shown, that, as they are interested in the policy, the action has been brought by their authority, and that they are liable to the attorney for the costs of the action. Nor will the circumstance that the nominal plaintiffs in the action have received an indemnity from other persons, make any difference, the witness still remaining liable to the attorney in respect of costs.(4)

In actions on policies of insurance where there has been a consolidation rule, an underwriter, who is a party to such rule, is of course as directly interested in the event of the particular cause, as if he were a party to the cause itself; and he is, therefore, incompetent. So, in a case where the

been taken to enable him to do it, and he was willing to release his surplus. *Tennant v. Strachan*, 4 Carr. & Payne, 31; S. C., 1 Mood. & Malk. 377.

(1) *Hawkings v. Inwood*, 4 Car. & P. 148.

(2) *Piesley v. Von Esch*, 2 Esp. N. P. C. 605.

(3) *Bailey v. Bailey*, 1 Bing. 92; S. C., 7 Moore, 439.

(4) *Bell v. Smith*, 5 B. & C. 188.

defendant in an action on a policy of insurance called another underwriter as a witness, who stated that he had paid the loss to the plaintiff, upon an undertaking that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff, promising to return the money on that event, Lord Ellenborough, C. J., at the trial rejected the witness. On a motion afterwards for a new trial, the court sent the case to be re-tried, for the purpose of ascertaining more particularly the time when the undertaking was made to the witness; but on that occasion Lord Ellenborough said, "If a person, who is under no obligation to become a witness for either of the parties to the suit, choose to pay his debt beforehand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event of that suit, as if he were a party to the consolidation rule." (1)

Upon the same principle, one who is in partnership with the defendant is not a competent witness to discharge a debt, to which, as a partner, he would be jointly liable. In an action for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and one J. S. as partners in trade, Lord Kenyon held, that J. S. could not be called for the defendant to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase, except as his servant, observing, that the witness came to defeat an action against a man proved to be his partner, and that by discharging the defendant he benefited himself, as he would be liable to pay his share of the costs recovered by the plaintiff in that cause. (2) In a similar action, where the plaintiff proved that the goods had been sold and delivered to the defendant, it was held that a partner of the defendant was an incompetent witness for him, to prove that the goods had been sold to the defendant and to the witness jointly, and had been paid for by them. (3) And in a late case where the action was

(1) *Forester v. Pigou*, 1 Maule & Selw. 9; S. C., 3 Campb. 380. See also *Fotheringham v. Greenwood*, 1 Str. 129, stated *infra*, p. 54.

(2) *Goodacre v. Breame*, Peake N. P. C. 174.

(3) *Evans v. Yeatherd*, 2 Bing. 133. See also *Cheyne v. Kooops*, 4 Esp. 112; *Jackson v. Gal-
loway*, 8 Carr. & P. 480.

NOTE 631.—S. P., *Simons v. Smith, Ry. & Mood*, N. P. Cas. 9; *Bagley v. Osborne*, 2 Wend. 527, *contra*, as to the right of releasing.

In an action for the repairs of a vessel, against one part owner, who neglects to plead the non-joinder of the other part owners in abatement, another part owner is not an admissible witness for the plaintiff to prove the ownership of the defendant; for although he would be liable as an owner to the plaintiff, in case he failed, or if the plaintiff succeeded, would be liable to the defendant for contribution, and so far stood indifferent between the parties, yet he had an interest, by charging the defendant (a verdict against whom would be evidence of joint ownership), to increase the number of part owners, and thereby diminish the amount of contribution or loss which he would otherwise be obliged to sustain. And whereas the fact to be proved by a witness is favorable to the party who calls him, and the witness will derive a certain advantage from establishing the fact in the way proposed, he cannot be heard, whether the benefit be great or small. *Marquand v. Webb*, 16 John. R. 89. See also *State v. Penman*, 2 Dessaus. Eq. R. 1,

on a bill of exchange, and the defendant called a witness who admitted that he was a co contractor with the defendant, the Court of Common Pleas held, that the witness was incompetent, for being liable to contribution for the costs and damages in the action, he had an interest to defeat the action, or reduce the damages.(1) In an action against one of two makers of a joint and several promissory note, the party not sued is not a competent witness for the party sued, to prove the consideration of the note illegal.(2) So also where in an action the defendant pleads the non-joinder of a co-contractor in abatement, such co-contractor will be an incompetent witness for the defendant in support of the plea.(3)

4, 5. In assumpsit for goods sold and delivered to A., a partner with the defendant, on his promissory notes, which were dishonored and he a bankrupt, was offered as a witness for the plaintiff. Held, that he was incompetent without a release; for if he could procure a verdict against the defendants, he would be liable for only a portion of the debt as contributor; whereas if he stood alone, he would be liable for the whole. *Ripley v. Thompson*, 12 Moore, 55. These cases would seem to be contrary to *Blackett v. Weir* (5 Barn. & Cres. 385), and *Hudson v. Robinson* (4 Maul. & Selw. 476), per *Holroyd & Littledale, J's*, cited in the text. Would not a recovery by or against the defendant solely, discharge the witness from all claim by the plaintiff? In this view, should the witness be sued by the plaintiff, he might, be the verdict either way, plead the record in bar. If such would be the result, his interest would seem to be in favor of the defendant; for a recovery by him would relieve the witness both from a suit by the plaintiff and from all contribution to the defendant. *Robertson v. Smith*, 18 John. R. 456; *Gibbs v. Bryant*, 1 Pick. 118; *Penny v. Martin*, 4 John. Ch. R. 566. The above cases from *Johnson* and *Moore* seem inconsistent also with *Lockhart v. Graham* (1 Stra. 35), and *York v. Blunt* (5 M. & S. 71), cited in the text; where a similar interest in a joint obligor or promisor was held to be balanced.

In assumpsit for services as a school mistress, the defendants called as a witness their co-contractor not sued: but he was held incompetent; for he was liable to contribute. *Hall v. Rex*, 6 Bing. 181; *S. C.*, 3 Mo. & Payne, 273.

Libel for seaman's wages against the owner. The captain (who was made a party to the libel, but no process had issued against him) was offered by the respondent to prove the facts set up in his defence. The judge said that in these cases he had constantly refused to omit the captain. He is liable for the wages, at the will of the mariner, who has several remedies, though he can have but one satisfaction. *Malone v. The Mary*, 1 Adm. Dec. 139; *Jones v. The Phoenix*, Id. 201. See also, *Atkins v. Burrows*, Id. 244.

The master of a vessel who had discharged his mate in a foreign port, is not a competent witness to prove the improper conduct of the mate, in an action by the mate against the owners for his wages, without a release from the owners. And *quere*, whether a release from the owners of a vessel, to their captain, to make him competent, must not be sealed and delivered by all the owners. *Galloway v. Morris*, 3 Yeates, 445.

One who is liable to contribution, is not a competent witness for the party to whom he is liable to contribute. Thus, where H. and L. had recovered a judgment against K. and B.; K., on being committed in execution, gave bond for the jail liberties, and subsequently escaped. The sheriff, who had paid the amount of the judgment to H. and L., brought an action on the limit bond against K. and his surety; it was held that B. was not a competent witness for the defendant, because if the plaintiff recovered, B. would be liable to contribute to K. for his proportion of the debt. *Ransom v. Keyes*, 9 Cowen, 128.

(See also *Wells v. Peck*, 23 Penn. State R. 155; *Whipper v. Stevens*, 19 N. H. 150.)

(1) *Hall v. Rex*, 6 Bing. 181.

(2) *Slegg v. Phillips*, 4 Ad. & Ell. 852.

(3) *Young v. Bairner*, 1 Esp. 103; *Hare v. Munn*, Mo. & Ma. N. P. C. 241, note a. *Vide infra* p. 77.

In an action on a joint and several bond against one of the obligors, who was surety for another, that other obligor (the principal) is not competent for the defendant, to prove a payment of money by himself in discharge of the bond; for he has an interest in favor of his surety to the extent of the costs of the action.(1)

(1) *Townend v. Downing*, 14 East, 565. See also *Trelawney v. Thomas*, 1 H. Bl. 306. *Vide infra*, p. 74. And see other cases as to incompetency from liability to costs, *infra*, p. 68.

NOTE 632.—See *Brown v. Vance's Ex'rs*, 4 Monroe's R. 418.

Where an action was commenced against the principal obligor and the surety jointly, but abated as to the principal by the sheriff's return of *no inhabitant*, the principal was held incompetent to testify for the surety, for the reason assigned in the text. *Riddle v. Moss*, 7 Cranch, 206. And see *Combs v. Wilcox*, 4 Day, 108, and *S. P., Hunter v. Gatewood*, 5 Monroe, 268, on a case precisely similar. The surety is in no case competent for the principal, to defeat or impair the written security. Where a bill was filed by the principal to avoid a judgment for usury, upon which a *fi. fa.* had been issued and levied on the defendant's goods, and which were replevied by him, on which a replevin bond had been given by him, with the witness as surety, and the whole money due on the judgment had been paid into court to abide the decree, yet the surety was held incompetent as a witness for his principal, in the chancery suit. Such a payment, though to a receiver appointed by the court, does not discharge the bond, or release the surety. The remedy of the surety over against his principal does not create a balance, whether the principal be solvent or not. *Wallace's Ex'rs v. Twyman*, 3 J. J. Marsh, 457, 460, 461. And see *Collett v. Wyley's Heirs*, 2 Bibb, 467. But in *Leavenworth v. Pope* (6 Pick. R. 419), it was held, that in a suit between two sureties for contribution, the principal debtor was not liable to the costs of that action, and was, therefore, competent. In assumpsit against one, and plea in abatement, the non-joinder of T. and 162 others, Lord Tenterden, C. J., after some hesitation, refused to receive T. as a competent witness in proof of the plea. *Hare v. Munn*, 1 Mood. & Malk-241, 242, note.

The proposed witness assigned a bond with guaranty of payment to H. and his assigns, and H. had assigned to the plaintiff; and the witness was held incompetent for the plaintiff to prove that the bond was not paid while in his, the witness's possession; for he would be liable to the plaintiff as H.'s assignee, should he fail to fix the defendant; and it was quite questionable in this case whether he would be liable to the defendant to refund the money he had received; for the defendant was set up as a *particeps* in the fraudulent negotiation of the bond as fairly due; and at any rate the witness would be liable only for that part which he had received. *Stoney v. McNeil*, 1 Harper, 156. Several parishioners in a vestry signing a resolution in the vestry book approving an action brought by A. respecting the parish rights, and stating that they thereby guaranty the expenses of it to A., are personally liable, and cannot be witnesses for A. *Hendebourck v. Langton*, 3 Carr. & Payne, 566. See *Hall v. Rex*, 6 Bing. 181, per Gaselee, J., and *S. C.*, 3 Mo. & Payne, 273.

See *Commonwealth v. Hargesheimer*, Ashm. R. 413, 416.

In an action against a sheriff, for an escape on *mesne* process, the debtor is not a competent witness for him, because he is answerable to the sheriff for the costs of the suit, in addition to the damages for which he may be equally liable to both parties. *Griffin v. Brown*, 2 Pick. Rep. 304. Otherwise, if the escape were voluntary. *Waters v. Burnet*, 14 John. R. 362. Emery and Elkins being joint sureties for P. Smart, the latter transferred to Elkins alone, as an indemnity to him, a note against R. Smart. Held, that Emery, the co-surety of Elkins, was not competent for the plaintiff in a suit on the note; for one surety is entitled to share in all indemnities of the co-surety. *Low v. Smart*, 5 N. H. R. 353, 354. A surety who has released his principal by a novation (*i. e.*, by assuming for good consideration the debt), is an incompetent witness for the principal in an action against him for the original debt, to prove the novation; for if the principal debtor be condemned to pay, he would have a right to call on the surety, who is bound

It is to be observed, that in all these cases the proposed witness admitted his own liability to the demand, which was the subject of the action, and therefore to a certain extent he appeared to be giving evidence against his own interest. But although he admitted his liability to be sued in another action, yet the object of his testimony was to defeat the plaintiff in the particular action then pending; and hence arose that direct interest in the event of the suit, which rendered him incompetent. For if the plaintiff had succeeded in the action, the witness, as partner or co-contractor, would have been liable to contribution not only for the damages recovered, but also for the costs; whereas by defeating the plaintiff the witness would not only have relieved himself from all liability in respect of the plaintiff's costs, but would also have thrown upon the plaintiff the burden of the costs incurred by the defendant, and in respect of which the witness might also have been called on to contribute.

3. Examples in actions by executors or administrators.

In an action by an executor to recover a debt due to the testator, a residuary legatee is an incompetent witness for the plaintiff.(1) This incompetency does not arise from the use of the verdict as evidence in any future suit, for the witness could neither be plaintiff nor defendant in an action relating to the debt; the witness is disqualified, because he receives an immediate benefit by a verdict for the plaintiff.(2) The action is in the name of the executor, but the witness is the party substantially interested in the event. And even if the witness release all claim to the debt in question, this will not restore his competency, for he has still an interest in supporting the action, in order that the costs may not be a charge on the estate.”(3)

by his novation, not only for the debt, but the costs incurred by his failure to discharge the obligation. *Lesassier v. Hertzell*, 8 Mart. Lou. R. 265.

(Recent authorities are to the same effect; the principal is not a competent witness for the surety, in a suit against the latter. *S. C., Vandiver v. Glaspy*, 7 Rich. 14; *Marshall v. Franklin Bank*, 25 Penn. State R. 384.)

(1) *Baker v. Tyrwhitt*, 4 Camp. 27. In assumpsit by an undertaker for funeral expenses, the residuary legatee is a competent witness for the plaintiff. *Green v. Salmon*, 8 Ad. & Ell. 348, stated *infra*.

(2) By *Tindal, C. J.*, 6 Bing. 394.

(3) *Baker v. Tyrwhitt*, 4 Camp. 27.

NOTE 633.—It is a general rule of evidence, that if the effect of a witness's testimony will be to create or increase a fund in which he may be entitled to participate, he is incompetent; and if the effect of his testimony will be to prevent the diminution of a fund created for his benefit, he must, on the same principle, be equally incompetent. Per *Hosmer, Ch. J.*, in *Stobbins v. Sackett*, 5 Conn. R. 262; and in *Clark v. Hoskins*, 6 Id. 262; per *Spencer, J.*, in *Stewart v. Kip*, 5 John. R. 258; *Innis v. Miller*, 2 Dall. 50; *White v. Derby*, 1 Mass. R. 237, 239; *Boynton v. Turner*, 13 Mass. R. 391; *Austin v. Bradley*, 2 Day, 466; *Temple's Exec'r v. Ellett's Ex'x*, 2 Munf. 452; *Vultee v. Rayner*, 2 Hall's R. N. Y. C. P. 376, per *Oakley, J.*; *Mathews v. Smith*, 2 Younge & Jervis, 426; *Emerson v. Proprietors of Land in Minot*, 1 Mass. R. 466; *Doe ex dem. Mayor and Burgesses of Stafford v. Tooth*, 3 Younge & Jervis, 19; *Lampton v. Lampton's Exr's*, 6 Monroe, 620; *Hudzel v. Revett*, 5 Bing. 368; *S. C.*, 2 Moor. & Payne, 663; *Owens v.*

Collinson, 3 Gill & John. 25; Donalds v. Plumb, 8 Conn. R. 447. See also numerous other cases in this note hereafter stated.

It is not necessary that the interest of the witness in the fund should appear to be necessarily and inevitably affected. If such may be the result, he cannot be allowed to testify. *Stebbins v. Sackett*, 5 Conn. R. 363; and *Clark v. Hoskins*, 6 Conn. R. 108, per Hosmer, Ch. J.

Thus where a debtor assigned various claims, to satisfy demand against him (*inter alia* the note in question which he indorsed to the plaintiff), he was held incompetent as a witness for the plaintiff, though released as an indorser. *Stebbins v. Sackett*, 5 Conn. R. 258. And see *Forretier v. Guerinneau's Creditors*, 1 M'Cord, 304.

A. mortgaged lands to B. and C. to secure distinct debts due to them respectively. C. afterwards made his will, attested by three subscribing witnesses, of whom B. was one, and thereby bequeathed to A. the debt due from him, the land mortgaged being apparently sufficient to pay both debts; yet held that B. was not competent to prove the will, if the case were left to common-law principles; but the statute had removed his interest. Though the fund were now sufficient, it might depreciate. *Clark v. Hoskins*, 6 Conn. R. 106, 108. But see *Hewes v. Lauve*, 6 Mart. Lou. R. (1st series), 502; and *Thompson v. Chauveau*, 6 Id. (N. S.) *contra*. A daughter who has received her share of her ancestors' succession is still an incompetent witness in a suit on a debt of the ancestor, against the other heirs of the succession. She may still be responsible to them on a final partition, if her share exceed the disposable portion. *Dangerfield's Ex'x v. Thurston's Heirs*, 8 Mart. Lou. R. 232, 240, 241. The husband of a legatee, offered in behalf of an executor, was rejected, though he had received his wife's legacy, and had no interest in the residuum, he expressing his doubts on his *voir dire* whether the estate would pay the debts; for the legacy might still abate in favor of creditors. *Strong's Ex'rs v. Finch*, 1 Alab. R. 256, note. The executor was also a party; but this was not made a point. In an action on a senior mortgage, a junior mortgagee is not competent for the defendant. *Enters v. Peres*, 2 Rawle, 279. Otherwise, if the action be on the bond. *Id.* An insolvent is not competent for his assignees in an action against a creditor of the insolvent, for money which the creditor received of the insolvent, but which is alleged to belong to the assignees, and so should be distributed as a part of the general fund. *Rudge v. Ferguson*, 1 Carr. & Payne, 253. In an action by executors for the use of a house belonging to the estate of the testator, the plaintiffs offered a son and heir of the testator as a witness, but he was rejected, as interested to increase the fund. *White v. Derby*, 1 Mass. 239. Where the suit was against an administrator to recover land, a creditor of the intestate was holden to be a competent witness for the defendant; for the suit could not in any way affect the estate, the administrator having no such interest in the land as could be affected by a litigation in that form. *Barnes v. Hatch*, 3 N. H. R. 304. So a legatee is a witness for the executor in an action against him for a suit of mourning, furnished by him to the widow; for this is not a funeral expense which can be taken out of the estate so as to affect the legatee. *Johnson v. Baker*, 2 Carr. & Payne, 207. Parke, J., once admitted a creditor of the intestate to testify for the administrator, saying he could never understand the principle on which the contrary dictum in *Craig v. Cundell* (1 Camb. 381), proceeded; that if the intestate were alive the creditor would be a witness for him; and that in *Carter v. Pierce* (1 T. R. 164), it was considered that a creditor of the administrator was a competent witness for him. *Davies v. Davies*, 1 Mood. & Malk. 345. The reasoning of Parke, J., certainly interferes with many cases which reject a witness because he is called to speak in favor of increasing or preventing the diminution of a fund on which the payment of his claim depends; and in *Owens v. Collinson* (3 Gill & John. 25, 32), the authority (a dictum in 3 T. R. 163), on which Parke, J., proceeded, is, after a very full examination, denied to be law. *Semb.* that creditors of a lunatic holding a judgment against him, would not be competent as a witness to impeach another and senior judgment against him. *Hart v. Deamer*, 6 Wend. 497. A son of the intestate is incompetent to testify generally for the administrator; for he is entitled to a distributive share, and so interested to increase the fund; but he was held competent on a plea of *plene administravit* to prove payment of certain debts made by the defendant in a course of administration; for though that plea should be sustained, there would still be judgment of assets *in futuro*. *Vultee v. Rayner*, 2 Hall's R. N. Y. S. C. 376. An insolvent whose future effects are liable, and who states that his present effects will not pay 20s. on the pound, is not competent for his assignees, in an action for work and labor done by him before his insolvency; for the more that is paid by the

effects assigned, the less he will be liable to pay from his future effects. *Wilkins v. Ford*, 2 Carr. & Payne, 344. So it is plain that his release of the surplus will not restore his competency. *Delafield v. Freeman*, 6 Bing. 291. The creditor, who has not received 20s. on the pound, is not a competent witness for an insolvent, who has assigned all his effects in trust for his creditors, and now sues for one of those debts, the witness stating that it is doubtful whether the estate will produce 20s. on the pound. *Crerer v. Sodo*, 3 Carr. & Payne, 10.

In *Delafield v. Freeman* (6 Bing. 291; S. C., 3 Mo. & Payne, 704), the insolvent whose future effects were liable was held incompetent for his assignees, without inquiry as to the prospect of his estate paying twenty shillings in the pound, and though he had released the surplus. S. C. at N. P., 4 Carr. & Payne, 67; *Rudge v. Ferguson*, 1 Carr. & Payne, 253, cited *supra*, S. P. See *Doe ex dem. Teynham v. Tyler*, 6 Bing. 390, per Tindal, Ch. J.; *Waldron v. Howell*, 3 Russ. 376, S. P. So a ceding debtor is not a witness for his syndics. *Clay's Syndics v. Kirkland*, 4 Mart. Lou. R. 405. On a bill *inter se* by partners, for an account, one is not a competent witness for another; for by diminishing the account of one, he might increase his own share in the fund. *Sharp v. Morrow*, 6 Monroe, 305. Otherwise after a decree rendered against him, and he no longer a party in the cause; for then, not being a party, nothing done will bind or affect him. *Id.* A co-heir or co-next of kin is not a competent witness for another, in a suit brought by the heir for an account of a trust fund, created by the ancestor, for the benefit of all the heirs or next of kin. *West v. Randall*, 2 Mason, 181. This was a suit in equity, brought for an account of a trust fund. The bill charged, among other things, that W. West (the father of the plaintiff), in his lifetime, conveyed his whole estate to the defendant and others, in trust to settle the same, for the payment of all debts due from him, and for the benefit of the heirs at law, and also charged that the trustees on being called on by the said W. West, in his lifetime, and on his deathbed, promised to settle and conclude the trust, and reconvey the property, but had never done so; and further charged, that the trustees had received more moneys than all their charges and disbursements, and all the debts paid by them for the ancestor. These facts being denied, the plaintiff attempted to prove them by S. West, another son and heir of the ancestor (W. West); but his testimony was rejected by Story, J., in the Circuit Court of the United States, on the ground that he was directly interested in the facts he was called to establish, that he was a co-heir with the plaintiff, and claimed the same rights in the fund; and he likened it to the case of a co-devisee, on the trial of an ejectment brought by another devisee against the heir at law, offered as a witness to establish the will; who, in such case, had been held to be incompetent. But *quere*: On a bill to redeem mortgaged premises, brought by the assignee of the equity of redemption, the defence was, that the assignment was fraudulent, and the defendant offered to prove the fraud by the heirs at law of the assignor. But by Story, Justice, they are directly interested in the matter in issue. If the assignment be set aside as void, their title to the equity of redemption as heirs, is completely established; so that in effect, they are now to testify directly to their own interest and title. Under such circumstances, I think their testimony inadmissible. *Randall v. Phillips*, 3 Mason, 378. A residuary legatee is not a competent witness in favor of the executor of the testator, in an action against the executor, to recover a debt alleged to be due to the testator; for, by preventing a recovery, he would protect a fund in which he is directly interested. *Campbell v. Tousey*, 7 Cowen's R. 64. Yet in covenant against an executor, the child of the testator received to testify for the defendant, because it appeared there was a will; and the court presumed, until the contrary appeared, that all his interest in the suit was cut off by the will; *dissentiente*, *Henderson, J.* *M'Kinna v. Hayer*, 2 Hawks, 422. *Quere*.

On a suit against two joint debtors, one died *pendente lite*; and on the trial, his son was offered as a witness for the other. He was held incompetent, as the survivor might claim over against his father's estate. The death was not suggested on the record, though it appeared in proof on the trial; and the court held this sufficient to exclude him. *Shepard v. Ward*, 8 Wend. 542. After suit brought on a promise made to A. and B., administrators of D., in consideration of a devastavit (the release of two judgments, due to D.'s estate), A. died, and his son, after having assigned all his interest in the suit, and offered to pay all costs, was offered as a witness for the plaintiff; yet he was held interested, for the father's estate was liable to make good a share of the devastavit. *Kimball v. Kimball*, 3 Rawle, 469. But a paid legatee was held competent for the executor, though liable to refund for want of sufficient assets to pay debts, it not appearing

that there was in truth a deficiency. *Clarke v. Gannon*, Ry. & Mood. N. P. Rep. 31. And where a testator devised the residue of his estate to a society, incorporated for pious and charitable purposes, the members of the society, being mere trustees to convey the testator's bounty to the objects of the institution, were held to be competent witnesses to prove the sanity of the testator when he made the will, *the society not being a party to the suit*. *Nason v. Thatcher*, 7 Mass. R. 398. It is said a residuary legatee shall not be a witness for the estate, even though it appear the estate has been so much expended that there will be no residuum. *Per Mills, J., Lampton v. Lampton Ex'rs*, 6 Monroe, 620. An executor is not a competent witness against legatees or creditors. *Id.* 620, 621.

A distributee having released all his interest in the subject matter, and being indemnified against contribution for costs, is competent to testify for the administrator, although he be also an heir, it now appearing that any real estate has descended, the value of which may be indirectly benefited by the recovery. *Boynton v. Turner*, 13 Mass. R. 361.

A person who has been discharged as a bankrupt in Great Britain, and against whose property in the state of New York an attachment has issued, under the absent and absconding debtor act of that state, cannot be a witness for his trustees appointed under the act, in an action brought to recover a debt due him, although he has released his interest in the surplus of his estate to his trustees in Great Britain, and to his trustees here. The court said, his discharge under the Bankrupt Law of England did not exonerate him from his debts contracted here. The object of the suit is to create a fund for the payment of the debts. If the plaintiff recovers, it will increase the fund for the payment of the debts for which he is still personally liable in our courts, and if the defendant prevails in his set off and recovers a balance, it will lessen that fund and increase his personal responsibility. *Graves v. Delaplaine*, 14 John. R. 146; *Coit v. Hawkins' Ex'r*, 3 Dessaus. Eq. R. 175, S. P. But see *M'Ewen v. Gibbs*, 4 Dall. 137. A suit was brought to recover from the defendants, R. and M., the amount of a note, made by B. and A., for goods sold to B. and A., by the plaintiffs, on the ground that the defendants were dormant partners of B. and A., who were insolvent. A witness, being sworn, testified that he was a creditor of B. and A., and considered himself interested to fix this debt upon the defendants. He was then objected to by the defendants. The court considered the witness incompetent, because if the plaintiff should not recover against the defendants, and be obliged to seek payment from the estate of B. and A., he would receive his dividend on his entire claim; whereas, should the recovery be had of the defendants, on the ground of a partnership, the defendants could only receive a dividend on one-half, they being, as partners, bound to pay the residue. *Corps v. Robinson*, 3 Wash. C. C. R. 388. In an action by the assignees of a bankrupt, a witness who had proved a debt under the commission, was adjudged incompetent for the assignees, for he had a direct interest to increase to increase the fund out of which his debt against the bankrupt was to be paid. *Phoenix v. The Assignees of Ingraham*, 5 John. R. 412. In ejectment for land conveyed expressly in trust for the support of an infant child, the mother is not a competent witness for the child; for by establishing the conveyance she would be relieved, as far as the fund extended, from the obligation to support the child, which would otherwise be binding on her. *Jackson ex dem. Saunders v. Caldwell*, 1 Cowen's R. 622. A commission merchant being called to prove that he sold the plaintiff's goods to the defendants, stated that the plaintiff was indebted to him for advances on the goods, and was insolvent; that he was uncertain whether he had sufficient security for his debt; but if the proceeds of the goods should come into his hands, he should apply them to his debt; and that as agent for the plaintiff, he had commenced this suit. Held, that he was not admissible for the plaintiff, on the ground that the plaintiff's recovery would produce a fund for the payment of his debt. *Marland v. Jefferson*, 2 Pick. R. 240. In an action by one commissioner in partition to recover his fees and disbursements, another of the commissioners is not a competent witness for him. The commissioner was called to prove not only the services of his fellow commissioner, but also the money paid out by the plaintiff in making the partition. The money thus paid, was a charge for which the other commissioners were bound to contribute a portion. It follows that they were interested in this part of the demand, for if the plaintiff succeeded in recovering the disbursements, they thereby become exonerated. *Smyth v. Broadstreet*, 5 Cowen's R. 213. A widow of a deceased partner is not a competent witness for the copartner, in an action brought by him as surviving partner for the recovery of a debt due the firm. Being entitled to a distributive share in her husband's estate, she is inter-

ested to aid a recovery by the plaintiff, as a share of the amount recovered would go to increase the estate, and in case of the plaintiff's failure in the cause, the estate would be liable to contribute to the payment of the costs. *Allen v. Blanchard*, 9 Cowen's R. 631.

And see *Hillhouse v. Smith*, 5 Day, 442. The cases are quite uniform as to the principle, but not entirely so in its application. Thus a bankrupt cannot testify for his assignees, unless he release his allowance. *Schneider v. Parr*, Peake's Add. Cas. 66; *Dixon v. Purse*, Id. 187; *Coit v. Owen*, 3 Dessauss. Eq. R. 175. A distributee of a testator or intestate is incompetent for the executor or administrator, in a suit against him as such. *Allington v. Bearcroft*, Peak. Add. Cas. 212; *Dunnington's Ex'r v. Dunnington's Adm'x*, 3 Harr. & John. 279; *Scott v. Young*, 4 Paige, 542, 544; *Caperton v. Dallison*, and *Terry v. Belcher*, *infra*; *Brown's Ex'rs v. Durbin's Adm'r*, 5 J. J. Marsh. 170, 174. Yet in an action against an executor, one entitled to an annuity under the will, which was of course a charge, and depended for its very existence on the fund, was holden competent for the defendant by the King's Bench in *Noel v. Davis* (5 Barn. & Adolph. 96). The court said it was not distinguishable from *Paull v. Brown* (6 Esp. N. P. Cas. 34). That was trover by an administrator; and a creditor of the estate was offered for the plaintiff. *Macdonald, B.*, received him, saying it was not distinguishable from an action by a party in his own right, wherein it never was heard that his creditor was an objectionable witness. And see *Russell v. Sprigg*, 10 Lou. R. (Curry) 424, 425, per Martin, J. But is there not a plain difference? Before the debtor's death, the liability is personal; after his death, *the fund*, the estate *alone*, is liable, on which the debts of the deceased are cast as a lien. The cases above cited from Peake's Add. Cas. seem most clearly to be correct in principle, and will be found sustainable by an almost unbroken line of English and American authority. See also *Paull v. Mackey*, 3 Watt. 110, 124; *Willis v. Dun*, 1 Wright, 133, 134; *Cleverly v. McCullough*, 2 Hill, 445. One who sold his stock in a turnpike company with a guaranty that it should bring the *par* price, was held incompetent as a witness for the company. *Grayble v. York, & Co.*, 19 Serg. & Rawle, 269. In assumpsit as sail maker against a prize agent, for the plaintiff's share in the proceeds of a captured vessel, the captain was held competent for the defendant to reduce the amount of the plaintiff's recovery to the share of a common sailor, inasmuch as the captain's share was fixed by act of Congress. *Murray v. Wilson*, 1 Binn. 531, 533. The witness had retained and agreed to pay the plaintiff's attorney, and had a promise of the plaintiff that the avails of the suit should be applied to discharge his debt against the plaintiff. He was excluded for the last reason. *Benedict v. Brownson*, Kirb. 70. *Quere*, whether the first, viz: liability to the attorney, was not the true ground (*Bell v. Smith*, 7 Dowl. & Ryland, 846; S. C., 5 Barn. & Cress. 188), and whether the reason given was more than an interest in the question. In trover by an executor, for a conversion subsequent to his testator's death, legatee was held a competent witness for the plaintiff, on the ground that the recovery was not necessary to render the estate adequate to the payment of his legacy. *Carlisle v. Burley*, 3 Greenl. 250. See *Richardson v. Freeman*, 6 Greenl. 57. Though the witness offered for the plaintiff have a promise from him that the money recovered shall be paid to the witness for a debt due him by the plaintiff, yet the witness is competent for the plaintiff. *Seaver v. Bradley*, 6 Greenl. 60. There must be an assignment of the fund to be recovered to the witness, or something equivalent, as an order on the attorney to pay the witness, &c., in order to disqualify him. *Seaver v. Bradley*, 6 Greenl. 63, 64, per Mellen, C. J., and the cases there cited. In trover or trespass by the bailee against a stranger, the bailor is not competent for the plaintiff, because the bailee recovers the value beyond his own interest for the use of the bailor, thus creating a fund for his benefit, unless indeed the property tortiously taken by the defendant has been returned to the plaintiff. *Chestney v. St. Clair*, 1 N. Hamp. R. 189, 190. A paid legatee, who was released by the executor, was held incompetent for him at the suit of a creditor, the will providing that the legacy should abate, if the assets proved insufficient. *Hedges' Ex'rs v. Boyle*, 2 Halst. 68. It was said the creditor still had a lien on the subject of the legacy in the legatee's hands. It was a specific legacy. It was also added that the record would be evidence against the legatee. Id. 70, 71. In the same case, for the reason that debts would be a lien on the land, devisees of a contingent remainder in land were excluded as witnesses to defeat the recovery against the executor. In debt against the administratrix of one of two joint obligors, the widow and distributee of the other was held to be a competent witness for the defendant. The court said, if interested at all, it was in favor of the plaintiff. *Braxton's Adm'x v. Hilyard*, 2 Munf. 49, 52. In debt on an administration bond, a distributee is incompe-

In an action by an administrator against a debtor of the intestate, a person entitled to a distributive share of the estate, will not be a competent witness to support the action.(1) And it has also been ruled, that a witness so situated will not be competent for the administrator, in an action brought against him in that character.(2)

tent for the plaintiff. He is himself the real plaintiff. *Ordinary, &c., v. Bracey*, 2 Bay, 542. In assumpsit against the defendant as executor *de son tort*, a distributee was held inadmissible as a witness for the plaintiff. *Anderson v. Primrose*, Dudley, 216. A creditor of A., the latter having assigned for the benefit of his creditors generally, is not a competent witness to impeach a claim which is adverse to the assignment. *Bates v. Coe*, 10 Conn. R. 280. Where in an action on an administration bond by the state, founded on the alleged fact that there is no next of kin within such a degree of consanguinity to the intestate as to be entitled to the residuum, B., who claimed to be such next of kin, was held an incompetent witness for the defendant to prove that fact. *State v. Greenwell*, 4 Gill & John. 407. The husband of a distributee was held incompetent as a witness for the estate of the intestate (*Caperton v. Callison*, 1 J. J. Marsh. 396, 397); and this, though his wife lived and dealt separately, and each was under bonds not to interfere with the property of the other. *Terry v. Belcher*, 1 Bail. 568. The creditor of an insolvent was held incompetent to testify in favor of his assignees in a suit by them to recover a debt. *Cleverly v. McCullough*, 2 Hill, 445. So of one who was held out as a partner of the insolvent (bankrupt), for a recovery would diminish his liability to creditors, by increasing the fund of the bankrupt partner. *Holland v. Reeves*, 7 Carr. & Payne, 736. See also *Bank of Alabama v. McDade*, 4 Porter, 252. In trover, for property claimed by the defendant as executor, a legatee was held incompetent for him. *Semb.* from the opinion of the court, he was a residuary legatee. *Dimond v. McDowell*, 7 Watts, 510, 512.

The main difference between the cases lies in what shall be deemed proof of such a direct and certain interest as to disqualify the witness. Some cases hold him at once disqualified and do not stop to inquire into the state of the fund in the first instance, as whether it would be solvent or sufficient actually to benefit the witness by its increase, or injure him by diminution. *McKinney's Executors v. McKinney's Administrators*, 2 Stewart's R. 17; *Hillhouse v. Smith*, 5 Day, 432, 438, per Mitchel, Ch. J.; *McKinney, J.*, in *Finks v. English*, 3 Blackf, 139. Others demand an inquiry into the state of the fund in the first instance, with proof that the increase or diminution will, in fact, be material to the witness. *Barclay's Assignees v. Carson*, 2 Hayw. 243; *Leary's Executors v. Littlejohn*, 1 Murph. 406; *Boyer v. Kendall*, 14 Serg. & Rawle, 178; *Youst v. Martin*, 3 Serg. & Rawle, 427; *Edgell v. Bennett*, 7 Verm. R. 534, 536. And others require, that if the fund can be in truth no probable benefit to the witness, this should be proved by the party producing him. *Morris's Adm'r v. Bills*, 1 Wright, 343. And see *Williams v. Baldwin*, 7 Verm. R. 503.

A creditor of the estate was held competent for the administrator plaintiff, because it did not appear affirmatively that he would be benefited by the recovery, it not being shown that the estate was otherwise insolvent. *Boyer v. Kendall*, 14 Serg. & Rawle, 178; *Youst v. Martin*, 3 Id. 427, S. P. The competency of the creditor is laid down by these cases almost as unqualifiedly as in *Noel v. Davis*, *supra*. So of a specific legatee. *Leary's Ex'rs v. Littlejohn*, 1 Murph. 406; *Torrence v. Graham*, 1 Dev. & Bat. 284, 286.

(That at common law a witness is not competent to increase a fund out of which he is entitled to a distributive share, see further *Rome v. Dickenson*, 13 Geo. 302. Under the New York Code of 1849, he is competent—he is not the party for whose immediate benefit the action is brought. *Freeman v. Spalding*, 2 Kernan R. 373.)

(1) *Matthews v. Smith*, 2 Y. & J. 426. It was also decided in this case, that a release from the witness to the administrator of all claims up to the time of executing the release would not restore competency, the right of the witness being prospective. The question of costs seems not to have been adverted to in this case. See *Ingram v. Dade*, *post*.

(2) *Allington v. Bearcroft*, Peake's Add. Ca. 212.

In these cases, the natural and immediate effect of a verdict in favor of the executor or administrator would be to benefit the general fund in which the witness was interested; but it will be seen hereafter, that the principle of these cases has been held not to apply to specific legatees, whether paid or unpaid, or to creditors of the testator or intestate.

4. Rule as to bankrupts, insolvent debtors and their creditors.

The situation of a bankrupt bears some resemblance, in point of interest, to that of a residuary legatee. The bankrupt is interested in increasing his estate, for his allowance under the Bankrupt Act depends upon the clear amount of the funds recovered by his assignees, and the surplus, if any, after his creditors are satisfied, belongs to himself. This is an interest which, in actions by or against his assignees, renders him an incompetent witness on behalf of the assignees, for the purpose either of adding to the amount of the fund, or of preserving it from diminution.(1) In order to render the bankrupt competent in such cases, he must release his allowance and surplus: and it is also necessary, that he should have obtained his certificate, without which his evidence will, in no case, be admissible on behalf of his assignees.(2)

Where there has been a second commission against the bankrupt, and he has not paid fifteen shillings in the pound, he will not be a competent witness for his assignees, although he has obtained his certificate and released his allowance and surplus; for his future effects remain liable until payment of fifteen shillings in the pound, and he is therefore interested in increasing the fund, in order to relieve himself from this liability.(3)

There is another case, in which a bankrupt is wholly incompetent to give evidence in any action by or against his assignees, notwithstanding he may have obtained his certificate and released his surplus and allowance: this is, where the bankrupt is called for the purpose of proving any fact, which is material either to support, or to defeat, the *fiat* issued against him.(4) The doctrine, that a bankrupt is incompetent to give evidence in

(1) *Ewens v. Gold*, B. N. P. 43; *Butler v. Cooke*, Cowp. 70; *Ex parte Burl*, 1 Mad. R. 46; *Williams v. Williams*, 6 Mees. & Wels. 170.

(2) See *Dixon v. Purse*, Peake's Add. Ca. 187; *Masters v. Drayton*, 2 T. R. 496; *Goodhay v. Hendry*, Mo. & Ma. 319; *Ferguson v. Spencer*, 1 Man. & Gr. 987. See 5 and 6 Vict. c. 122, providing in what cases a certificate shall be a discharge.

(3) *Kennett v. Greenwollers*, Peake's N. P. C. 3; 6 Geo. IV, c. 16, § 127. The same principle applies to a party who has become bankrupt after having compounded with his creditors. See the words of the section above referred to. But where the composition has not been general, but has been limited to particular creditors only, the objection will not arise. *Roberts v. Harris*, 2 C., M. & R. 292. See *Norton v. Shakspeare*, 15 East, 619.

(4) The following are some of the principal cases on this point. That a bankrupt is incompetent to prove his own act of bankruptcy, *Field v. Curtis*, 2 Stra. 828; *Ewens v. Gold*, B. N. P. 40; by Lord Kenyon, *Oxlade v. Perchard*, 1 Esp. 288; by Lord Ellenborough, *Hoffman v. Pitt*, 5 Esp. 25; *Wyatt v. Wilkinson*, 5 Esp. 187. That a bankrupt is incompetent to prove the petitioning creditor's debt, *Cross v. Fox*, 2 H. Bl. 279, n. a; *Flower v. Herbert*, Id. 279, n. a; *Chapman v. Gardner*, 2 H. Bl. 279. That a bankrupt is incompetent to disprove the alleged act

support of his commission, has been sometimes referred to the ground of interest; it has been said, if the *fiat* or commission is not good, the certificate and all other proceedings are void, and the bankrupt will be again liable to his debts.(1) If, however, this were considered as the sole foundation of the rule, it would appear to follow, that the same ground which disqualified a bankrupt from giving evidence to support his commission, would render him competent to defeat it. But it seems to be pretty clear that in either case the interest of the bankrupt, one way or the other, will depend entirely upon circumstances. A bankrupt has frequently an interest in supporting a commission or fiat, but he has also as frequently an interest in defeating it, where such is his object and desire.(2) The rule in question, therefore, seems to have been considered as resting not entirely upon the ground of interest, but partly upon considerations of policy and convenience. It would often be exceedingly difficult to discover when the bankrupt is, and when he is not interested, in supporting or defeating his commission. And if his testimony were generally admitted, he would often be called on to make statements of matters resting in his own knowledge alone, and the proceedings under fiats of bankruptcy would be rendered generally insecure.(3) Whatever may have been the foundation for the rule, at all events the practice on the subject has been fully settled, and it is clear, the bankrupt cannot be called either to affirm or disaffirm his bankruptcy, nor, if called and examined for any other purpose, can he be asked on cross-examination any questions as to facts which are material to support or defeat the fiat.(4)

The objection of a direct interest in increasing the fund of his estate, which, in general, disqualifies a bankrupt from giving evidence in behalf of his assignees, applies also to the case of a person who has taken the benefit of the Insolvent Act.(5) And as the future effects of an insolvent are liable to his creditors under the judgment, which the act directs to be

of bankruptcy, or to explain an equivocal act, *Hoffman v. Pitt*, 5 Esp. 22; *Binns v. Tetley*, *McLel.* & Y. 404, in which case all the authorities were reviewed; *Sayer v. Garnett*, 7 Bing. 103. In *Oxlade v. Perchard* (1 Esp. 287) Lord Kenyon had ruled differently, and had considered the bankrupt admissible to explain an equivocal act, but in *Sayer v. Garnett* (7 Bing. 104), Park, J., said that Lord Kenyon afterwards changed the opinion he had there expressed.

(1) See by Lord C. J. Ryder, in *Flower v. Herbert*, 2 H. Bl. 279, *u. a.*; by Bayley, J., and Holroyd, J., 2 B. & C. 18, 19.

(2) By Tindal, C. J., 7 Bing. 104.

(3) *Ibid.*

(4) *Binns v. Tetley*, *McLel.* 397; *Sayer v. Garnett*, 7 Bing. 103. The rule is restricted to evidence affirming or disaffirming the bankruptcy, and will not be extended to exclude the bankrupt from giving evidence of facts which in themselves are not material to the validity of the fiat. See *Reed v. James*, 1 Stark. N. P. C. 134; *Morgan v. Prior*, 2 B. & C. 14, *post.*

(5) *Rudge v. Ferguson*, 1 Car. & P. 253; *Wilkins v. Ford*, 2 Car. & P. 344.

entered against him, he will not be rendered a competent witness by releasing his surplus to his assignee.(1)

In the case of bankruptcy or insolvency, the interest of the bankrupt or insolvent in the fund is of the nature of a residuary interest, being subject to the rights of creditors, who are the persons primarily interested in any fund realized by the assignees. The amount of the creditors' dividend must depend upon the amount of the fund, and a creditor is an incompetent witness for the purpose of increasing the estate, on account of this direct interest in the event of the suit.(2) He cannot, therefore, give evidence to deprive the bankrupt of his allowance.(3)

The creditor of a bankrupt is also interested in supporting the bankruptcy, the effect of the bankruptcy being to appropriate the whole estate and effects of the bankrupt towards the immediate satisfaction of his creditors. A creditor is, therefore, an incompetent witness to support the fiat, and it is immaterial, whether he has or has not availed himself of the right of proving under the bankruptcy.(4) It is clear that the petitioning creditor is incompetent to prove the fiat regularly sued out, for (independently of the objection which applies to other creditors) he gives a bond to the chancellor, conditioned to establish the fact upon which the validity of the fiat depends.(5) The interest of other creditors, as we shall hereafter see, may be removed by a release to the assignees: and if a creditor has sold his debt, or agreed to sell it, his interest will be extinguished.(6) The cases relative to the competency of a bankrupt, of a creditor to diminish the fund, and of a creditor to reduce the amount of his own debt, or to defeat the commission, will be stated in the next section, which treats of particular cases where a witness will not be disqualified by interest.

5. Examples in actions relating to real property.

The next class of cases which may be here noticed, are those in which witnesses have been rejected on the ground of interest in actions relating to real property.

In an action of ejectment, a tenant in possession is incompetent for the defendant, having an immediate interest in the event of the suit;(7) for the verdict and judgment in the action would have the effect of turning

(1) *Delafield v. Freeman*, 6 Bing. 294; S. C., 4 Car. & P. 67; *Rudge v. Ferguson*, *supra*. See stat: 7 G. IV, c. 57, § 57.

(2) *Shuttleworth v. Bravo*, 1 Stra. 507.

(3) S. C.

(4) *Adams v. Malkin*, 3 Campb. 543; *Crooke v. Edwards*, 2 Stark. 303, overruling *Williams v. Stevens*, 2 Campb. 301. And see 1 Rose, 392, n.; *Ex parte Malkin*, 2 Rose, 27; *Ex parte Osborne*, 2 V. & B. 177.

(5) *Green v. Jones*, 2 Campb. 411.

(6) See *post*. And *Granger v. Furlong*, 2 Bl. R. 1273; *Heath v. Hall*, 4 Taunt. 326.

(7) *Doe v. Wilde*, 5 Taunt. 183. See also 6 Bing. 304; and *Doe v. Bingham*, 4 B. & Ald. 672; *Doe dem. Willis v. Birchmore*, 9 Add. & El. 662.

him out of possession immediately.(1) So also, if a plaintiff agree with a witness, that, in case he recovers the lands, he will grant the witness a lease of them for so many years, this excludes his evidence; for he would have a fixed and certain advantage by the event of the verdict;(2) he is therefore incompetent, upon the same principle as a witness, who, if the plaintiff fail in the action, is to repay a sum of money in his hands belonging to the plaintiff, but is not to repay any part of it, if the plaintiff succeed.(3)

In ejectment brought by a tenant in tail to try the validity of a common recovery suffered of the lands in dispute, a remainder man, after the tenant in tail, is incompetent to give evidence for the latter; for by recovering in the ejectment, the tenant in tail would be in as of his former right, and the witness would thereupon acquire a vested interest in the remainder in tail.(4) As the effect, therefore, of the verdict would be to

(1) 6 Bing. 394; 5 Taunt. 183.

NOTE 634.—*Brant ex dem. Van Cortlandt v. Dyckman*, 1 John. Cas. 275; *Jackson ex dem. Vandenburg v. Trusdell*, 12 John. R. 246; (*Kennedy v. Reynolds*, 27 Ala. 364.)

So in a hypothecary action to prove and obtain a judgment for a debt secured by a mortgage, though the proceeding be not directly against the premises, yet one claiming an interest in them is not good for the defendant. By the Civil Code the judgment would be evidence against the witness. *Reeves v. Burton*, 6 Mart. Lou. R. (N. S.) 283.

(One who has conveyed lands with a covenant of warranty is not competent as a witness to support the title (*Elliott v. Boren*, 2 Snead (Tenn.) 662); though he may be rendered competent by a release from his covenant. *Gilbert v. Curtis*, 37 Maine, 45.)

(2) *Gillb. Evid.* 108.

NOTE 635.—This dictum is questioned in New York by *Ten Eyck v. Bill* (5 Wend. 55), though it is not perceived that the case directly conflicts with it. That was a case where a plaintiff indebted to the witness promised him an order on the fund, if recovered, as security for the debt. Yet he was held competent. Here no additional right depended on the recovery; all still rested in the mere personal engagement for the debt, and at law, certainly could create no lien on the fund. But in the case put by *Gilbert*, cited in the text, the right depended essentially on the recovery; upon the happening of which, too, a court of chancery would compel a specific execution, enjoining the party against a sale, and thus indirectly creating a lien.

Where the witness said the sum recovered would go to discharge a claim for which the plaintiff was liable in behalf of the witness, he was held incompetent for the plaintiff. *Wood v. Braynard*, 9 Pick. 322.

An attesting witness to a charter party, was held incompetent to prove it, the plaintiff having agreed with him that he should have a share in the bargain, in an action on the charter party, and the court refused to receive evidence of his hand. *Hovill v. Stephenson*, 3 Mo. & Payne, 146. A witness holding an order from the plaintiff on his agent, the amount of which was to be paid out of the avails of the action, was held incompetent as a witness for the plaintiff, though the order was not accepted by the agent. *Payton v. Hallet*, 1 Cain. R. 364. And see the distinction between this case and *Ten Eyck v. Bill*, 5 Wend. 57, 58.

(If the witness has a legal interest in the subject of the suit, depending upon the event of a recovery, he is not competent. *Moran v. Portland Steam Packet Co.*, 35 Maine, 55.)

(3) *Fotheringham v. Greenwood*, 1 Stra. 129.

(4) NOTE 636.—In ejectment for entailed property by the tenant in tail, the remainderman in fee was held incompetent for the tenant in tail, though he was ninety years old, and the lessor of the plaintiff had sons and daughters. *Doe dem. Teynham v. Tyler*, 6 Bing. 390. On a bill filed to rectify a deed given by B. to D. of land, over which B. had, subsequent to the deed to

D., granted a water passage to W., the effect of which rectification would be to exclude the land over which the water passage ran from the deed to D., and thus protect W.'s water passage against an ejectment by D., W. is not competent to testify in favor of the complainant. *Rogers v. Dibble*, 3 Paige, 238. In *quare impedit*, the father of the defendant, in support of the claim of the latter to present, was called as a witness, when, it appearing that he was tenant by the curtesy, his late wife having been seized of an estate of inheritance, his testimony was rejected, although it was insisted that he could have no interest in the event of the suit, his right to present (if any) having lapsed, more than six months having expired since the vacancy happened; for if the bishop neglect or omit to present within the six months, the party originally entitled has still a right to present. *Gully v. The Bishop of Exeter*, 2 Moore & Payne, 266.

In ejectment, the defendant offered a witness to prove that he, the witness, was in possession of the premises in question at the commencement of the suit, and then still continued to be the real tenant in possession, and not the defendant. Held, that if the witness was in possession, he had an immediate interest to protect that possession, by preventing a recovery, and was therefore not competent. *Brant ex dem. Van Cortlandt v. Dyckman*, 1 John. Cas. 275; *Jackson ex dem. Vandenberg v. Trusdell*, 12 John. R. 246. So, if the witness be offered by the defendant, to prove a lease fraudulent under which the plaintiff's lessor claims, and he is in possession of only a part of the premises, he is incompetent. *Jackson ex dem. Church v. Hills*, 8 Cowen's Rep. 290.

In ejectment brought by a mortgagee against a tenant claiming under the mortgagor by a quit-claim deed, the mortgagor is not admissible for the plaintiff. Having conveyed by a quit-claim only, he cannot be made responsible to his grantee in any event; but if the plaintiff should fail to recover the premises, he will be liable to him on the mortgage bond for the whole amount for which the premises were mortgaged; should the plaintiff recover, he would be relieved wholly or partially from payment. *Jackson ex dem. Rounds v. McChesney*, 7 Cowen's Rep. 360.

One who has put the defendant in ejectment in possession, under a contract to sell and convey, is not a competent witness for the defendant; as where a mortgagor had contracted to sell and convey the mortgaged premises to the defendant, who had taken possession under the contract; in ejectment by the mortgagee, it was held that the mortgagor was not competent to testify for the defendant. The defendant holding under him, whether bound to protect the defendant or not, the witness had an interest in the possession, which could not be supported by his own testimony. *Jackson ex dem. Roosevelt v. Stackhouse*, 1 Cowen's Rep. 122.

A grantor of lands, with covenants of warranty, is not a competent witness to support the title of his vendee. Thus, in a suit in equity, the following facts appeared: A., the defendant, executed a bond and warrant of attorney, in his own name and in the name of B., for a debt due from them, in pursuance of which a judgment was entered against them. B., owning lands, conveyed them to D. with covenants of warranty, and D. sold them to the plaintiff. An execution having been issued on the judgment, these lands were seized and sold by the sheriff under the execution, and A. became the purchaser. Having brought an action of ejectment against the present plaintiff, this bill was filed against A. to stay proceedings in the action of ejectment. At the hearing, the plaintiff offered the testimony of B., to show that A. had no authority to execute the bond and warrant on which the judgment was entered; but his testimony was rejected by the chancellor, and this decision was subsequently recognized and approved of in the Court of Errors, on the ground that B., having warranted the title to the lands, was interested to defeat the judgment, in order to sustain the title of his grantee to the lands which he had warranted to him. *Swift v. Dean*, 6 John. Rep. 523. So though the deed contain words of implied warranty only. *Shields' Lessee v. Buchanan*, 2 Yeates, 219.

A. mortgaged land to B. and C. to secure distinct debts due to them respectively. C. afterwards made his will, and bequeathed his debt to A., the mortgagor. B. witnessed this will; and though the land was sufficient to pay both debts, yet held that B. was incompetent at common law as a witness to prove the will; but his competency was restored by statute. *Clark v. Hoskins*, 6 Conn. Rep. 106.

Semble that in an action against a sheriff for removing goods without paying rent arrear, the tenant is not competent for the plaintiff; for he comes to swear his rent out of the sheriff's pocket. *Thurgood v. Richardson*, 4 Carr. & Payne, 481.

A vendor of goods is not a competent witness for the vendee, in an action by another person

revest the remainder in the witness, he has a direct and immediate interest which renders him incompetent.(1) So also in a *quare impedit* respecting the right of presentation to an advowson, which was claimed by the defendant through his mother, it was held, that the father of the defendant, who was tenant by the curtesy of the mother's property, was an incompetent witness on the defendant's behalf, on the ground that he had a direct interest in the result of the cause.(2) On the trial of an issue on *devisavit vel non*, a devisee, who takes under the will a vested interest in the testator's estate, has been considered incompetent to support the will, in an action of ejectment brought by another devisee against the heir.(3)

It may be observed here, that a claim to an estate or interest in land, on the part of a witness in an action of ejectment, will not in all cases

against the vendee for the goods, for every man is considered as warranting the title of personal property which he sells, though there be no express warranty. *Heermance v. Vernoy*, 6 John. Rep. 5. And see *Chapman v. Andrews*, 3 Wendell's Rep. 240.

In replevin by the vendee of the debtor against the deputy who levied on the goods, it was held that the debtor was not competent for the deputy, where the debtor had sold and been paid for the goods by his vendee, or received or negotiated a note to a *bona fide* holder; for he would thus be swearing the goods a second time into his own pocket; otherwise, had he not received pay or negotiated the note; for the recovery against his vendee in the replevin would disable him from recovering in assumpsit against his vendee, though the claim of the officer was on the ground that the sale to the vendee was fraudulent in respect to creditors. *Bailey v. Foster*, 9 Pick. 138. *Quere.*

A. gave a deed with warranty to B., and afterwards, by another warranty deed, conveyed land adjoining to C. In an action in which the question was whether the boundaries of the land granted to B. did not extend so as to include the land granted to C., A. is not a competent witness for C. to prove the boundaries, for he is interested to support C.'s title. The court remark, in giving judgment in this case, that the witness was undoubtedly admitted at the trial, on the principle that he stood indifferent between the parties, and was liable to the losing party. But he was not in that situation. The question was whether the prior deed comprehended the premises in question or not. That the deed under which the defendant claimed included the premises was not questioned. If, then, the witness could so locate the first deed as not to include the premises, he would avoid a responsibility on his warranty to the last grantee, and the first grantee could never have any remedy against him, because he would have failed, not for want of title in the witness, the grantor, but as to the boundaries of the land granted. *Jackson ex dem. Caldwell v. Hallenback*, 2 John. Rep. 394.

(1) *Doe v. Tyler*, 6 Bing. 390; *Smith v. Blackham*, 1 Salk. 283. And see by *Lee, C. J.*, *Commins v. The Mayor of Oakhampton*, *Sayer*, 45.

(2) *Gully v. The Bishop of Exeter and another*, 5 Bing. 171.

(3) In *Holliard v. Jennings* (1 Lord Raym. 505), on an issue of *devisavit vel non*, it was assumed as a clear proposition that a *devisee* was not competent. See, also, *Pyke v. Crouch*, 1 Lord Raym. 730. The ground of these cases would not prevent an executor, taking a pecuniary interest under a will, from giving evidence to support the will in an action of ejectment brought by the heir at law; for the verdict against the plaintiff would only have the effect of establishing the will as to the real property, and the witness would have no immediate interest in the termination of that suit; nor has he any indirect interest in the record, since the judgment would not be evidence in the Ecclesiastical Court, upon a question whether the will were good as to the personality. *Doe v. Teague*, 5 B. & C. 335. Upon the same principle, a *legatee* of personal estate seems also to be competent in such a case. An heir apparent is also competent upon any question concerning the lands, for the heirship is no interest, but a mere contingency. See the following section.

disqualify. Thus in the recent case of Doe agt. Maissey,(1) an action of ejectment brought to recover premises which the defendant claimed as heir at law to his father, the defendant's mother was tendered as a witness for him, and was objected to, on the ground that her evidence would tend to establish for her a title to dower; but the Court of King's Bench, after time taken to consider, held that she had no legal interest in the event of the suit, and was competent. Lord Tenterden, in delivering the judgment of the court, said that the judgment in the action would be no evidence of her husband's seizin; and that if he was seized, she was entitled to dower, whether the premises were in the hands of the lessee of the plaintiff or of the defendant.(2)

In an action of ejectment by an assignee of a mortgage made by a defendant, a person who has taken a later mortgage from the defendant, is not a competent witness for the defence, to show the first mortgage void on account of fraud;(3) for if this action succeed, there would be a change of possession, and the witness would not be able to recover against the new possessor, without proving what he himself comes to prove in the action; whereas, if the action fail, he would be entitled to possession at once, since the defendant cannot resist him; the witness, therefore, is interested in the event of the suit itself.(4)

We have seen, in actions by or against corporations respecting the lands of the corporation, that individual members are incompetent, when they have an interest, as members of the corporation, in the lands which are the subject of the action. So also, in an action of trespass brought by the tenant of a corporation, in which a question arose respecting the right of the corporation to inclose the *locus in quo*, against the defendant who claimed a right of common thereon, freemen of the corporation were held incompetent for the plaintiff, to prove that there was a sufficiency of common left, although the rent was nominally reserved to the mayor and bailiffs alone.(5) It was objected in this case, that if any interest existed in the witness, it was too minute to form a ground of incompetency, and it is obvious, that the same objection might be raised in most cases of a similar description, and in many of those which have been before stated in the text; but the principle was fully settled by that case, and has ever since been adhered to, that if there be an interest to any amount, the objection must prevail, however small it may be in reality.

On the trial of an issue, whether the owners of property within a particular district are liable by immemorial usage to the charge of repairing a chapel, an owner of property within the district was held incompetent

(1) 1 Barn. & Ad. 439. See *Gully v. Bishop of Exeter*, and *Doe v. Tyler*, *supra*.

(2) *Id.* 440. It would seem that the widow assisted her case for dower by her evidence.

(3) *Doe d. Cuthbert v. Bamford*, 11 Ad. & Ell. 786.

(4) See Lord Denman's judgment.

(5) *Burton v. Hinde*, 5 T. R. 174.

to disprove the liability (although he neither resided nor was rated in the district), having leased his property to a tenant who was bound to pay the rent without deduction; the owner was immediately interested in removing such a permanent charge, and thus to improve the value of his estate.(1) In a subsequent case, upon an issue whether a messuage was situated within a chapelry, it was determined that an occupier of property within the district, who was not actually rated, was competent to prove that it was so situated; and although the decision proceeded chiefly upon the operation of the statute of the 54 Geo. III, c. 170, § 9, in restoring competency in such cases (which statute will be noticed afterwards), yet the court expressed an opinion that as the witness was not actually rated, but only ratable, he was competent at common law.(2) Before the act of 3 & 4 Vict. c. 26 (noticed afterwards), a rated inhabitant was held to be an incompetent witness for the defendant in an action against the surveyor of the highways, in support of a custom to take materials from the sea beach for the purpose of repairing the road; for if such custom were established, the highways would be repaired at less expense, and the highway rates be thereby diminished;(3) nor was the witness rendered competent by the statute 54 Geo. III, c. 170, § 9.(4) So also in an action to recover a sum, alleged to be due to the plaintiff for attending a pauper, against an overseer who defends on the part of the parish, a rated inhabitant was an incompetent witness for the defendant;(5) for if the plaintiff recovered the amount claimed, it would be a charge on the rates; and the witness was not rendered competent by the statute 54 Geo. III, because the question in the action was not "*a matter of rates or cesses of the parish*," within the meaning of that statute.(6)

In an action of replevin, a party under whom the defendant make cognizance is, in general, an incompetent witness for the defendant, being the person really interested in the event of the cause, and in truth the substantial defendant. And in a case where there were two cognizances, one under the party beneficially interested, and the other under a trustee for him; the evidence of the latter was rejected, notwithstanding the absence of any beneficial interest on his part in the premises.(7)

(1) *Rhodes v. Ainsworth*, 1 B. & Ald. 87. See *post* as to the effect of the rule (by statute 54 Geo. III, c. 170, § 9), upon questions of this description.

(2) *Marsden v. Stanfield*, 7 B. & C. 815, 818. See *Rex v. Kirdford*, 2 East, 559.

(3) *Oxenden v. Palmer*, 2 B. & Ald. 236. See the provisions of stat. 3 & 4 Vic. c. 26, stated *infra*, p. 105.

(4) *S. C.*, and *R. v. Bishop Auckland*, 1 Ad. & Ell. 744. See this statute, *infra*, p. 102. See, also, p. 105.

(5) *Tothill v. Hooper*, 1 M. & R. 392. See 3 & 4 Vict. c. 26, *infra*, p. 105.

(6) See the words of the act, and by Lord Tenterden, 2 Barn. & Ad. 243, 244.

(7) *Golding v. Nias*, 5 Esp. N. P. C. 272. In a prior case, it appears that the wife of a party under whom cognizances were made, was admitted as a witness for the defendant; but no objection seems to have been taken, or any question raised as to her competency. *Johnson v. Mason*, 1 Esp. N. P. C. 89.

In the case of *Upton* agt. *Curtis*,⁽¹⁾ it appears that a party, under whom cognizance was made, was considered incompetent for the defendant, although that particular cognizance had been abandoned. But it has been settled in a very recent case, that where distinct cognizances are made under different parties, who do not appear to be in any manner connected in interest, if one of the cognizances be abandoned at the trial, the party, under whom it is made, is a competent witness for the defendant.⁽²⁾ Lord Denman, in delivering the judgment of the court, after observing that there was reason to suppose that the facts of the case of *Upton* agt. *Curtis* was not reported with perfect accuracy, said, the court were of opinion, that the offer to abandon the issue joined on the cognizance under the witness, was tantamount to consenting that a verdict should be found for the plaintiff on that issue.⁽³⁾

6. Witnesses liable to an action by one of the parties.

It is now proposed to notice an important class of cases, in which witnesses have been rejected as incompetent to give evidence in a particular suit, on account of their liability to a subsequent action by one of the parties to that suit. On this ground, in the case of actions against a master or principal, for the misconduct of a servant or agent of the defendant, such servant or agent has been generally rejected as incompetent for the defendant to disprove his own misconduct.⁽⁴⁾ In the numerous

(1) 1 Bing. 210.

(2) *King v. Baker*, 2 Ad. & Ell. 333.

(3) 2 Ad. & Ell. 339, 340. In the case of *Hart v. Horn* (2 Campb. 92), it was ruled that the declarations of a party under whom cognizance had been made, were inadmissible in evidence for the plaintiff. For another example of direct interest, see *Bland v. Ansley*, 2 N. R. 331.

(4) NOTE 637.—In an action against the defendant for so pulling down one of her own houses that the plaintiff's house was injured, held that the defendant's architect, retained to perform the work, was incompetent for her to prove that the injury was not occasioned by his own work. *Flanagan v. Drake*, 2 Fox & Smith, 200. So the coachman, in an action against another for an injury done by a cart to the coach while the coachman is driving, is not a competent witness for the plaintiff. *Kerrison v. Coatsworth*, 1 Carr. & Payne, 511. So a pilot is not competent for the captain of a steamboat, sued for running down a barge, the pilot steering at the time of the accident, though the captain was on board. *Hawkins v. Finlayson*, 3 Carr. & Payne, 305. The guard of a coach is not competent for the proprietors, sued for mismanaging it so that the plaintiff was struck by the luggage. *Whitmore v. Waterhouse*, 4 Carr. & Payne, 383. So the bailee of goods, levied upon by execution against him, is not competent for the bailor in an action against the sheriff. *Pleasants v. Rose*, 2 Mart. Lou. R. 114.

Where a vessel was seized for a violation of the non-importation act of March 1st, 1809, chap. 91, and there were strong circumstances to induce a presumption that the master was privy to the illegal importation of the goods which were found concealed on board the vessel, it was held that he was not a competent witness for the owners of the vessel, to prove his ignorance of the goods being on board. He had a direct interest to prevent a forfeiture, occasioned by his own illegal conduct; for the decree of condemnation would be good evidence in a suit brought against him by the owners. *The Hope*, 2 Gallison, 48.

But the mate is a witness for the master, in an action or reconvention by the owner against the latter for negligence; for the mate is not the servant of the master in such sense as shall ex-

cases of this description, which occurred before the passing of the statute 3 and 4 Wm. IV, 42 (see *infra*, p. 77), the rejection of the witness almost always proceeded on the ground of an indirect interest in the record with reference to a subsequent suit: for if the servant or agent has been guilty of the misconduct imputed to him, he will in general be liable to make good all damage sustained by the master or employer in consequence of such misconduct, and may be compelled by the latter, through the medium of an action, to repay any damages and costs recovered by the party injured: and in such action, the record in the first suit would be admissible for the purpose of showing the *quantum of damages* sustained by the master or employer in consequence of the witness's misconduct (the fact of his misconduct being first proved by other evidence), although it would not be evidence for the purpose of establishing the fact of the misconduct of the witness.(1) Now it has been seen, that, before the statute of the 3 and 4 Wm. IV, c. 42, it was a settled general rule, that a witness was incompetent to give evidence in any suit, where the record of the proceedings in that suit would be evidence for or against him in a subsequent action; and as it was clear, that in the cases above mentioned, the defendant in the first action might produce the record thereof as evidence in a subsequent action against the servant or agent, the latter when tendered as a witness in the first action, has generally been rejected upon the ground of this indirect interest in the record.

Thus, in the case of *Green v. The New River Company*,(2) which was an action to recover damages, sustained by the plaintiff through the alleged misconduct of a servant of the defendants, the servant was held an incompetent witness for the defendants, to disprove his own negligence. It was said by the court, that although a tradesman's servant is permitted to prove the delivery of goods on behalf of his master, this is an exception

clude him from testifying. He is rather, like the master, a servant to the owner. *Jordan v. White*, 4 Mart. Louisiana R. (N. S.) 335.

A distinction was taken in *Flanagan v. Drake* (2 Fox & Smith, 200, 205, 206, by Bushbe, C. J.), by which these cases are reconciled to those mentioned *ante*, viz: where the defendant's servants commit a trespass by his command, they are competent witnesses for him, they then being joint trespassers with him; otherwise where, being retained by him generally to do his lawful work, they negligently or injudiciously commit an injury not authorized by him. In the last case they are liable over to him, and, therefore, are not competent; for they are called to disprove the very negligence against which they undertook.

(A cartman who takes goods to a railroad company may prove the delivery (*Moses v. B. & M. R. R. Co.*, 4 Foster (N. H.) 71); and a clerk is a competent witness to prove that he has paid out his employer's money by mistake. *Burd v. Ross*, 15 Mis. 254. So an attorney is admitted as a witness for his client. *Bell v. Bell*, 12 Penn. State R. 235. But where a liability has accrued against an agent, so that he has a direct interest in establishing the demand against a party to the suit, a release of his liability becomes necessary. *Lewis v. Eastern Bank*, 32 Maine, 90; *Christy v. Smith*, 23 Vt. 663.)

(1) 4 T. R. 589.

(2) 4 T. R. 589.

to the general rule, proceeding merely from necessity;(1) and that this exception would not extend to actions arising from the misconduct of coastmen and sailors, in which cases the verdict against the proprietor might be given in evidence in a subsequent action by the latter against the servant, as to the *quantum of damages*, though not as to the fact of the injury; and so in the case then before the court, the verdict might be given in evidence in an action by the defendants against the witness, and therefore he was incompetent without a release.(2) So also in an action against a coach proprietor for negligence in the management of the coach, the guard, who appeared to be implicated in the alleged mismanagement, has been considered incompetent, without a release.(3) In an action against the captain and owner of a vessel for an injury occasioned by imputed mismanagement of the vessel, a pilot, who had the control of the vessel at the time, has been also considered incompetent to give evidence for the defendant.(4)

Upon the same principle it has been ruled, in an action against a principal for misconduct in the purchase of certain goods, that a broker, who had been employed by the defendant to make the purchase, was incompetent to disprove negligence in the transaction.(5) And in an action for an excessive distress, the broker who made the distress, has been considered incompetent to prove that it was not excessive.(6)

In like manner, in an action against a sheriff for a false return, the sheriff's officer, who has given security for the due execution of process (and is consequently liable over to the sheriff in case of misconduct), has been adjudged to be an incompetent witness to prove the correctness of the return.(7) But in a case where, in an action of this nature, an objection was made to the competency of an assistant to the sheriff's officer, upon the ground, that although the witness was not immediately liable to the sheriff, he was liable to his own employer, the officer, and that in an action against the officer the sheriff might give in evidence the record in

(1) See *post*, chapter on exceptions to the rule of incompetency from interest.

(2) 4 T. R. 590.

(3) *Whitmore v. Waterhouse*, 4 Car. & P. 383.

(4) *Hawkins v. Finlayson*, 3 Car. & P. 305.

(5) *Gevers v. Manwaring*, Holt, 139; *Christy v. Smith*, 23 Vt. 663.

(6) *Field v. Mitchell*, 6 Esp. 71.

(7) *Powell v. Hord*, 2 Lord Raym. 1411; S. C., 1 Stra. 650.

NOTE 638.—So in trespass or trover against a sheriff for levying on goods, the deputy who made the levy is not a competent witness for the defendant, for the deputy is accountable to the sheriff. *Harris v. Paynes*, 5 Litt. 105, 107, 108; *Whitehouse v. Atkinson*, 3 Carr. & Payne, 344. He is not admissible, though he be indemnified by the creditor. *Whitehouse v. Atkinson*, 3 Carr. & Payne, 344. But *quere* of this last case. (The deputy is bound by the judgment recovered against the sheriff, where he has due notice of the suit with an opportunity to defend; so that in an action brought by the sheriff on the bond given to him by his deputy, for misconduct of the latter, the judgment recovered against the sheriff is conclusive. *Thomas v. Hubbell*, 18 Barb. 9.)

the first action, and that the record of the second action would be evidence for the officer in a subsequent action against the witness, Lord Tenterden held, that this circuity of interest was no legal ground of exclusion. He observed, that the rule established and acted upon was, that in order to exclude a person called as a witness, the verdict must be evidence for or against him, and that an interest beyond this was to remote to establish incompetency.(1) In another case, the officer himself was rejected by Lord Tenterden as incompetent for the sheriff, even where he had received an indemnity from the execution creditor, and had not employed the attorney for the defence; on the ground, that, if there should be a verdict against the sheriff, the liability of the officer would be certain, and that he might never get paid on his indemnity.(2)

It has also been decided, in an action against the sheriff for a false return to a *fi. fa.*, which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, that the landlord is incompetent to prove the rent due; for if the action were to succeed, the witness would be liable to an action at the suit of the sheriff, in which the judgment in the former action would be evidence of special damage.(3) In this last case, it will be observed, the witness did not stand exactly in the situation of an agent employed by the defendant to do a particular act, and misconducting himself in the course of his employment; but the principle upon which he was rejected was the same as in the preceding cases—namely, that there would be a legal liability over to the sheriff, arising from the alleged misconduct of the witness in claiming rent, which, it was contended, was not really due, and that in a subsequent action by the sheriff against the witness, the record of the verdict would be admissible in evidence to enforce such liability.(4)

(1) *Clark v. Lucas*, Ry. & Mo. N. P. C. 32.

(2) *Whitehouse v. Atkinson*, 3 Car. & P. N. P. C. 344.

(3) *Keightley v. Birch*, 3 Campb. 521.

(4) NOTE 639.—A grantor whose deed is set up by the defendant in ejectment, is not competent for the plaintiff to prove it fraudulent, when, by avoiding the deed, the recovery of the plaintiff will enure to the common benefit of the plaintiff and witness; as where, by defeating the deed, the grantor would be tenant in common with the plaintiff of one-half of the premises claimed; for the verdict would be conclusive in an action for mesne profits, to a share of which the witness would be entitled. *Jackson ex dem. Hungerford v. Eaton*, 20 John. R. 478. A. sold a negro to B. and took his note with C., as security for part of the purchase money. Judgment was obtained on the note, but it was not satisfied; the court held, that in an action by B. against A. for a fraud in the sale of the negro, C. was an incompetent witness; for the judgment which he was sworn to obtain would come in as a set-off, on motion against the former plaintiff in favor of him and his principal. *M'Call v. Smith*, 2 M'Card, 375. *Quere.* Was not the surety's interest balanced? If he was compelled to pay, he would have a remedy over for the debt and all cost. It was said in this case that it is not necessary, to render a witness incompetent, that he should have a direct and immediate interest in the event of the suit. If he is to derive any advantage from it, it is enough. Although it be consequential only, he cannot be sworn. On an issue to try the right of property between the garnishee in a foreign attachment and the attaching creditors, any of the latter are not competent witnesses, though they assign or release their claims:

In most, if not in all the cases of this nature, which arose after the case of *Green agt. The New River Company*, and before the passing of the late statute of the 3 & 4 Wm. IV, c. 42, witnesses liable over to the defendant, were held incompetent to give evidence for him, for the reason before stated; namely, that the verdict might be given in evidence, in a subsequent action against the witness, to prove the *quantum of damages*. This was a sufficient ground for the rejection of the witness before the statute 3 & 4 Wm. IV, c. 42; but the 26th and 27th sections of that statute appear (as we have already observed), to have produced the effect of removing all objections to the competency of witnesses, which are founded on an *indirect interest in the record* as being admissible evidence in a subsequent action. And it therefore becomes material to ascertain, whether, in the class of cases now under consideration, the witness is or is not liable to objection, on the ground of a direct interest in the event of the particular suit.

It will be observed, that in all the cases which have been above cited and referred to, the witness was tendered on behalf of the defendant. And if no objection to his competency could have been made, except on the ground of the subsequent use of the verdict as evidence against him, it would seem to follow, that in all actions of a similar description, a servant, or agent, or other person liable over to the plaintiff, would be a competent witness, on his part, to prove that the injury complained of arose from

for the record will be evidence for or against them in an action for a wrongful attachment. *Forreter v. Guerrineau's Creditors*, 1 M'Cord, 304. In assumpsit by the holder of a promissory note, payable to F. or bearer, against the maker, the plaintiff called F., the payee of the note, as a witness to prove the execution of the note. Being objected to by the defendant, he stated that he transferred the note to one Cummings, in payment for a pair of horses, but at the risk of Cummings as to the solvency of the maker, and that he had no interest in the suit. Held, that the witness was responsible upon an implied warranty that the note was not forged. He therefore had a direct interest in establishing the fact he was called to prove; for, by obtaining a verdict for the plaintiff on the plea of non-assumpsit, he protected himself against his own warranty. *Herrick v. Whitney*, 15 John. R. 240. See *Shaver v. Ehle*, 16 John. R. 201; and *Murray v. Judah*, 6 Cowen's R. 484. But after the execution of the note has been proved by other testimony, he is competent. *Williams v. Matthews*, 3 Cow. R. 252; *Baskins v. Wilson*, 6 Cowen's R. 471. So, if he have been discharged from his debts under an insolvent law, he is thereby discharged from liability on his implied warranty, and is competent. *Murray v. Judah*, 6 Cowen's R. 484. Where in an action of trespass, the defence set up was that the *locus in quo* was a free and common fishery for all the inhabitants of Staten Island, and had been used by them as such during sixty years past; it was decided that another inhabitant of Staten Island was not a competent witness to prove the right of common. *Jacobson v. Fountain*, 2 John. R. 170; *Gould v. James*, 6 Cowen's R. 369, S. P. In trespass, *quare clausum fregit* and a justification, that the close is a free fishery for the inhabitants of O., one of the inhabitants is not a competent witness for the defendant. *Prewitt v. Tilly*, 1 Carr. & Payne, 140. In an action for customary toll for keeping up a capstern and rope in a cove, so that boats could land safely in bad weather, held, that a fisherman frequenting the cove was not a competent witness for the defendant. *Falmouth v. George*, 5 Bing. 286; S. C., 2 Mo. & Payne, 457. So copyhold tenants are incompetent to prove a right, within the manor, for copyholders to take timber for repairs. *Le Fleming v. Simpson*, 2 Mann. & Ryl. 169.

negligence or improper conduct on the part of the defendant; because, whatever might be the result of the action, the verdict could in no case be used as evidence for or against such witness for the plaintiff in any subsequent proceeding.

It has, however, been decided in several cases, that the plaintiff's servant or agent is equally incompetent to give evidence on behalf of the plaintiff, as the defendant's servant or agent is to give evidence on behalf of the defendant. Thus, in *Miller agt. Falconer*,⁽¹⁾ which was an action against the defendant for negligently running against the plaintiff's cart with a dray, the plaintiff's servant, who was driving the cart, was objected to as incompetent, on the ground that *prima facie* he was himself answerable to his master, and that he was interested in fixing the liability on the defendant, and the objection was allowed by Lord Ellenborough, who observed, that the witness certainly came to discharge himself, and therefore was incompetent without a release.

The same point was subsequently decided by the Court of Common Pleas, in the case of *Morish agt. Foote*.⁽²⁾ In this last case it was contended, that the witness was competent, because no use whatever could be made of the verdict as evidence against him in a subsequent action; and that the case was distinguishable from that of *Green agt. The New River Company*, on the ground, that there the witness was called on the part of the defendant, but here he was tendered on the part of the plaintiff; but the court decided, that the witness was incompetent, as having a direct interest in the event of the suit; for if the plaintiff obtained a verdict, the witness was placed in a state of security. In giving judgment in this case, Gibbs, C. J., referred to and recognized a prior *Nisi Prius* decision, in which the same principle had been acted on by Lord Kenyon,⁽³⁾ in a case where the action was upon a policy of insurance on the plaintiff's goods, and the right to recover depended upon the question, whether the ship was seaworthy or not. In order to prove the vessel was staunch, the plaintiff called the owner, who was objected on the ground that he exonerated himself from all liability by fixing the defendant. On the other hand, it was contended that it had been settled by the case of *Bent agt. Baker*, that a witness was competent in all cases, except where the verdict could be used as evidence for or against him. But Lord Kenyon said, it was held in *Bent agt. Baker*, that a witness was incompetent, not only in cases where the verdict would be evidence for or against him in another suit, but also where he was directly interested in the event of the particular suit; and that in the case then before him the witness was directly inter-

(1) 1 Campb. 251.

(2) 8 Taunt. 434; 2 Moore, 508.

(3) *Rothero v. Elton, Peake*, 84. See by Gibbs, C. J., 8 Taunt. 457. See also *De Symonds v. De la Cour*, 2 N. R. 374, in an action on policy of insurance, the captain is incompetent to give evidence on the question of deviation.

ested in procuring a verdict for the plaintiff.(1) So in a later case it was ruled at *Nisi Prius*, that in an action for an injury to a stage coach by a cart, the coachman was an incompetent witness for the plaintiff without a release;(2) and in two recent cases of a similar nature the same point has been ruled in the same way.(3)

In the recent case also of *Boorman agt. Brown*,(4) an action against a broker for negligently delivering goods of the plaintiff without payment, the Court of Queen's Bench decided, that a person employed by the plaintiff to attend to the delivery of goods under the orders of brokers, was not a competent witness on behalf of the plaintiff, to prove that the delivery had been directed by himself under the orders of the defendant. If the act, from which the damage accrued, was done by the witness without the plaintiff's authority, he would have been responsible; he was therefore directly interested in the event of the suit, and in fixing the liability upon the defendant.

It appears to be established by the class of cases last cited,(5) that when a witness produced for the plaintiff is so connected with the transaction in question, that a verdict for the plaintiff would entirely relieve him from all liability, he will be incompetent, as being directly interested in the event of the cause. To this class of cases the stat. 3 and 4 Wm. IV, c. 42, seems not to apply; and the witness would still be considered incompetent.(6) But in the other class of cases before cited,(7) when the witness produced on the part of the defendant was thought to be incompetent, his interest was of a different kind; his liability would not have been established by a verdict against the defendant, and he was not interested, except that the verdict might be used against him to show the amount of damages resulting from his misconduct. This class of cases appears to be within the scope and meaning of the stat. 3 and 4 Wm. IV, c. 42;(8) and if such cases should occur again, the witnesses, it is conceived, would be admitted as competent within the provisions of that act. In the case of *Yeomans agt. Legh*,(9) the Court of Exchequer decided, in an action against the defendant for the negligent driving of his carriage, that the defendant's servant who drove the carriage, was a competent witness for the defendant. "The effect of the clause in the statute," said Mr. Baron Parke, "is to make the witness competent, when the only interest is that the verdict

(1) *Peake*, 85. See also *Fox v. Lushington*, Id. 85, n., S. P.

(2) *Kerrison v. Coatsworth*, 1 C. & P. 645.

(3) *Wake v. Lock*, 5 Car. & P. 454; *Sherman v. Barnes*, 1 Moo. & Rob. N. P. C. 69. In both these cases, the authority of *Morish v. Foote*, *supra*, was expressly recognized.

(4) 9 Add. & Ell. 487.

(5) Pp. 64, 65.

(6) See *infra*, 80.

(7) Pp. 59-64.

(8) See *infra*, p. 79.

(9) *Yeomans v. Legh*, 2 M. & W. 419.

may be used for or against him. In this case there is no interest, except that the verdict might be used against him in an action by his master, to show the amount of the damages recovered.”(1)

There are several other cases remaining to be noticed, in which witnesses have been rejected as incompetent, on the ground of an interest arising from a liability over to one of the parties to the suit; in some of which cases the interest is sufficiently clear, but in others its precise nature and extent are not easily discoverable; neither, indeed, is it easy to reconcile some of them with the principles upon which the courts have acted in other cases.

In an action between the vendor and purchaser of an estate in which the title to the estate comes in question, a person who had previously sold the estate, and who is liable to the vendor if the title prove defective, is incompetent to give evidence in support of the title.(2) But if the former vendor sold the estate without any covenant for good title or warranty, he will be competent;(3) for in this case the witness is under no liability.(4)

(1) The case of *Yeomans v. Legh*, is here stated, as being immediately connected with the cases above cited. It should also be referred to in p. 79, *infra*. The question of competency decided *against* the witness in *Green v. The New River Company*, *Whitmore v. Waterhouse*, *Hawkins v. Finlayson* (see pp. 60, 61, *supra*), would now, conformably with *Yeomans v. Legh*, be decided in favor of the witness. The reader is referred to a note on this subject in Mr. Smith's Selection of Leading Cases, Vol. 2, p. 52, where all the cases are collected.

(2) 2 Roll. Abr. 685.

(3) *Busby v. Greenslade*, 1 Str. 445.

(4) NOTE 640.—*Major v. Deer*, 4 J. J. Marsh. 586, S. P. In trover for a negro, where the witness swore that he, as constable, sold and bid off the negro at the instance of one Bell, and then, under Bell's direction, gave a bill of sale of the negro to the defendant, the constable was held a competent witness for the defendant. *Reid v. Powell*, 2 Murph. 53. This was probably because the circumstances did not raise any implied warranty on the part of the constable, but only on the part of Bell, who was his principal. A vendor is competent for the vendee in a suit against the latter by his vendee, upon a warranty of soundness. *Lightner v. Martin*, 2 McCord, 214. A judgment debtor whose goods have been sold on execution, is competent for the levying officer or purchaser who is sued by another who claims the goods; for he does not stand in the relation of a warrantor to the purchaser. *Lathrop v. Muzzy*, 5 Greenl. R. 451. Though, where the debtor had sold the goods before the levy and got pay, he would not be competent for the levying officer, for he would thus be swearing the goods a second time into his pocket. *Bailey v. Foster*, 9 Pick. 138. Yet in such a case he was received to testify for one claiming under his vendee, though he (the debtor) had conveyed with warranty; for the second vendee did not dispute, but affirmed the title of the first vendee, and the sole question respected fraud upon creditors. But the vendee also released the debtor. *Bagland v. Wickwire*, 4 J. J. Marsh. 530, 531, 532.

The payee of a negotiable note, the maker having become insolvent, transferred it to the plaintiff, with whom the understanding was that the payee could and would swear to a new promise by the maker. Yet, in an action by the plaintiff against the maker, held that this understanding would not destroy the competency of the payee (he being released by the plaintiff) as a witness of the plaintiff, though the witness's credit was open to observation. *Mooré v. Viele*, 4 Wend. 420.

(The rule stated in the text is fully supported (*Elliott v. Boren*, 2 Sneed (Tenn.), 662; *Jordan v. Faircloth*, 14 Geo. 544); and the principle applies equally in the case of a sale of chattels, with warranty. *Gunn v. Mason*, 2 Sneed, 637; and *Burke v. Clark*, 2 Swan (Tenn.), 310.)

It has been decided, that if the buyer of a horse, warranted to him, resell with a warranty, and upon being sued offers the defence of the action to the person from whom he bought, but who does not interfere, the buyer may recover against him the costs of the action, as part of the damage occasioned by the breach of warranty.(1) In the case of Briggs agt. Crick,(2) it is said to have been ruled, that a former proprietor of a horse, who had sold with a warranty, was competent, without a release, to prove the soundness; and in a later case Lord Tenterden appears to have ruled to the same effect.(3) But in a very recent case at Nisi Prius, in which the same question arose, and the case of Briggs agt. Crick was cited in support of the witness's competency, Mr. Justice Alderson was of opinion, that as the effect of a verdict would be to relieve the witness from an action at the suit of the defendant, to whom he had sold and warranted the horse, he was incompetent to give evidence on the defendant's behalf.(4)

In the case of Nix v. Cutting,(5) it was decided, in an action of trover for a horse alleged to be the plaintiff's property, that a witness was competent to prove, on the part of the defendant, an agreement between the plaintiff and the witness, that he (the witness) should take the horse as a security for a sum of money due to him from the plaintiff, and should sell it if the money were not repaid on a day certain, and that, on default of payment, the witness sold the horse to the defendant: an objection was taken against the witness, that by selling the horse, he had warranted it to the defendant to be his property, to whom he would be liable over, if the plaintiff succeeded in the action; but the court held, that this was not a sufficient objection, and said, that as between the witness and the plaintiff, and the witness and the defendant, the verdict obtained upon his testimony in the cause would be of no avail.(6) So also in the case of Ward v. Wilkinson,(7) it was decided, in action of trover for goods in the de-

(1) *Lewis v. Peake*, 7 Taunt. 153.

(2) 5 Esp. 99.

(3) *Baldwin v. Dixon*, 1 Mood. & Rob. 50.

(4) *Biss v. Mountain*, 1 Mood. & Rob. 302.

(5) Taunt. 18.

(6) 4 Taunt. 20. See case of *Larbalestier v. Clark*, *post*, 74.

(7) 4 B. & Ald. 410.

NOTE 641.—But *quere* of the case of *Nix v. Cutting*, cited in the text if there was an implied warranty to the defendant; which the counsel asserted, and it was not denied.

In an action for a breach of warranty of title to personal property, the person claiming the goods against the vendor warranting, is a competent witness for the vendee. *Armstrong v. Percy*, 5 Wend. 535. So in an action for work and labor, it would seem that the person who actually did the work is competent for the defendant to show that the work was done by the witness, and not the plaintiff; so that the witness, not the plaintiff, is entitled to pay for the work. *Martin v. Jackson*, 1 Carr. & Payne, 18. And in ejectment, the grantee of one under whom the plaintiff claimed was allowed as a witness for the defendant, to show title out of the plaintiff. *Kline v. Beebe*, 6 Conn. R. 494.

In *Pettengil v. Brown* (1 Cain R. 168), the borrower who was received to testify had paid the

defendant's possession which were claimed by the plaintiff, that a witness was competent to prove that the goods belonged to him, and had been fraudulently obtained from him by the plaintiff; because the verdict could not be evidence for or against the witness in any subsequent action; and the court in this case recognized the decision of *Nix v. Cutting*.⁽¹⁾ But it does not appear, that in this case of *Ward v. Wilkinson* any question arose as to incompetency on account of liability over to either of the parties, for the witness had not sold the goods to the defendant (as in the former case), but was called to prove that they actually belonged to himself at the time of trial.

7. Witnesses liable to a party for costs of the action.

There are several cases, of actions on bills of exchange, in which witnesses have been rejected as incompetent, from being liable over to one of the parties to the suit. The general rule is, that, in actions brought against parties to such negotiable instruments, other parties to the bills are competent to give evidence, either for the plaintiff or defendant; and their competency depends upon the principle of an equal liability on either side. But an exception to this rule prevails in the case of actions on accommodation bills; there the party, for whose accommodation the defendant has put his name to the bill, is incompetent to give evidence to defeat the plaintiff, being liable over to the defendant not merely for the amount of the bill, but also for the costs of the action. Thus in *Jones v. Brooke*,⁽²⁾ a leading authority on this subject, in an action against a party who had accepted a bill for the drawer's accommodation, it was decided, that the drawer was incompetent, on the part of the defendant, to prove that the plaintiff held the bill on an usurious consideration. It was argued in this case, that the drawer was indifferent, as having an equal liability on either side; for if the defendant succeeded, the witness would be liable to the plaintiff (the holder), and if the plaintiff succeeded, the witness would be liable to the defendant, who had accepted the bill for his benefit. But the court said, that the witness had an interest to protect the acceptor, to whom he would be liable, not only for the amount of the bill, but also for all damages which the acceptor might sustain by being sued for it: the

debt; but in *Commonwealth v. Frost* (5 Mass. R. 53), he was received as competent without. See per Case, J., in *Wilson v. Lenox*, 1 Cranch, 201.

(An agent to sell who has exceeded his authority is competent to testify for the principal. *Towle v. Leavitt*, 3 Foster (N. H.) 360. But as the person who sells personal property in his possession, warrants the title, he is not a competent witness in a suit against his vendee involving the title. *Whitney v. Heywood*, 6 Cush. 82. On the other hand, one who gives property to another, is competent notwithstanding he has volunteered to warrant the title. *Gunn v. Mason*, 2 Sneed (Tenn.), 637; *Easley v. Dye*, 14 Ala. 158, 395. A previous vendor of a chattel with warranty, is competent in an action against the defendant for a like warranty of the same. *Mulvany v. Rosenberger*, 18 Penn. State R. 203.)

(1) See by Holroyd, J., 4 B. & Ald. 412, 413.

(2) 4 Taunt. 463; *Hardwicke v. Blanchard*, Gow, 113, S. P.

drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation.(1)

(1) NOTE 642.—See *Hobby v. Brown*, 16 John. R. 70, where the same rule is laid down. The rule admitting parties to negotiable paper as competent witnesses, for or against other parties, between whom a suit is pending in respect to the same paper, is, in England, very comprehensive. We have seen *ante* (note 58), that they are not excluded because they are called to impeach the paper as void in its origin, or discharged or avoided by matter *ex post facto*. And by the adoption of another doctrine, noticed at the close of the previous note (626), that a remedy over shall equalize and balance the interest of a witness, the broad general rule is received as laid down by Bayley, in his *Treatise on Bills* (4 London ed. 422; Boston ed. 1826, 374; that the indorser is competent for the plaintiff or defendant, in an action either against drawer or acceptor; for the plaintiff, because, though the witness is a warrantor, yet he has his remedy over against the drawer or acceptor; for the defendant, of course, because his interest, if anything, is opposed to him. *Shuttleworth v. Stephens*, 1 Camp. 408; *Venning v. Shuttleworth*, Bayl. on Bills, 4 Lond. ed. 422; Boston ed. 1826, 374; *Charrington v. Milner*, Peake N. P. C. 6; *Jordaine v. Lashbrooke*, 7 T. R. 601; *Richardson v. Allan*, 2 Stark. 334; *Stephens v. Lynch*, 2 Camp. 332; S. C., 12 East, 58.

The same doctrine of course extends to a promissory note, where the indorser may also be a witness for or against the maker. *Post*, 2 Phil. Ev. 20, 21.

A joint maker not sued is competent for the holder against the co-maker, as he is either liable to the plaintiff for the whole demand, or has a remedy over for contribution against his co-maker; and so is even competent for the latter. *York v. Blott*, 5 Maul. & Selw. 71. The drawer is of course competent for the acceptor. *Pool v. Bonsfield*, 1 Campb. 56.

Within the principle cited above from Bayley, the drawer is also a competent witness for either plaintiff or defendant. *Dickinson v. Prentice*, 4 Esp. R. 52; *Rich v. Topping*, Peake N. P. C. 224; *Brand v. Ackerman*, 5 Esp. R. 119; *Hubner v. Richardson*, Mann. Dig. Witness, pl. 98; *Humphrey v. Moxon*, Peake N. P. C. 52; *Barber v. Gingell*, 3 Esp. R. 62.

But I forbear to enlarge on this subject, the rather as it is more particularly considered hereafter. I have said so much, because I have thought it better in this place to set down most of the American and some of the later English cases here, so that the more narrow grounds on which many of the American courts have proceeded may appear.

The extent of exclusion, because the parties shall not speak against paper to which they have given the sanction of their names, will appear *ante* (note 58), and for a further application of the rule of balanced interest to these parties, see the cases cited in the previous note, 626, especially *Lowber v. Shaw*, *Hall v. Hale*, *Cushman v. Loker*, *Emerson v. The Providence Hat Manufactory*, *Martineau v. Woodland*, *Hewitt v. Thompson*, *Cropley v. Corner*, *Baker v. Briggs*, and *Scott v. M'Lellan*, cited *passim* in that note.

Most of the American cases shut out the indorser, unless he be released, as a witness for the holder against the drawer, acceptor or maker. *Baskins v. Wilson*, 6 Cowen's Rep. 471; *Barnes v. Ball*, 1 Mass. Rep. 73; *Murray v. Carrett*, 3 Call. 373; *Steinmits v. Currie*, 1 Dall. 269. Even to take the case out of the Statute of Limitations (*Baskins v. Wilson*, *supra*), or against a prior indorser. *Talbot v. Clark*, 8 Pick. 51. A prior indorser is not competent against the drawer, in favor of the witness's indorsee, unless the witness indorsed without recourse to himself. *Cowles v. Harts*, 3 Conn. Rep. 516. So the drawer is not competent for the indorser against the acceptor; for the drawer is subject to charges, interest and costs, which the acceptor would not be bound to answer to him. *Scott v. M'Lellan*, 2 Greenl. 199, 204.

New York and Connecticut, however, seem to be approaching the English rules cited *supra* from Bayley. *Barretto v. Snowden*, 5 Wend. 181; *Hall v. Hale*, 8 Conn. Rep. 336.

The maker or acceptor is in general competent between drawer and holder, or indorser and holder, for either party. *Barnwell v. Mitchell*, 3 Conn. Rep. 101; *Hubby v. Brown*, 16 John. Rep. 70; *Skelding v. Warren*, 15 John. Rep. 270; *Williams v. Walbridge*, 3 Wend. 415, 416; *Abat v. Doliole*, 3 Mart. Lou. Rep. 657; *Marburgh v. Canfield*, 4 Mart. Lou. Rep. (N. S.) 539 540; *Pierce v. Butler*, 14 Mass. Rep. 303, 312, *contra*. The maker or acceptor is especially com-

petent, if judgment be already obtained against him at the suit of the holder. *Columbia Bank v. McGruder*, 6 Har. & John. 172, 178.

The assignor of a note or bill payable to bearer, though not indorsed, is not admissible for the holder, by reason of the implied warranty that the note is genuine; and this, though the note be taken by the holder expressly at his own risk. *Herrick v. Whitney*, 15 John. Rep. 240; *Shaver v. Ehle*, 16 Id. 201; *Murray v. Judah*, 6 Cowen's Rep. 484. Otherwise, after the execution of the note is fully proved by others. *Williams v. Matthews* (3 Cowen's Rep. 252), and *Rice v. Stearns* (3 Mass. Rep. 226), held an indorser to indorse at his own risk, competent against the maker. *Barker v. Prentiss*, 6 Mass. Rep. 430, S. P. So if it do not appear that he is charged as indorser, if he be not called to prove the genuineness of the note. *Barretto v. Snowden*, *supra*. The following cases depend on some peculiar relation held by the witness.

A master of a vessel who had drawn a bill on his owners for money advanced by the plaintiff for the necessary expenditures of the vessel, is a competent witness for the payee, in an action brought by the payee against the owner for the money advanced, for he is alike liable to both parties. *Milward v. Hallet*, 2 Cain. Rep. 77. If a note be made and indorsed for the accommodation of the maker, he is not competent for the indorser, for, in that case, the indorser being regarded as a surety, in the event of a recovery by the plaintiff, the maker would not only be liable to the indorser for the amount of the note, but also for the costs of the present suit. *Hubby v. Brown*, 16 John. R. 70, per Spencer, J.; *Pierce v. Butler*, 14 Mass. R. 303. In answer to an action upon a bill drawn by the defendant, and by him indorsed to the plaintiff, the acceptor, who accepted to discharge a debt he owed the drawer, cannot be called to prove it was indorsed upon a consideration which failed, through the default of the plaintiff; for though he may be indifferent as to the principal sum, he is liable to the defendant for the costs. *Edmonds v. Lowe*, 2 Mann. & Ryl. 427. In an action by the indorsee against the acceptor, the drawer is competent for the defendant, the bill not being accepted plainly for the drawer's accommodation, though on a doubtful state of accounts between him and the acceptor. *Bagnall v. Andrews*, 7 Bing. 217. On a bill filed by the maker to avoid the usurious interest alleged to have been included in a note made by him to G., and indorsed by G. to A., to enable G. to raise money by loan; G. was held incompetent as a witness for the maker; for these facts appearing on his deposition, his interest was not balanced. He was liable to the maker on recovery against him, for the face of the note and costs; but to H., the indorsee, for the same, deducting the usurious interest. *Mosely v. Armstrong*, 3 Monroe, 287, 288. The drawer of a bill was held competent as a witness for the indorsee against the acceptor, though the latter had taken the benefit of the Insolvent Act, and had set down the witness as a creditor; for the judgment against the acceptor would be no bar to an action against the drawer. *Cropley v. Corner*, 4 Carr. & Payne, 21.

Any party to the paper, even if he be a party to the suit, or any other, be his interest what it may, is received in many of the American courts to prove the loss of the instrument, in order to let in parol proof of its contents. *Chamberlain v. Gorham*, 20 John. R. 144. But this is a general rule in respect to the loss of any papers, as will be hereafter noticed. *Jackson ex dem. Livingston v. Frier*, 16 John. R. 193; *Seekright ex dem. Wright v. Bogan*, 1 Hayw. 176, 178. The cases to this point were fully considered in note 19, *ante*.

By the foregoing cases, it appears that the courts are not consistent in their decisions, as to the competency of a party to a bill or note. As a general rule he is, in England, a competent witness, for he is equally liable, let the suit terminate as it will, and for nothing beyond the face of the paper; not for costs, unless the party for whom he is called, became a party for his accommodation, or he has otherwise made himself liable by some special undertaking. The American cases mostly come short of that, especially as to the competency of a drawer or indorser, for a subsequent holder. We are inclined to believe, however, that there is a tendency to the adoption of the English rule. True, the holder, by a recovery and *satisfaction*, discharges the drawer or indorser; but the same thing may be said as between a plaintiff in tort and the joint wrongdoer of the defendant. Yet he is competent for the plaintiff, because *non constat*, that the plaintiff will proceed to obtain satisfaction. He is held competent in England, even though the mere recovery will be a bar in his favor. *Abbott, C. J.*, in *Blackett v. Weir*, 5 Barn. & Cress. 385; *Hall v. Curzon*, 9 Id. 646; *Ashurst, J.*, in *Walton v. Shelly*, 1 T. R. 301, 302; *Wilde, J.*, in *Eastman v. Winship*, 14 Pick. 47. In case of the drawer or indorser, too, beside the verdict in favor of which he is called to testify being no bar, he usually has a remedy over. 1 Saund. on Pl. & Ev. 315,

316, who speaks of the remedy over as one reason. This was commented upon and repudiated as unsound by Saffold, C. J., in *Kennon v. M'Rea* (2 Porter, 393, 394). He added (at p. 399) that the indorser, on the holder recovering, would probably (and of this there seems to be no doubt. *Geoghegan v. Reid, infra*) be entitled to all the benefits of the judgment by right of cession or subrogation. The witness was therefore held to be incompetent. The question was much and ably discussed in *Reid v. Geoghegan* (1 Miles, 204, 205, 206, District Court of Philadelphia), where the English rule was adopted. But the judgment was reversed on error, by the Supreme Court, who also went much on the ground that the witness was aiding to obtain a judgment to which he was entitled by right of subrogation or substitution. *Geoghegan v. Reid*, 2 Whart. 152, 154. The rule as laid down by Chief Justice Saffold in *Kennon v. M'Rea (supra)*, is that "an indorser of a note or bill is incompetent, in respect to his interest, as a witness in favor of a subsequent indorsee, to charge any party to the instrument whose liability is anterior to his own." It is not to be denied that he concludes according to the general current of American cases directly upon the point.

They certainly either decide or assume that neither a drawer of a bill, nor a prior indorser of a bill or note, is competent for the holder, in an action against any other party, without a release or other discharge. *Carroll v. Meeks*, 3 Porter, 226; *Geoghegan v. Reid*, 2 Whart. 152; *Juniata Bank v. Brown*, 5 Serg. & Rawle, 226, 232; *Cropper v. Nelson*, 3 Wash. C. C. R. 125; *Cowles v. Harts*, 3 Conn. R. 516; *Brown v. Yance's Ex'rs*, 2 Monroe, 137; *Duncan v. Pindell*, 4 Bibb, 330; per Mellen, C. J., in *Pingree v. Warren*, 6 Greenl. 457, 459; *Murray v. Marsh*, 2 Hayw. 290; *Billingsly v. Knight*, 2 Tayl. 103. And this was held to be especially so where the witness had transferred the note in payment of a precedent debt to the plaintiff; for on failure of the suit, the debt would revive. *M'Ginn v. Holmes*, 2 Watts, 121. And see *Watson's Ex'rs v. McLaren*, 19 Wend. 562, per Cowen, J. What we mean, therefore, in speaking of a contrary tendency is, that a multitude of other cases contain principles which, applied to the drawer or indorser, would bring him within the English rule. Some of these we have just noticed, especially the principle which receives one joint wrongdoer to testify against another, though the recovery may discharge the witness. This principle was expressly adopted in Massachusetts, in *Eastman v. Winship*, stated *infra*; and applied to a party whose name was upon a promissory note; the court thus going the whole length of the English rule. *Vid.* 14 Pick. 47. And see *Winship v. The United States Bank*, 5 Pet. 529, where a like question was argued, but the court were divided. No case pretends that the verdict in the pending cause can be used as evidence for or against the witness; and, with deference, we do not see the force of the argument against competency in Pennsylvania and Alabama, arising from the right of subrogation. The right certainly exists, and we have no doubt that it should universally be enforced by rule, as in Pennsylvania. *Burns v. The Huntington Bank*, 1 Pennsylv. R. 395; per Sergeant, J., in *Geoghegan v. Reid*, 2 Whart. 154. This, however, would not be done till the drawer or indorser should have paid the holder the principal, interest and costs. It is merely facilitating the witness's remedy over, and thus rendering the balance of interest more complete. Nothing is directly and certainly gained or saved by the witness's testimony. All is contingent. If the force of a remedy over be denied as creating a balance, we answer that it has been recognized by many cases (*ante*), and some very recent ones. *Lake v. Auburn*, 17 Wend. 18, citing and explaining *Gregory v. Dodge*, 14 Wend. 593, but doubted in *Allen v. Hawks*, 13 Pick. 79, 85. Saffold, J., admits in *Kennon v. M'Rea (supra)*, that it is recognized in England. The admissibility of the witness may be maintained independent of this principle; but if this be considered available, facilitated as it is, in operation, by a prompt subrogation, the argument seems to be complete. See per Cowen, J., in *Commercial Bank of Albany v. Hughes*, 17 Wend. 97; *Descadillas v. Harris*, 8 Greenl. 298.

Taking the cases for law which proceed upon the least comprehensive ground of competency, still a party to the paper is recognized as a very common recourse for testimony. The objection does not apply to an indorser subsequent to the plaintiff. Per Saffold, Ch. J., in *Kennon v. M'Rea*, 2 Porter, 393; *Lonsdale v. Brown*, 3 Wash. C. C. R. 404, 405. And see *Wendell v. George*, R. M. Charl. 51. And so of a prior indorser, who indorses "without recourse" (*Cowles v. Harts*, 3 Conn. R. 516; *Billingsly v. Knight*, 2 Taylor, 103; per Saffold, J., in *Kennon v. M'Rea, supra*; *How v. Thompson*, 2 Fairf. 152); or at his own risk (*Watson's Ex'rs v. McLaren*, 19 Wend. 558, 561); or has been released or otherwise discharged by the holder. *Duncan v. Pindell*, 4 Bibb,

330; Juniata Bank, &c., v. Brown, 5 Serg. & Rawle, 226. And without being discharged, he was held competent to repel a claim of set-off, which the defendant had interposed as valid against the witness while he was holder. Here he was received on the ground of a balanced interest. Zeigler v. Gray, 12 Serg. & Rawle, 42, 43, 44.

In an action by the holder against the acceptor or maker, the drawer or any indorser is a competent witness for the defendant. Spring v. Lovett, 11 Pick. 417; Stone v. Vance, 6 Ham. 266; Adams v. Carver, 6 Greenl. 390, 394. But not if the maker signed for the indorser's accommodation, especially if he be called to show a payment made by him to the holder, even though he may not have been charged by demand and notice, for he is liable without. Letson v. Dunham, 2 Green's R. 307, 310. The courts in Pennsylvania, however, exclude the drawer and indorser in such case, though they admit that the exclusion is contrary to the English and American cases generally. Elias v. Teill, 1 Miles, 272. He was rejected in this case on the positive authority in that state of Sterling v. Marietta, &c., Trading Co., 11 Serg. & Rawle, 179, and Rhodes v. Lent, 3 Watts, 365.

But all the cases must be taken with the qualification that the party who calls the witness did not become a party for the witness's accommodation. If he did, the witness being liable over to him, not only for the principal but for costs, is incompetent without a release, of the costs at least. The case stands on the footing of a surety calling his principal. Cowles v. Wilcox, 4 Day, 108; Haig v. Newton, 1 Rep. Const. Court, 423, 432, in connection with Chur v. Keckely, 1 Bail. 479, 481. These were cases of a holder against an indorser, the maker being offered as a witness for the latter. The witness would clearly have been competent, independent of the fact that the defendant indorsed as his surety (see also Letson v. Dunham, *supra*, and Watson v. Minchin, *infra*); and he is generally, in such case, equally a witness for the plaintiff, even to show that a blank left by mistake was filled by the witness according to the intent of the parties. Boyd v. Brotherson, 10 Wend. 93.

In an action by an indorsee against W., on two notes, one made by W. and indorsed by J.; and the other made by J. and indorsed by W., J. was held to be a competent witness for the plaintiff, though W. had released him. Eastman v. Winship, 14 Pick. 44, 47, 48. In one case, it was held that, in an action by the holder against the surety alone, a co-maker with his principal, that the latter was a competent witness for the defendant, on the ground that his interest was balanced. Freeman's Bank v. Rollins, 1 Shepl. 202, 205. In a like case he was released. Harmon v. Arthur, 1 Bail. 83. In a like case, Gaselee, J., directed the defendant to release the witness from all claim for costs. Perryman v. Steggall, 5 Carr. & Payne, 197.

In suits by indorsees against indorsers of notes, the maker is of course a competent witness for either party (Venning v. Shuttleworth, Bayley on Bills, 536 (5th ed.); Levy v. Essex, Chit. on Bills, 413 (7th ed.); and in Watson v. Minchin (Jones' Exch. R. (Irish), 583), he was held competent in an action by the indorsee against the indorser, to prove that the note was given for the defendant's accommodation; and that so he was not entitled to notice of its dishonor. A partner who had signed a note in the partnership name, his copartner being sued alone, was held competent for the defendant, to prove that the note was given on a consideration for his own exclusive benefit, with notice to the plaintiff of that fact. Robertson v. Mills, 2 Harr. & Gill, 98. In assumpsit by the holder of a bill against the drawer, an indorser is a competent witness for the defendant. Wendell v. George, R. M. Charlt. 51. In assumpsit by the holder against the maker, on a note payable to A. or bearer, and by him indorsed to B., but declared on as delivered directly from the payee to the plaintiff, the court said that if B. had delivered back the note to A., and he had then delivered it to the plaintiff, B. would have been a competent witness for the plaintiff. Carroll v. Meeks, 3 Porter, 226, 230.

(Interest in the event of the suit disqualifies parties to bills and notes as in other cases, and with similar qualifications. A remote interest does not disqualify (Barney v. Newcomb, 9 Cush. 46); nor does a balanced interest. Farmers' & Mechanics' Bank of Michigan v. Griffith, 5 Hill R. 476. If the indorser has not been charged, he is not at all interested in a suit against the maker of a note (Barretto v. Snowden, 5 Wend. 181); and it has been held in New York that his interest is not so certain and direct as to render him incompetent in a suit against the maker, though properly charged. 5 Hill R. 476, *supra*. *Contra*, Hatz v. Snyder, 26 Penn. State R. 511; Smithwick v. Anderson, 2 Swan, 573. Being excluded on the ground of his interest, the statute renders him competent as a witness. Calkins v. Packer, 21 Barb. 275.)

So also it has been ruled at Nisi Prius, that in an action by the indorsee against an accommodation indorser of a bill, a witness who was indebted to the plaintiff, and for whose accommodation the defendant indorsed the bill as a security for the debt, is incompetent to defeat the plaintiff, for he is liable to indemnify the defendant against the costs of the action.(1)

So in an action on a bill of exchange against the drawer, where the question was, whether the bill, as the defendant maintained, had been delivered by one A. B. to the plaintiff to be discounted, or whether it had been delivered in payment for goods bought by A. B. of the plaintiff, Lord Chief Justice Gibbs held, that A. B. was not a competent witness for the defendant, to prove that the former was the case; for if the witness had received the bill merely to get it discounted, and instead of doing so had pledged it for his own debt, he would be liable for the costs of the action, as special damage resulting from his breach of duty.(2) And in a more recent case, where the action was brought by the indorsee of a bill against the drawer, and a question arose, whether the plaintiff had received the bill from the acceptor in discharge of a debt due from him, or whether, as the defendant alleged, the bill had been accepted for a debt due from the acceptor to the defendant, and had been delivered to the acceptor that he might get it discounted, which acceptor had delivered the bill to the plaintiff on condition that the latter would get cash for it, but this the plaintiff had neglected to do, it was decided, that the acceptor could not be examined as to these facts on the part of the defendant; for although he was uninterested as to the amount of the bill itself (being liable on both sides), yet he was interested further as to the costs, against which he would have to indemnify the defendant, if the plaintiff got a verdict.(3) In the latter of these cases the witness was a party to the bill, and in the former he was not a party, and in neither of them were the circumstances exactly the

(1) *Bottomley v. Wilson*, 3 Stark. 148.

(2) *Harman v. Lasbrey*, Holt N. P. C. 390.

NOTE 643.—One who borrows money as the assumed agent of another, drawing a bill upon his pretended principal for the amount, which is protested for non-acceptance, is not a competent witness for the lender in an action by him against such principal for the money lent. *Shiras v. Morris*, 8 Cowen's R. 60. The witness, by charging the defendant, would exonerate himself. And so where an officer had, as he alleged, taken property on an execution of less amount than the debt, and relinquished it to the debtor, the maker of a promissory note; in an action against the indorser of the same note, the officer was held inadmissible as a witness to prove the relinquishment, as this would go to discharge him, by subjecting the indorser. *Sheldon v. Ackley*, 4 Day, 458. So where the plaintiff sued the defendant, on an alleged agreement to pay for A.'s board, while A. was a laborer with the defendant, A. was held not competent as a witness for the plaintiff. *Emerton v. Andrews*, 4 Mass. R. 653. But this case was strongly contested by the court, in *Marquand v. Webb*, 16 John. R. 95.

(One who acts as an agent for another may prove his authority, given to him by parol (*Gould v. Norfolk Lead Co.*, 9 Cush. 338); and assuming to sign a note for another person, he may show that he acted without authority. *St. John's Adm'r v. McConnell*, 19 Miss. (4 Bennett) 38.)

(3) *Edmonds v. Lowe*, 8 B. & C. 407.

same as in the before-mentioned cases of accommodation bills; but the principle upon which the witness was rejected, appears to be the same in all these cases, viz: a liability to indemnify the defendant against the costs of an action, to which he had been subjected through the act or default of the witness.

This principle was recognized as fully settled, in the late case of *Larbalastier v. Clark*,⁽¹⁾ where the defence in an action for goods sold and delivered was, that a third person had bought the goods of the plaintiff and sold them to the defendant on his own account, and had been paid for them by the defendant, and he was tendered as a witness to prove these facts on the defendant's behalf. The Court of King's Bench thought, that under the particular circumstances of the case the witness was competent, as it did not appear that he had acted in the transaction in such a manner as to render himself liable to the defendant for the costs of the action, if the plaintiff obtained a verdict; but they were of opinion, that if the witness had appeared to have acted fraudulently in the matter, so as to incur this liability to costs, he would not have been competent. And Mr. Justice Littledale, in giving judgment, says, "It is now well established, that a person who has received money due from a defendant to a plaintiff, is not a competent witness for the defendant, to prove that he received the money as agent of the plaintiff, or in his own right, if his conduct has been such that he would be liable, in the event of a verdict for the plaintiff, to pay the defendant, not only the money received, but also the costs of that action in which the plaintiff should recover; since in such a case he has an interest in defeating the action." The same judge added, that he regretted that such a rule had been established, because in many cases, it was extremely difficult to ascertain whether a party so situated would be liable to costs. And Mr. Justice Taunton observed, in the same case, that he had understood the rule of evidence as stated by Mr. Justice Littledale to be well established ever since the case of *Jones v. Brooke*.

In some cases which had occurred prior to the case of *Jones v. Brooke*, it appears to have been considered, that where the witness was liable on both sides, his competency was not affected by the circumstance of a greater liability to the defendant in respect of the costs of the action; (2) but the contrary appears to be now fully established by the authorities above referred to. It has been before shown, that on this ground of liability to costs, a co-obligor of a bond, who was the principal debtor, was considered incompetent, in an action on the bond against a surety, to give evidence on behalf of the defendant. (3) In the case in which this point was decided, Lord Ellenborough asked, why there should not be an interest in costs as well as on any other account.

(1) 1 Barn. & Ad. 899. See *Nix v. Cutting*, *supra*, p. 67, and *Ward v. Wilkinson*, *Id.*

(2) *Ilderton v. Atkinson*, 7 T. R. 480; *Birt v. Kershaw*, 2 East, 450.

(3) *Townend v. Downing*, 14 East, 565.

The general rule, that a liability on the part of a witness either to pay or contribute to the costs of a cause will render him incompetent, appears to have been recognized in several other cases. Thus, as we have seen, parties to the suit, who have no beneficial interest in the subject matter, are incompetent, by reason of their liability to costs. In an action by an infant plaintiff, his *prochein ami* and guardian are not competent witnesses for him, on the ground of such liability.(1) So in most actions upon contracts, a co-contractor is incompetent to give evidence for the defendant, being interested to defeat the action and thereby to avoid the liability of contribution to the costs.(2)

(1) *James v. Hatfield*, 1 Stra. 548; *Hopkins v. Neal*, 2 Stra. 1026; *Gilb. Evid.* 107; *Head v. Head*, 3 Atk. 511, 547.

(2) See cases cited *supra*, and *French v. Backhouse*, 4 Burr. 2727.

NORR 644.—In general, the attorney on record of a party is a competent witness for him. *Reid v. Colcock*, 2 Nott & M'Cord, 592. But in New York, if an attorney or solicitor commences an action for a plaintiff not residing within the jurisdiction of the court, for or in the name of the trustees of a debtor, of a discharged insolvent, of a person committed in execution for the crime, or of an infant whose next friend has not given security, he is liable for costs to the amount of one hundred dollars. 2 Rev. Stat. 620, 621, §§ 1, 7. In such and the like cases, the plaintiff's attorney is not a competent witness for the plaintiff, on account of his liability for costs. *Wynn v. Williams*, 1 Alab. R. 136; *Brandgee v. Hale*, 13 John. R. 125. And this always where the nominal plaintiff resides without the state, though the real plaintiff (the assignee, for instance) reside within it. *Jones v. Savage*, 6 Wend. 658. In order to relieve him from his liability, and render him competent, security for the costs must be filed, the sureties having justified, if excepted to, and notice must be given to the defendant or his attorney. 2 Rev. Stat. 621, § 8.

By a statute of Massachusetts, the attorney who indorses a writ is responsible to the defendant for costs; and where the attorney indorses a writ thus, "A. B. by C. D. his attorney," he was held responsible, and therefore not a competent witness for the plaintiff. *Chadwick v. Upton*, 3 Pick. R. 442.

The ground landlady was allowed by her tenant's assignees, this tenant having underlet to the defendant and become insolvent, to sue the defendant for use and occupation in the name of her tenant. She died, and her executor directed the attorney to go on. The executor was held not a competent witness for the plaintiff; for by his direction he had made himself liable for the defendant's costs, if the suit should fail. *Parker v. Vincent*, 3 Carr. & Payne, 38.

Where G. being insolvent, assigned to S. a chose in action to pay certain debts, and an action thereon was brought in G.'s name, S. was held not to be an admissible witness for G.; for, being the party in interest, he was liable to the defendant for costs. *Hopkins v. Banks*, 7 Cowen's R. 650; *Parker v. Vincent*, stated *supra* from 3 Carr. & Payne, 38, S. P.

On a bill filed by a surety to avoid a judgment as to himself, obtained against him and his principal, on the ground of the creditor's delay against the principal, the latter is not a competent witness for the complainant; for though in respect to the principal sum the witness's interest is balanced, yet to the surety he is also liable for costs. *Canon v. Jones*, 4 Hawks, 368. So in an action on a bond against the surety, the principal is not competent for the defendant for the same reason. *Riddle v. Moss*, 7 Cranch, 206.

So in replevin by R. and avowry of taking in N.'s house for rent due from him, and plea *riens in arrear*, he is not competent for the plaintiff, being liable to him for costs, beside the value of the goods, and liable to the defendant for the rent only. *Rush v. Flickwire*, 17 Serg. & Rawle, 32; *Kessler v. McConachy*, 1 Rawle, 435.

An attorney whose fee is by agreement contingent, depending on the event of the suit, is incompetent. *Wynn v. Williams*, 1 Alab. R. 136.

In a suit upon an administration bond against a surety, the administrator is not competent for the defendant, being accountable to his principal for costs. *Owens v. Collinson*, 3 Gill & John. 25, 35.

Indorsee against drawer. The plaintiff's case was that he received the bill from the acceptor in discharge of a debt. The defendant stated that it was accepted in part discharge of a debt due from the acceptor to the drawer, indorsed and delivered to the acceptor, that he might get it discounted, that the acceptor delivered it to the plaintiff on condition that if he got it discounted, he might retain it for the debt due to him; but he never got it discounted. Held, that though the acceptor was uninterested as to the amount of the bill, yet he stood liable to indemnify the defendant for the costs of the action, and therefore could not be received to prove the defence. *Edmonds v. Lowe*, 8 Barnw. & Cress. 497; S. C., 2 Mann. & Ryl. 427.

In an action for goods sold, the plaintiff's case in evidence was, that he had sold and delivered the goods to the defendant, who called a witness to prove that the witness had himself bought the goods of the plaintiff, and sold them to the defendant, who had paid the witness; but held, that as the witness, upon the case made, must have obtained payment fraudulently, and so would be liable to the defendant for the costs, in addition to the money he had recovered, provided the defendant now failed, this destroyed the balance of his interest, and rendered him incompetent; and so, it is said in the case, it would have been, if he had fraudulently obtained the money as an assumed agent, or in any other fraudulent way. *Larbalestier v. Clark*, 1 Barnw. & Adolph. 899.

We have seen by the cases in the previous notes, that a joint debtor not sued, has often been received to testify as a witness for or against the defendant. He is of course a witness for the plaintiff unless he be called to prove the joint liability. *Ante*, note 621; *Purviance v. Dryden*, 3 Serg. & Rawle, 402, 405, 406; *Redfield, J.*, in *Pike v. Blake*, 8 Verm. R. 401; *Miller v. M'Clenachan*, 1 Yeates, 144; *Miller v. Hale*, *Dudley*, 119; *Whatley v. Johnson*, 1 Stew. R. 498; *Doebler v. Snively*, 5 Watts, 225; *Nelson, J.*, in *Gregory v. Dodge*, 14 Wend. 602. And, on being released, or otherwise discharged of his interest, he is equally a witness for the defendant. *Ante*, note 621; *Richardson, C. J.*, in *Jewett v. Davis*, 6 N. Hamp. R. 520. And some cases hold that he is competent without a release, as being interested against the defendant. *Ante*, note 621. A majority of the cases, however, hold, that he is not so without a release. *Ante*, note 632. *Gardiner v. Levaud*, 2 Yeates, 185; *Owings v. Low*, 7 Harr. & John. 124; *Kile v. Graham*, 1 M'Cord, 552; *Ross v. Wells*, 1 Stew. R. 139, 141; *Pike v. Blake*, 8 Verm. R. 400; *Leeds v. Leeds*, 12 Conn. R. 176. At *ante*, note 632, is a case that on a plea of non-joinder of a defendant, the person alleged to be nonjoined is not competent to prove the plea. There are several cases which hold the same thing. *Spaulding v. Smith*, 1 Fairf. 363; *Jewett v. Davis*, 6 N. H. R. 518, S. P. But *Storrs v. Wetmore* (Kirb. 203), *semble, contra*. And the rule is otherwise on a plea of non-joinder of a plaintiff. There the person alleged to be non-joined is competent to prove the plea. *Davis v. Evans*, 6 Carr. & Payne, 619.

A joint debtor is held not to be sued if he be not served with process, though he be named in it, and it issued against him. *Purviance v. Dryden*, 3 Serg. & Rawle, 402, 405; *Henderson v. Lewis*, 9 Id. 379, 382, 383; *Gibbs v. Bryant*, 1 Pick. 118; *Le Roy v. Johnson*, 2 Pet. 186. In some states, *v. g.*, New York, he would be deemed in court for the purpose of a judgment and proceeding against the joint property of the defendants. Of course the cases now cited would then have no application.

A joint obligor not sued, though released by the defendant, his co-obligor, was held still incompetent to prove the set-off of a debt due to the witness. It was said the verdict would bar an action against him; and the release cut off all claim for contribution; but he was still interested in the demand to be *defaulted*, and should have himself released to his co-obligor all claim on that account. *Henderson v. Lewis*, 9 Serg. & Rawle, 379, 383. A partner not sued, who made a note signing the name of his firm was held competent for his copartner sued alone, to prove that the witness made the note for his own private benefit, with notice of that fact to the plaintiff. *Robertson v. Mills*, 2 Harr. & Gill. 97. *Quere*. In a suit against A., on a note made by B., and signed by his own name only, the suit being on the ground that in truth the note

In a recent case on this subject, where the action was in tort, being for a libel against a person who was secretary to a society, the members of which had agreed to contribute towards all law expenses, Lord Tenterden appears to have considered, that a member of the society was competent for the defendant without a release, on the ground that a contract between parties for bearing each other harmless in doing wrong, was void, and consequently that there was no legal liability to affect the witness. But he observed, at the same time, that if the witness would be liable for a share of the expenses, in the event of a judgment passing against the defendant, he would be incompetent.(1)

7. Cases as to liability to one of the parties, since the passing of the statute 3 and 4 Wm. IV. c. 42.

It now only remains to notice the cases, upon the subject of incompetency from a liability over to one of the parties to the suit, which have occurred since the statute 3 and 4 Wm. IV. c. 52, came into operation; that it may be seen what effect the provisions of that statute have had on this numerous and difficult class of cases.

The 26th section of that act is as follows: "In order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a ver-

was on the partnership account of A. and B., the latter is incompetent as a witness for the plaintiff; for he comes to throw one half his debt upon another. And though the plaintiff release him from all demands, *except demands against him jointly with A.*, this leaves him precisely where he was before. *Miller v. Hale, Dudley*, 119. In an action by the payee, against the surety alone, the principal and co-signer was received as competent for the defendant on being released by him. *Harmon v. Arthur*, 1 Bail. 83. And so in one case without a release. *Freeman's Bank v. Rollins*, 1 Shepl. 202, 205. *Quere.* See *ante*, note 642. See also several cases in point, note 632, in connection with the text, all *contra* the last case. So *Jordan v. Trumbo*, 6 Gill & John. 103. But see *Gass v. Steinson*, 2 Sumn. 453, 458; acc. also *Steele v. Boyd*, 6 Leigh, 547, 558, 559. But in the latter case no action had yet been brought. The principal was received as a witness for the surety on a summary application to discharge the latter. See also *Barnes v. Dick, infra*. In a case where only one of three joint makers of a note was sued, the others were held competent for the defendant because the plaintiff who objected did not show that they were principals in the note, or otherwise interested in the event against the plaintiff. *Long v. Ray*, 1 Dana, 430. But *quere.* In debt against the administratrix of one of two joint obligors, the widow and distributee of the other was held to be a competent witness for the defendant, the court saying that if she were interested either way, it was in favor of the plaintiffs. *Braxton's Adm'x v. Hilyard*, 2 Munf. 49, 52. See, as to the joint debtor principal, not sued, being a witness for a surety who is sued, several references in the previous notes. Where a judgment is against principal and surety, and the former replevies the debt, *semble*, that the surety is a competent witness for the principal, in a chancery suit by him for relief against the replevin bond. *Griffith v. Miller's Adm'rs*, 6 J. J. Marsh. 330. On a separate issue whether C. was legally bound as surety for A. and B.; held that A. was a competent witness for C. *Barnes v. Dick*, 9 Yerg. 430. *Quere.*

(1) *Humphrey v. Miller*, 4 Car. & P. 7-12.

dict or judgment in that action, in favor of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him."

By the 27th section, it is further enacted, "That the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding, in which the verdict or judgment shall be offered in evidence."

The meaning of the former of these two enactments appears to be in this, that where the objection taken to the witness's competency is that the verdict or judgment for or against the party on whose behalf he is proposed to be examined, would be admissible in evidence for or against the witness, in such case he may be examined; the ground of objection is removed by enacting that the verdict or judgment shall not be admitted in evidence either for or against him, nor for or against one claiming under him. The remedy provided for preventing the exclusion of the witness seems to apply to those cases only, but to all those cases, where the sole objection taken is that just mentioned; so that other cases would be left, as they were before the passing of the act.

There has been some difference of opinion, however, on the construction of the provision in question. In four cases which will be first mentioned, the witness was not allowed to be examined, as being liable to costs—although certainly that liability could only have been enforced through the medium of the verdict and judgment. In one of the earliest cases reported since the passing of the statute, it is said to have been ruled by Lord Lyndhurst, that in an action on a guaranty, the party primarily liable, who was tendered as a witness for the defendant, and objected to on the ground of his being liable to indemnify the defendant against the costs, was not rendered competent by the provisions of the statute.(1) And in an action on a bill of exchange, accepted by the defendant for the accommodation of the drawer, Lord Lyndhurst is said to have ruled, that the drawer was not rendered competent by the statute, which, he thought, was not intended to apply to cases of this nature.(2) In a subsequent case, in an action for injuring the plaintiff's house by improperly digging a cellar, whereby the plaintiff's wall sunk, the person employed to dig the cellar by

(1) *Braithwaite v. Coleman*, Hertf. Spring Ass. 1834; 2 Har. Ind. 1047.

(2) *Burgess v. Cuthell*, 1 Mood. & Rob. 315; 6 Car. & P. 282.

the defendant was tendered as a witness on behalf of the defendant, but Mr. Justice Patteson is reported to have been of opinion that the witness was not rendered competent by the statute, and that the statute was not intended to apply to such cases.(1) The same judge is reported also to have ruled, that a carrier's servant is incompetent to disprove negligence in an action against his master without a release.(2)

In these cases the witnesses called on behalf of the defendant were objected to as incompetent, on the ground of their being liable to the defendant, if the verdict should be against him, for the costs of the action. For the recovery of such costs, the verdict and judgment would be admissible in evidence against him in a suit, and not only admissible, but also necessary and indispensable proof. All these cases, therefore, appear to come precisely within the meaning and scope of the act; for when the only objection is a liability to costs, which liability can only be enforced through the medium of the verdict and judgment, the objection is altogether removed by making the verdict and judgment unavailable and inadmissible in evidence.

In a recent case the subject was again considered, and another construction was put upon the act, larger and more commensurate both with the terms and object of the clause in question, than the construction adopted in the cases above mentioned. In the case of *Faith agt. M'Intyre*,(3) Mr. Baron Parke ruled, that the drawer of a bill was a competent witness for the defendant, in an action against a person who had accepted it for the drawer's accommodation. It was stated at the trial, Lord Lyndhurst had ruled, that such a witness was not rendered competent by the 3 and 4 Wm. IV, c. 42; but Mr. Baron Parke said, he thought, that by indorsing the witness's name on the postea, according to the 27th section, the witness would be rendered competent, for he could only be made liable to the costs of that action by means of the verdict or judgment, which in consequence of the indorsement of his name could not be used against him; and to the amount of the bill he was liable at all events. The witness's evidence was accordingly received, and the defendant obtained a verdict.(4)

The authority of the case of *Faith agt. M'Intyre* has been recognized and supported by the Court of Queen's Bench, in the recent case of *Kilpack agt. Major*.(5) It was an action by the indorsee of a bill against the acceptor, who pleaded first, that the drawer was indebted to A. B., and that the bill was given to secure that debt and an additional sum to be lent by A. B. to the defendant; and secondly, that A. B. obtained the bill

(1) *Mitchell v. Hunt*, 6 Car. & P. 351.

(2) *Harrington v. Caswell*, 6 Car. & P. 352.

(3) 7 Car. & P. 44.

(4) A rule nisi for a new trial was afterwards obtained, but not (as it seems) on the ground of the improper admission of the witness, and the rule was afterwards discharged. 7 Car. & P. 48, n.

(5) Judgment delivered by Lord Denman, Hil. Term, Jan. 14, 1842.

by fraud. The drawer was called to prove this defence, and objected to as incompetent; the judge admitted him, being of opinion that he might be rendered competent by the mode pointed out by the statute. The court were of opinion, on a motion for a new trial, that they were bound by the authority of *Faith agt. M'Intyre*, which had been recognized in subsequent cases in the Court of Exchequer, and thought that the witness was rendered competent.

But where witnesses are objected to on the ground of their having a direct and immediate interest in the event of the suit (independent of the consideration as to the verdict being admissible in evidence for or against him in some other suit), that is a substantial objection not included or touched by the enactment. Such cases are not within the act, and to be dealt with as if the act had not passed. Thus, in a case before Lord Denman,⁽¹⁾ in an action for an injury alleged to have been done to the plaintiff's horse by the negligent driving of the defendant's servant, the plaintiff called as a witness on his part a servant, who had the care of the horse at the time of the accident; the servant was objected to as incompetent without a release; and Lord Denman allowed the objection, saying that it was so decided in the case of *Wake v. Lock*,⁽²⁾ which he had considered a good deal. And the statute 3 & 4 Wm. IV, c. 42, being relied on as restoring the witness's competency, Lord Denman appears to have considered that the statute did not apply, since it only rendered competent those persons for or against whom the verdict or judgment would be evidence; but if this witness should state what he was expected to state, and should be believed, there never could be any action against him.

In a still later case, a witness called for the plaintiff was rejected by Lord Denman, on the same ground of an immediate interest in the event of the suit, arising from a liability to the plaintiff, which would be removed by a verdict in the plaintiff's favor. In this case the action was for use and occupation, and in order to show that the defendant had occupied the premises, a witness was called, who stated that he had taken the premises of the plaintiff, and had not been released from his tenancy, and upon his being asked whether he had not given up the premises to the defendant, it was objected that he was interested in fixing the defendant; and the statute being referred to in support of the admissibility of the witness, Lord Denman ruled, that the witness was not competent, on the ground that he had a direct interest in the event of the suit; for if the plaintiff succeeded in getting the amount he claimed from the defendant, that

(1) *Harding v. Cobley*, 6 Car. & P. 664. See also *Pickles v. Hollings*, 1 Mood. & Rob. 468; *Creevey v. Bowman*, 1 Mood. & Rob. 496.

(2) 5 Car. & P. 454, *vide supra*, p. 65.

would put an end to his claim for rent during the time for which he sought to recover it in the action.(1)

In an action of trespass for entering the plaintiff's house and taking away his goods, where the defendants pleaded, first, that the plaintiff was tenant of the house to them as overseer, &c., and justified under a distress for rent in arrear; secondly, that W. W. was tenant of the house to them; and issue was joined as to each of these tenancies: the wife of W. W., called on behalf of the plaintiff, proved that the house had been built by W. W. on waste land, and occupied by him as his own above twenty years; and, further, that the plaintiff was let into possession by W. W. as his tenant. The witness was objected to, but the evidence received. On a motion for a new trial, the Court of Queen's Bench decided, that the witness was incompetent, being directly interested to disprove the tenancy of W. W. under the defendants, inasmuch as W. W. would be liable over to the plaintiff, in case the defendants should succeed on that issue; and this ground of incompetency, being independent of any use that might be made of the verdict, was not remedied by the statute.(2)

SECTION V.

What is not such an Interest as will Disqualify.

The general rules relative to the incompetency of witnesses have been explained in the preceding section, and numerous cases referred to where witnesses are liable to be rejected from this cause. It is now proposed to give examples of cases where witnesses may be so connected with questions at issue as to raise a suspicion of interest in the event, but where there is no legal interest capable of producing incompetency.

It is not an objection to the competency of a witness that he has wishes or a strong bias on the subject matter of the suit, or that he hopes to obtain some benefit from the result of the trial.(3) Such circumstances may

(1) *Hodson v. Marshall*, 7 Car. & P. 16. See also *Davies v. Morgan*, 1 Beav. 405, 409; *Holden v. Hearne*, 1 Beav. 445; *Stewart v. Barnes*, 1 Moo. & Rob. 472.

(2) *Wedgwood v. Hartley and others*, 10 Ad. & Ell. 619. The question as to incompetency was precisely the same as if W. W. himself had been called as a witness. The objection seems not to have arisen on the *voir dire*.

(3) NOTE 645.—*Lafon's Ex'x v. Gravier*, 1 Mart. Lou. R. (N. S.) 243, 246. Thus a vendor without warranty may be received to support the title of his vendee. *Major v. Deer*, 4 J. J. Marsh. 586. So a witness who stands by and allows another to sell goods belonging to the witness in the other's name, is competent to prove the sale, in assumpsit by the vendor for goods sold, the witness having agreed to look to the vendor for the price, and having received the money. *Outwater v. Dodge*, 6 Wend. 397.

A. and B. having become sureties for C., he executed to them certain promissory notes as an indemnity. A. and B. afterwards commenced suits on these notes, and attached C.'s property; whereupon W., a creditor of C., agreed with A. and B. that if they would discharge their attach-

influence his mind and affect his credibility; they are therefore always open to observation, and ought to be carefully weighed by the jury, who are to determine what dependence they can place on his testimony; but it is clear, from what has been stated in the preceding section, that they are insufficient to render him incompetent.(1)

A witness who stands in the same situation as the party for whom he is called to give evidence, is under a strong bias, and may have strong wishes on the subject; but unless he will gain or lose by the event of the particular suit, he will not be disqualified. Thus, if there are two actions brought against two persons for the same assault, in the action against one the other may be a witness, because he is not interested in the event.(2) So also, in the case of *Bent v. Baker*,(3) which is a leading authority as to the rule of incompetency from interest, it was decided, after much argument, that in an action against an underwriter on a policy of insurance, another underwriter was a competent witness for the defendant, on the ground that he would neither gain nor lose directly by the event of the particular suit, nor could the verdict therein be evidence for or against him in any subsequent suit. So also it appears, that in an action in which a question arises concerning the validity of a deed, the attorney who prepared the deed is a competent witness to prove that the deed is valid, notwithstanding there is another action pending against him, in which he must fail if the deed be invalid.(4)

The same rule prevails in criminal proceedings; as, when several persons are separately indicted for perjury in swearing to the same fact, either

ments, he, W., would not sue C. within one year. A. and B. accordingly discharged the attachments. W. having commenced an action against C. within the year, in an action by A. and B. for a violation of the agreement; held that C. was a competent witness for them. *Boardman v. Wood*, 3 Verm. R. 570. A father and mother were admitted as competent witnesses for their daughter, to prove that the father had given her a negro slave; and this against the claim of the father's creditor, who had taken the negro in execution as the father's property. *Smith v. Littlejohn*, 2 M'Cord, 362. A witness is not incompetent because he is in the service of the party calling him, or of the other party. *Lafon's Ex'x v. Gravier*, 1 Mart. Lou. R. (N. S.) 243; *Finlay v. Kirkland*, 9 Mart. Lou. R. 463. A father-in-law may be a witness for his son-in-law. *Bernard v. Vignaud*, 10 Id. 482.

On a bill of foreclosure, the plaintiff's grantor, who had conveyed the premises to a third person, with covenants of seizin and warranty, was held to be a competent witness to prove the plaintiff's title; as a decree in chancery taking away an equity of redemption, can be no evidence in a court of law, and between other parties, of a breach of the covenant. *Beers v. Broome*, 4 Conn. R. 247. In an action for contribution between the sureties of a collector of taxes, for money paid by one of them without suit, the town treasurer is a competent witness to prove the collector's delinquency. *Nason v. Read*, 7 Greenl. 22.

(A vendor without express warranty, may be rendered incompetent to support the title of his vendee, on the ground of an implied warranty; as where he sells chattels in possession, and impliedly guaranties his title. *Whitney v. Heywood*, 6 Cush. 82.)

(1) See *ante*, note 623.

(2) By *Ashurst, J.*, 1 T. R. 301; by *Abbott, C. J.*, 5 B. & C. 387.

(3) 3 T. R. 27.

(4) *Hudson v. Revett*, 5 Bing. 368.

of them may, before conviction, be a witness for the others.(1) So in *Rudd's Case*, a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected, in case of his conviction, that her husband would receive a pardon.(2) In treating of the evidence of accomplices, it has been seen, that persons admitting their participation of crime with the prisoner at the bar, but not indicted with him, are competent to give evidence for him as well as for the crown; and though separately indicted for the same offence, they are not incompetent, until rendered infamous by actual conviction. Where separate informations of *quo warranto* are brought against several members of a corporation, on the trial of one of the informations the other parties are competent witnesses on behalf of the defendant.(3)

A witness who has no actual interest in the event of a suit is not incompetent on the ground that the verdict may afterwards come to the knowledge of a jury in an action brought by the witness himself, and so have an influence on their decision, though not adduced as evidence before them. This subject has been before touched upon, in treating of the competency of the prosecutor, or party grieved, to give evidence upon indictments. In the case of *The King agt. Whiting*,(4) Lord Holt, on an indictment for a cheat in obtaining a person's subscription to a note of £100 instead of £5, rejected the evidence of the maker of the note, on the ground that the verdict would certainly be heard of in an action on the note, and would influence the jury; and this decision was followed by Lord Hardwicke, in a case before him.(5) But in a subsequent case, Lord Hardwicke reviewed his own opinion and that of Lord Holt, and decided that the objection went only to the credit, and not to the competency of the witness; and with respect to the possibility that the jury might hear of the verdict, he said, that sitting as a judge, he could only hear of it judicially.(6) This doctrine was fully confirmed in the subsequent case of *The King agt. Boston*,(7) where it was held that a witness was competent to give evidence for the prosecution upon an indictment for perjury, although a civil action was pending between himself and the party indicted, in which the same question arose as upon the indictment, and which was coming on for trial at the same assizes.

In an action for penalties, under the statute of usury, against the lender of the money, the borrower is a competent witness for the plaintiff; and

(1) *Bath v. Montague*, cit. *Fortesc. R.* 247; *Gunstone v. Downes*, 2 *Roll. Ab.* 685 Art. 3; *S. C.*, cited 2 *H. P. C.* 280; and in *R. v. Gray*, 2 *Selw. N. P.* 1148 (6th ed.)

(2) 1 *Leach Cr. Ca.* 151.

(3) *R. v. Gray*, 2 *Selw. N. P.* 1148 (6th ed.)

(4) 1 *Salk.* 283.

(5) *R. v. Nunez*, 2 *Stra.* 1043.

(6) *R. v. Bray*, *Rep. temp. Hard.* 572.

(7) 4 *East*, 572, *supra*.

whether he has or has not repaid the money lent, does not appear to make any essential difference, so far as his competency is affected; for in neither case does he gain anything immediately by the event of the suit: nor could any objection be made to his competency on the ground of an indirect interest in the record, for the verdict in the action for penalties could not be used as evidence in a subsequent action for the debt.(1)

In the preceding section we have seen, that a legal liability to be sued in respect to the matters in issue in a particular action, in the event of an unfavorable verdict, will in many cases exclude witnesses from giving evidence. But the bare possibility of an action being brought against a witness is no objection to his competency. Thus, it has been decided, that in an action against an administrator, one of the bond securities for the defendant's due administration of the intestate's effects is a competent witness, on the part of the defendant, to prove a tender; and the court said in this case, that if a *creditor* of the administrator had been offered as a witness (which was a stronger case), there could have been no objection to his evidence being received. Mr. Justice Buller added: "In order to show a witness interested, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause one way or the other. In this case, supposing there was no assets, though the defendant would be answerable for the costs, he would not be liable on his bond to the Ecclesiastical Court. He is only bound to distribute the intestate's effects, and it does not appear in this case how they have been applied." Upon the same principle, a witness is competent to prove a codicil, made subsequently to a second will, and reviving a former will, though he has acted under the first will, and might possibly be subjected to actions brought against him as executor *de son tort*, if it should be set aside.(2)

It has been before stated, that in actions by or against executors or administrators, a residuary legatee, or person entitled as next of kin to a distributive share of the estate, is incompetent to increase the fund in which he is so interested, for he has a direct and certain interest in giving evidence to this effect. But the principle of these cases does not apply to legatees of specific sums or chattels, for it is a matter altogether uncertain, whether they will or will not derive any benefit from a favorable termination of the suit. Thus, in an action by an executor to recover a debt due to the estate, it was ruled by Lord Tenterden, that a paid legatee was a competent witness for the plaintiff to increase the estate.(3) It was ob-

(1) *Abrahams v. Bunn*, 4 Burr. 2251; *Smith v. Prager*, 7 T. R. 60. See *Masters v. Drayton*, 2 T. R. 496. See *ante*, note 641.

(2) *Baillie v. Wilson*, cit. 4 Bur. 2254. And see *Goodtitle v. Wilford*, 1 Doug. 140.

(3) *Clarke v. Gannon*, Ry. & Mo. N. P. C. 31. In *Johnson v. Baker* (2 Car. & P. 207), an unpaid legatee was admitted in an action against the executor, but it appears that in that case the demand was considered as one which was not recoverable out of the estate. See 5 B. & Ad. 370, by *Patteson, J.*

jected to his competency, that he would be obliged to refund, in case the estate should prove deficient, but Lord Tenterden observed there was nothing to show that the other funds were insufficient, and although the debt sought to be recovered in the action had not been paid, it was not to be assumed that there was not some other estate sufficient. In a recent case, the Court of King's Bench decided, in an action against executors for a debt of the testator, that a person entitled to an annuity under the will was a competent witness on the part of the defendants.(1) On the authority of this decision, a rule nisi for a new trial was obtained in the case of *Bloor v. Davies*,(2) on the ground that a competent witness had been rejected; but after full argument and time for consideration, the Court of Exchequer discharged the rule. It was an action of debt on bond against the devisee and heir of the obligor and testator: the defence was, that the testator's signature on the bond was a forgery: a person entitled under the testator's will to an annuity charged upon the testator's real estates, was called as a witness on the part of the defendant, and, being objected to as a witness, was rejected. Lord Abinger, in delivering the judgment of the court, distinguished the case from *Nowell v. Davies*: "This," said the lord chief baron, "was the case of an action by a bond creditor of the testator against the devisee of the real estate, in which the object of the plaintiff is to have execution against the real estate, out of which an annuity is payable to the witness under the will: the witness was therefore, directly interested, for the object of the witness's evidence was to prevent the plaintiff from recovering against the very estate devised for payment of the annuity."

Upon the same principle, on which witnesses are not disqualified in the above-mentioned cases, that is to say because the interest is altogether uncertain, a creditor of the estate is a competent witness for an executor or administrator to increase the fund. In the case of *Paull v. Brown*,(3) it was ruled, in an action by an executor to recover a debt due to the estate, that a creditor was a competent witness for the plaintiff; and Macdonald, C. B., said, the creditor may give evidence for his debtor in his lifetime, and is equally competent to give evidence for his executor after his death.

In a subsequent case,(4) indeed, it was ruled by Lord Ellenborough, that a creditor was not competent for the executor, if it appeared that the estate was insolvent, although it was urged, that the interest must necessarily be quite uncertain, for an executor was not bound to distribute equally, but might give a preference to any creditor whom he thought fit to select. But the opinion of Lord Ellenborough on this point was ques-

(1) *Nowell v. Davies*, 5 B. & Ad. 368.

(2) *Bloor v. Davies*, 7 Mees. & Welsb. 235.

(3) 6 Esp. 34.

(4) *Craig v. Cundell*, 1 Campb. 186.

tioned by Parke, J., in a late case before him at Nisi Prius,(1) in which he ruled that an unsatisfied creditor was a competent witness for an administrator upon a plea of *plene administravit*; and the authority of the case of Paull v. Brown was fully upheld by the Court of King's Bench in the case of Nowell v. Davies.(2)

It will be observed, that there is a material difference between these cases and the class of cases collected in the preceding section, which decide that the creditor of a bankrupt or insolvent is incompetent to increase the fund; for in the latter cases the assignee is under an obligation to distribute equally amongst all the creditors, to whom, therefore, the fund *prima facie* belongs, and whatever is either added to, or taken from the fund, must naturally be presumed to be for the advantage or disadvantage of the creditors. But even in these cases, if the creditor has assigned his debt, though only by parol, his competency will be restored, for he is then a mere naked trustee having no beneficial interest whatever.(3) It may, indeed, be laid down as a general rule, that mere trustees and executors in trust are not rendered incompetent by an interest, which is, as far as they are concerned, only nominal.(4) If a trustee has a beneficial interest, or is

(1) Davies v. Davies, Mo. & Ma. 345.

(2) By Lord Denman, C. J., 5 B. & Ad. 371. In neither of the last two cases does it appear that any evidence was given with respect to the solvency or insolvency of the estate. It is difficult to understand how the solvency or insolvency can alter the question with respect to the competency of a creditor.

(3) Heath v. Hall, 4 Taunt. 326; Granger v. Furlong, Bl. R. 1273.

(4) See 1 Mod. R. 107; Goss v. Tracy, 1 P. Wms. 287; Gilb. Evid. 123; 1 Bl. R. 366.

NOTE 646.—Comstock v. Hadlyme Ecclesiastical Society, 9 Conn. R. 254; Scott v. Shepherd, 3 Verm. Rep. 104; Butler v. De Hart, 1 Mart. Lou. R. (N. S.) 184; Jordan v. White, 4 Id. 335; Martial v. Cotterel, 5 Id. 276; Webb v. Alexander, 7 Wend. 281; Robertson v. Nott, 2 Mart. Lou. R. (N. S.) 122; Pratt v. Flowers, Id. 333, 334; Duplantier v. Randolph, 3 Mart. Lou. R. (1st series), 194; Menendez v. Syndics of Larionda, Id. 256. And see Villere v. Armstrong, 4 Mart. Lou. R. (N. S.) 21.

One who has sold goods as the agent of another upon a *del credere* commission, is not a competent witness for the principal, in an action in the name of the principal, against the purchaser, for the price, notwithstanding the principal may have released the agent or factor. New York Slate Co. v. Osgood, 11 Mass. R. 60. But *quere*. The general rule of law is, that a sale by a factor or agent creates a contract between the owner and the purchaser, and this rule equally holds in the case of a factor who acts under a *del credere* commission, subject to the right of the owner to look solely to the factor, if he choose. Scrimshire v. Alderton, Strange, 1182; *et vid.* Drinkwater v. Goodwin, Cowp. 251, 252; Livermore on Agency, 281, 282, 283; Leverick v. Meigs, 1 Cowen's R. 645, per Woodworth, J., pp. 663, 664; and Grove v. Dubois, 1 Term. R. 115. The owner, electing to be himself the party, by suing the vendee in his own name, affirms the act of the agent, and makes it his own, so that the factor is not interested as a party, and can have no interest, except his liability to the owner for the price, according to the rules governing commissions *del credere*; and no reason is perceived why the principal may not as effectually release this liability as any other. See Paley's Principal and Agent, 249, 250.

An agent to sell goods is competent for his principal in an action for the price. Shepherd v. Palmer, 6 Conn. R. 95; Depau v. Hyams, 2 M'Cord, 146. And this, though he is to receive a commission, if the commission do not depend on the collection of the money. Murley v.

exposed to any immediate liability in respect of costs, that may be another ground of objection, but, without such interest or liability, trustees and executors are competent witnesses.⁽¹⁾ In an action by a bankrupt against

Langrick, 1 Carr. & Payne, 216; Caune v. Sagory, 4 Mart. Lou. R. 81. Or though he have a lien on the property. Whiting v. Bradley, 2 N. H. Rep. 79.

In an action by a bank for an overpayment of a check by their teller, he is competent for the plaintiffs. O'Brien v. Lou. State Bank, 5 Mart. Lou. R. (N. S.) 305. So of a cashier. U. S. Bank v. Johnson Id. 310.

The allegation was that the plaintiff had lent money to his debtor by directing one who owed the plaintiff to pay to the debtor. The debtor claimed that the money paid was due to him. Yet because the payor of the money acted as agent, he was held competent as a witness for the plaintiff, though on his failure, the witness might be liable for the costs of an action brought against him by the defendant for the same money; and thus the balance of his interest be in favor of the party calling him. Martial v. Cotterel, 5 Mart. Lou. R. 274. So in trover for goods, the captain of the plaintiff's boat, from whose custody the goods were taken, was holden competent as a witness for the plaintiff. Lane v. De Peyster, 7 Mart. Lou. R. (N. S.) 372. One who, as agent for another, has settled an account and given a note in the other's name, is competent against him to prove that fact, as also his agency, in a suit on the note. Covington v. Bussey, 4 M'Cord, 412.

The general rule is, that an agent may be a witness to prove his agency as well as his acts. Id. Thus an agent is a witness to prove that the drawee of a bill drawn by the agent, agreed to, and thus constructively did accept the bill; in assumpsit by the payee against the drawee, the agent's principal. Lowber v. Shaw, 5 Mason, 241. So in a bill for contribution between several debtors who had paid a judgment confessed for them by an attorney, who, as to some of them, had no authority, held that the attorney was a competent witness for the defendants to show his want of authority. Cox's Adm'r's v. Hill, 3 Ohio Rep. 411, 424. The plaintiffs sued the defendant for not accounting for goods sold by the latter for the former on commission. The defendant's agent who had accepted a bill for the money in question was notwithstanding held competent for the plaintiffs; for if he paid the bill, he would recover of the defendant; if he made the defendant pay, then he paid nothing. Martineau v. Woodland, 2 Carr. & Payne, 65. A factor, though he has, as a security for advances, a general lien on the goods and proceeds of the goods of his principal, is yet a good witness for him in an action for goods sold by the witness. Baldwin v. Milderberger, 2 Hall's Rep. N. Y. S. P. 176. Otherwise, if he have a specific lien on the very money in question. Id., and *vid.* Payton v. Hallet, 1 Cain. Rep. 364. The attorney on record being no otherwise interested, is in general a competent witness for his client. Reid v. Colcock, 1 Nott & M'Cord, 592. But he is excluded by statute in Louisiana. English v. Latham, 3 Mart. Lou. Rep. (N. S.) 88; Caulker v. Banks, Id. 532, 543, and the marg. note to Gould v. Bridges, Id. 692.

T. being the owner of several French government bills, indorsed them in blank, and delivered them to B., to take to France for collection. B. delivered them to P., in France, to negotiate and receive the amount, and to place the proceeds, when collected, to the credit of T. and B., who were jointly interested in a cargo furnished by P., and of which B. had the charge. P. received the amount of the bills, but refused to place it to the credit of T. and B., who settled and paid the full amount of P.'s claim, and T. then brought his action against P. to recover the amount of the bills; held, that B. was a competent witness for T., having no interest in the bills. Taber v. Perrott, 9 Cranch, 39.

The plaintiff's agent had given a receipt in full, in which the plaintiff offered him to prove there was a mistake. It was proved that the witness was the assignee of the plaintiff's effects, including the demand in question, for the benefit of his, the plaintiff's creditors; yet held competent, as a trustee without interest. Main v. Newson, Anth. N. P. Cas. 11, 12, before Van Ness, J.

(The interest of an executor in the event of a suit to which he is not a party, does not disqualify him. Turner v. Reynolds, 23 Penn. State R. 199; Miller v. Thatcher, 9 Texas, 482.)

(1) Goodtitle v. Welford, 1 Doug. 140; Bettison v. Bromley, 12 East, 250; by Mansfield, C.

his assignee, the official assignee is a competent witness to sustain the bankruptcy, for his allowance is uncertain, and depends upon the discretion of the commissioner.(1)

In an action on the case by a reversioner, for an injury done to his inheritance by a stranger, the tenant in possession is a competent witness to prove the injury.(2) In an action between a vendor and a purchaser of lands, a former vendor, who has sold without warranty, is competent to prove the title.(3) An executor is also competent to prove the sanity of the testator in an action of ejectment concerning his real property.(4) In none of these cases does the witness gain or lose directly by the event of the suit, and as the verdict could not have been evidence for or against him in any subsequent action, he was not incompetent upon this ground even before the latter species of disability was removed by the late statute. Upon similar grounds it has been decided, in an action for mismanagement of a farm, that the sub-lessee of the defendant is competent to prove its proper cultivation.(5) In an action for a trespass on the plaintiff's close, a lessor of the plaintiff is a competent witness to prove the defendant in possession of the close under him.(6) And where, in an action of trespass, the defendant pleaded *liberum tenementum* in a third person, and justified under him, and it appeared at the trial that the plaintiff also claimed under a conveyance from the same person, who had subsequently conveyed the land without warranty to the defendant, and after that had taken a mortgage of the lands from the defendant, it was decided, that such person was a competent witness for the defendant, for he had no legal interest in the

J., 4 Taunt. 328; Phipps v. Pitcher, 6 Taunt. 220. See 1 Ball and Beatty's R. 100, 414, and cases there cited as to the rule in equity.

NOTE 647.—An agent giving his receipt as on payment of the money of his principal, was said not to be competent to prove it not paid, in an action by his principal against the debtor for the money received; for he is liable to the plaintiff if he fail; a recovery against the debtor would bar such liability; and if the plaintiff should recover, the agent would not be liable to the debtor without his showing not only the payment, but a breach of trust. Fuller v. Wheelock, 10 Pick. 135. A trustee, though without any interest, is not receivable for the treasurer who is authorized, by act of Parliament, to sue in his own name for the benefit of the trustee; for the latter is the real, though not the nominal party. Whitmore v. Wilks, 1 Mood. & Malk. 214, 220, 221. On a bill filed by A.'s former ward against B., as an intruder, to compel him to account to the ward for rents, &c., of her estate, received by B. during the ward's minority; held that A., her former guardian, was not a competent witness to prove an agreement between him and B., that the latter was not to possess the estate, and account to the ward, on her coming of age; for it was A.'s duty to have collected the rents of B., and accounted for them. Owens v. Collinson, 3 Gill & John. 25. (See Philadelphia Ins. Co. v. Washington Ins. Co., 23 Penn. State R. 250.)

(1) Giles v. Smith, 1 Mood. & Rob. 443.

(2) Doddington v. Hudson, 1 Bing. 257; S. P., Adeane v. Mortlock, Bing. 236; Read v. Thoyts, 9 C. & P. 515.

(3) Bushy v. Greenslade, 1 Stra. 445.

(4) Doe v. Teague, 5 B. & C. 335.

(5) Wishaw v. Barnes, 1 Campb. N. P. C. 341.

(6) Rocs v. Walters, 3 Mees. & Welsb. 527.

event; the objection, as to his coming to impeach a former conveyance to the plaintiff, would not affect his competency but only his credit.(1)

In ejectment by a party claiming under a devise as tenant in common, a person claiming another undivided interest as tenant in common in the same estate, under the same will, is a competent witness for the lessor of the plaintiff;(2) he takes under the will a separate interest, which cannot be affected by the event of the verdict.

In an action on a policy of insurance on goods, where the only question was concerning the original destination of the ship, the captain has been considered competent to give evidence for the plaintiff respecting that fact, though he was a part owner of the ship, and, as such, liable to the owners of the goods, in case the ship had unnecessarily deviated from the voyage; but if the question had turned on a deviation, he could not have been examined.(3)

In an action of assumpsit for funeral expenses, against a person (not being executor or administrator of the deceased), the residuary legatee is not incompetent to give evidence for the plaintiff.(4) The objection was, that he had an interest in relieving the residue by charging the defendant; the answer to which is, that, on whichever side the verdict may be, the estate must pay the reasonable expenses of the funeral.

In an action of trover by assignees of a bankrupt, for goods in the possession of the defendant, who had obtained them under a sale from the bankrupt (the validity of which transaction the plaintiffs disputed), a third person was held competent for the defendant, to prove that the goods belonged neither to the plaintiffs nor to the defendant, but to himself.(5) It has also been held, that in an action on a contract, in order to recover damages for the loss of some copies of a work, which loss was alleged to have been occasioned through a breach of the defendant's contract to insure them from fire, a witness who had purchased a number of the copies from the plaintiff, but was not privy to the contract with the defendant, was competent on the part of the plaintiff to prove the contract.(6) In an action for infringing a patent, a purchaser of a license to use the patent is a competent witness for the plaintiff.(7) And in an action for falsely

(1) *Simpson v. Pickering*, 5 Tyrw. 143.

(2) *Doe d. Wildgoose v. Pearce*, 5 Mees. & W. 506.

(3) *De Symonds v. De la Cour*, 2 N. R. 374.

(4) *Green v. Salmon*, 8 Ad. & Ell. 348.

(5) *Ward v. Wilkinson*, 4 B. & C. 410. And see *Nix v. Cutting*, and *Larbalestier v. Clark supra*. The same doctrine was applied in ejectment for tithes. *Doe d. Bath v. Clark*, 3 Bing. N. C. 429.

(6) *Mawman v. Gillett*, 2 Taunt. 325, n. This case has been sometimes cited as deciding that a dormant partner of the plaintiff may be a witness for him against the defendant, where there has been no privity of communication relative to the contract on his part, and the language of *Mansfield, C. J.*, appears to warrant the inference; but it would seem that this proposition cannot be supported. See *Skinner v. Stocks*, 4 B. & A. 437.

(7) *Derosne v. Fairlie*, 1 Mood. & Rob. 457.

representing the circumstances of a person who was insolvent, that person is competent on the plaintiff's part to prove his insolvency.(1)

A witness will not be disqualified, because through a mistaken view he may believe himself to have an interest which he does not possess. It is true, if a witness believes himself to be interested, the impression on his mind, and his bias in favor of the party calling him, may be as strong as if he were legally incompetent. But the difference is, that in the one case the inquiry is more simple and more easily defined; in the other it would be complicated, vague and uncertain. For the purpose of determining whether a witness was incompetent, on the ground of believing himself to be interested, it might be necessary to examine him on a great variety of points, which after all would be more proper for the consideration of a jury; as for example, on the nature of the benefit he expects, the reasons for his expecting it, or the impression which such an expectation might have produced on his mind. Such an inquiry would in all cases be extremely indefinite, and would lead to great inconvenience. The course therefore uniformly taken, is to inquire, not into the state of the witness's belief on the subject, but to ascertain whether or not, as a matter of fact, he has any existing legal interest in the event of the suit.(2)

It has been held, that a witness who believes himself under an obligation of honor to indemnify the bail in an action, is not incompetent, unless he has in fact entered into an engagement to that effect.(3) Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognized in courts of justice as a motive of conduct. Besides, where the sense of honor is so strong and binding as to influence a witness against his interest, it must be unnecessary to reject the witness; as the same principle which would induce him to pay the costs, would oblige him in giving his evidence, to speak only the truth; and, in cases where the sense of honor is less firm and imperative, the ground of the objection fails, since the witness is not bound in point of law, and does not feel himself absolutely bound in point of morals. But, independently of this reason-

(1) *Smith v. Harris*, 2 Stark. P. C. 47.

(2) NOTE 648.—There are certainly respectable authorities in this country that a witness believing himself interested, is to be rejected as incompetent, though in truth he is not interested in a legal or technical sense, so as to exclude him from testifying. *Richardson's Ex'r v. Hunt*, 2 Munf. 148; *Skilling v. Bolt*, 1 Conn. R. 147; *Plumb v. Whiting*, 5 Mass. R. 518; *Trustees of Lansingburgh v. Willard*, 8 John. R. 428; *M'Veaugh v. Goods*, 1 Dall. 62, cited and approved, 2 Dall. 50; *Freeman v. Luckett*, 2 J. J. Marsh. 390. But the decided weight of authority seems now to be the other way, and in accordance with the doctrine of the text. *Fernsler v. Carlin*, 3 Serg. & Rawle, 130; *Rogers v. Burton*, Peck, 108; *Long v. Baille*, 4 Serg. & Rawle, 222; *State v. Clark*, 2 Tyl. 373; *Stimmel v. Underwood*, 3 Gill & John. R. 282; *Havis v. Barclay*, 1 Harp. R. 63, and the cases cited in the two next notes; (*Carrington v. Holsbird*, 17 Conn. 530.)

But a witness who is really interested shall not be received because he believes he is not so. *Doe ex dem. Scales v. Bragg*, Ry. & Mood. N. P. Cas. 388.

(3) *Pederson v. Stoffles*, 1 Camp. 145, S. P. said to have been ruled *contra*, in an old case, by *Parker, C. J.* See *Fotheringham v. Greenwood*, 1 Str. 129.

ing, another more general answer is, that the ends of justice are most effectually attained by a full and complete investigation of the subject in dispute; and, unless the objection to the witness is founded on a strictly legal interest, he will be admitted to give evidence. In the case supposed, of a witness who says he thinks himself bound in honor to pay the costs, it might be injurious to the party who calls him to be deprived of his testimony on account of such a fancied obligation; more especially as it is an obligation which may easily be pretended by the witness, but which it is scarcely possible for the court justly to appreciate, and which, from the nature of the case, the party cannot release or enforce against the witness; on the other hand, his testimony may not deserve all the credit due to a witness free from bias, and it ought therefore to be strictly examined and sifted. The witness, then, is to be heard, but his evidence is open to observation.(1)

Cases not unfrequently arise, in which a witness, who has an interest inclining him to one of the parties to a suit, has also an interest inclining him to the opposite party. These cases have been adverted to in a former section, where it has been shown, that if the interest on one side be greater than that on the other, the party will be an incompetent witness on that side on which his interest preponderates; but where the liability or interest, on the side on which he is called, is counterbalanced or outweighed by an equal or greater liability or interest on the other side, he will be competent.(2)

(1) There are several dicta in support of the position that a witness is not competent, if he believes himself interested, whether he is or is not interested in strictness of law. By Pratt, Ch. J., in *Fotheringham v. Greenwood*, 1 Str. 129, cited and approved by Lord Loughborough, C. J., and by Gould, J., in *Trelawney v. Thomas*, 1 H. Bl. 307, S. P., by Perry, B., in *Newland's Case*, 1 Leach Cr. C. 353. And see a case tried before Lord Mansfield, cited by counsel in *Rudd's Case*, Leach Cr. C. 154. See also the case of *The Amitie, Villeneuve*, 5 Robinson Adm. R. 344, n; and the case of *The Galen*, Dodson Adm. R. 20.

NOTE, 649.—The authorities in this country are quite uniform that an honorary obligation shall not constitute a disqualifying interest in the witness. *Wells v. Lane*, 8 John. R. 462; *Gilpin v. Vincent*, 9 John. R. 219; *Moore v. Hitchcock*, 4 Wend. 292; *Union Bank v. Knapp*, 3 Pick. R. 96; *Smith v. Downs*, 6 Conn. R. 365; *Stimmel v. Underwood*, 3 Gill & John. 282; *Carman v. Foster*, Ashm. 133.

The reason given in the text, however, that the same principle of honor which binds the party to his obligation, would lead him to speak the truth, seems to confound the principle of *honor* with that of *moral obligation* merely. See the note to *Solarte v. Melville*, 1 Mann. & Ryl. 202. The true reason, therefore, would seem to be the one last assigned.

(2) NOTE 650.—That the witness is not incompetent where his interest is equal between the parties, see notes 626, 642. *Harwood v. Murphy*, 9 Halst. 215; *Wright v. Nichols*, 1 Bibb, 298; *Reed v. McGrew*, 1 Wright, 105; *Potter v. Burd*, 4 Watts, 15, 20; *Benedict v. Hecox*, 18 Wend. 490, 503; *Fancourt v. Bull*, 1 Bing. N. C. 681; *Woods v. Skinner*, 6 Paige's R. 76. Other cases of balanced interest are the following: In ejectment between two claimants by deed with general warranty from A., his widow was held competent for either. *Brindle v. McIlvaine*, 10 Serg. & Rawle, 282. In trover by the assignees of the witness, in trust to pay his debts, and return the surplus, against his creditor who claims to hold the goods in virtue of a lien for his debt, the witness is competent for either party. *Jacoby v. Laussatt*, 6 Serg. & Rawle, 300.

How far the doctrine that a complete remedy ever shall work a balance will be carried, is doubtful. It is of modern origin, and has been denied by the older cases. See per Mill, J., in *Shelby v. Smith's Heirs*, 2 A. K. Marsh. 507. But see several cases, *infra*, in this note. Thus the witness received payment for land from the defendant in ejectment, by a note indorsed by A., under an agreement, that if the defendant failed in his defence, the witness should refund, and look to A. for the money; though the latter was perfectly able to pay, yet the witness was held incompetent for the defendant. *Owen v. Mann*, 2 Day, 399. The reasoning of the court (pp. 403 to 405), is certainly very strong, on authority, against the whole doctrine. Though the witness's interest be balanced as to the principal sum in question, yet if he be liable to the party offering him, for costs, and not to the other, this destroys the balance, and renders him incompetent. *Beach v. Swift*, 2 Conn. R. 269, 275; *Bill v. Porter*, 9 Id. 23, 29; *Barnwell v. Mitchell*, 3 Id. 101, 105, 106; *Seymour v. Harvey*, 11 Id. 275. In assumpsit against a ship owner, for money advanced to the master, for which he had drawn his bill on the defendant, the master was held competent for the latter, as being indifferently liable to either party. *Descadillas v. Harris*, 8 Greenl. 298. In assumpsit by A. against C., for goods delivered to B. on C.'s order, B. is a competent witness for the plaintiff. *Cochran v. Dawson*, 1 Miles, 276, 278. The defendant, as bailiff of C., distrained and sold his tenant Brooks's goods, and paid the avails to C. Then the plaintiff sued the bailiff for the money, because Brooks had, prior to the distress, mortgaged the same goods to the plaintiff. Held, that Brooks was a competent witness for the plaintiff, as being indifferently liable to him for his mortgage debt, or to the landlord for the rent, according to the event of the contest. *O'Farrell v. Nance*, 2 Hill, 484. In one case the action being against one of two makers of a note, the surety, the other maker, his principal, was held to be a competent witness for the defendant, the court saying his interest was balanced. *Freeman's Bank v. Rollins*, 1 Shepl. 202, 205. But *quere*, for he would be liable to the surety for costs. In *Perryman v. Steggall* (5 Carr. & Payne. 197), the method directed by Gaselee, J., was for the surety to release the principal from the costs only. One who sells goods with warranty to both parties; he is a competent witness for either. *Jones v. Park*, 1 Stew. R. 419. And so of a mortgage of the goods forfeited to one party, and a sale to the other; for if the vendee recover, the witness will be liable to the mortgagee for the value. *Butler v. Tufts*, 1 Shepl. 302. Although, in an action against one of two alleged joint debtors, the one not sued is incompetent for the plaintiff, as a witness to charge the defendant, yet where the latter has agreed with the witness to pay the whole debt, this creates a balance, in respect to the witness's remedy over. *Nelson, J.*, in *Gregory v. Dodge*, 14 Wend. 602, *et seq.*, as explained by him in *Lake v. Auburn*, 17 Wend. 19. Preponderance of difficulty is not received to determine the balance either in England or in this country. Id. p. 605; S. C., 4 Paige, 557. In this last, the case, as considered, was, that two persons only filed a bill to account, the defendant insisting that A. was the complainant's partner, and introducing a set-off against all three. Held, that A.'s interest stood equal between the parties; and so he was a competent witness for the defendants. In replevin, the plaintiff claimed by sale from W., who swore that he had bought the goods of the defendant, but had not paid for them. W. was received as a witness for the plaintiff, and Weston, J., who delivered the opinion of the court, said he was competent for either party, being liable to the plaintiff on his warranty, or to the defendant for the price, accordingly as the plaintiff or defendant should fail in the suit. *Eldridge v. Wadleigh*, 3 Fairf. 371. We have seen that one who sells with warranty to each party, is indifferent between them; and it was held that the equipoise is not destroyed by the circumstance that the witness has specially indemnified one of the parties, by giving security. He is still a competent witness for that party. *Jones v. Park*, 1 Stew. R. 419. In a suit against sureties, the principal was offered as a witness for them; and Gaselee, J., directed him to be released from the costs only, and then held him to be competent. *Perryman v. Steggall*, 5 Carr. & Payne, 197. In detinue for slaves, by the mortgagee against the vendee of the mortgagor, the latter was held a competent witness for the plaintiff. *Miller v. Dillon*, 2 Monroe, 73.

We adverted above to the question, whether a remedy over, though clear, and against one perfectly solvent for what the witness is to lose by a determination against the party calling him, would create such an equality of interest as to save or restore his competency. On this, we have already seen, the cases are conflicting. *Walworth, Ch.*, expressed a doubt of this in *Brown v. Lynch*, 1 Paige, 147, 157. See *Gregory v. Dodge*, 14 Wend. 593, as explained by *Nelson, C. J.*, 17 Wend. 19; *Lake v. Auburn*, 17 Wend. 18. And see *Shelby v. Smith's Heirs*, 2 A. K. Marsh.

Thus, in an action of assumpsit for money paid to the use of the defendants, who were shipowners, Lord Kenyon admitted the captain as a witness for the plaintiff, to prove that he had received the money for the defendants' use; for he stood indifferent between the parties, and, whichever way the verdict might go, he was equally answerable.(1) So, in an action of covenant for rent, where the point in issue was, whether A. B., whose title both the plaintiff and the defendant admitted, had demised the premises first to the plaintiff or to another person, A. B. was considered a competent witness for the defendant to prove the fact, the court saying that it was a matter of indifference to the witness, whether he had one person or the other for his tenant, and though he might feel inclined to prefer one tenant to another, this objection would go to his credit only, and not to his competency, because the verdict could not be given in evidence in any action to be brought by or against him.(2)

Several cases, relative to the competency of witnesses equally interested on either side, have arisen with regard to co-contractors and partners. In an action on a bond against one of several obligors, another of the obligors is competent for the plaintiff to prove the execution of the bond.(3) And in an action on a promissory note against one of several joint makers, a maker of the note who is not sued is competent to prove the defendant's signature.(4) In these cases it has been said, if the plaintiff recover, the witness will be liable to the defendant for contribution; if the plaintiff fail, he may resort to the witness for the whole, and in that case the witness will be entitled to contribution for the defendant; so that in either point of view the witness stands indifferent between the parties. So also

504, 507; *Whitehouse v. Atkinson*, 3 Carr. & Payne, 344. The question is very fully examined in *Owen v. Mann* (*supra*). And see *Saffold, J., in Kennon v. M'Rea*, 2 Porter, 393, 394; also *Kendall v. Field*, 2 Shepl. 30, 32; *Schillinger v. M'Cann*, 6 Greenl. 364; and *Allen v. Hawks*, 13 Pick. 79, 85. There seems to be little or no difference in the cases that funds in hand, of the witness, or a deposit of a sum of money with him equal to his liability, will restore his competency. And in a late case in the Court of Errors, New York, it was held that where one of several sureties pays the whole, and sues the principal, the other surety is a competent witness for the plaintiff; for, if he fail, and the witness be made liable for part, he still has a remedy over against the principal. *Benedict v. Hecox*, 18 Wend. 490, 503, reasoning of *Paige*, Senator, on which the case turned.

It will have been observed by the learned reader, that the principle of this last case, if carried out to its full extent, will subvert those cases which hold that a surety, not sued, is incompetent as a witness for his principal. See *Leeds v. Leeds*, 12 Conn. R. 176.

The same principle will also subvert the rule excluding special bail and other judicial sureties; for, in all, there is a remedy over. So of many other cases, as parties to bills and notes, joint debtors not sued, &c., &c.

The principle will also very much enlarge the means of restoring competency by counter security, &c.

(1) *Evans v. Williams*, 7 T. R. 481, n. c; *Rocher v. Busher*, 1 Stark. N. P. C. 27.

(2) *Bell v. Harwood*, 3 T. R. 308.

(3) *Lockett v. Graham*, 1 Stra. 35.

(4) *York v. Blott*, 5 M. & S. 71; *Page v. Thomas*, 6 Mees. & Wels. 733.

in assumpsit for goods sold and delivered, a witness, who admitted himself to be a partner of the defendant, was considered competent on the part of the plaintiff to fix the defendant's liability.(1) And in an action charging the defendant as a partner in a trading company, a witness, proved to be himself a shareholder, was held competent on the part of the plaintiff to prove that the defendant was a partner.(2) Upon the same principle, in an action of contract in which the defendant pleads the non-joinder of a partner or co-contractor in abatement, the alleged joint contractor is a competent witness for the plaintiff to negative the plea;(3) for it is indifferent to the witness which way the verdict goes. Indeed, if he be in fact a partner, the verdict in favor of the plaintiff would rather be prejudicial to him, for he would then be liable to contribution, increased by the amount of the costs. In the one way, therefore, the verdict would be indifferent, in the other prejudicial.(4)

From the case of *Ridley v. Taylor*,(5) it appears to have been considered by the Court of King's Bench, that in an action by the indorsee against the acceptor of a bill drawn in the name of a firm, a member of the firm was a competent witness for the defendant, to prove that the bill had been drawn by one of the partners in fraud of the rest, and indorsed by him to the plaintiff for a separate debt.

In actions on negotiable securities many instances arise in which parties to the instrument are competent witnesses, by reason of an equal liability on either side.(6) It has already been mentioned, that in an action against one of several makers of a note, a joint maker not sued is a competent witness for the plaintiff. And in an action against the acceptor of a bill, the drawer is a competent witness for either party.(7) Thus, he has been admitted for the plaintiff, to prove the defendant's handwriting to the bill;(8) and he has also been admitted for the defendant, to prove payment of the bill,(9) and also to impeach the plaintiff's right to recover, on the ground of an usurious consideration.(10)

(1) *Blackett v. Weir*, 5 B. & C. 385.

(2) *Hall v. Curzon*, 9 B. & C. 646.

(3) *Hudson v. Robinson*, 4 M. & S. 476; *Cosham v. Goldnay*, 2 Stark. N. P. C. 414; *Fowler v. Round*, 5 Mees. & Wels. 478, *ante*, note 631.

(4) By *Lord Ellenborough*, 4 M. & S. 479. It has been before shown, that on account of the superior liability for costs, the witness has been thought incompetent for the defendant.

(5) 13 East, 175.

(6) NOTE 651.—Numerous cases, respecting the competency of accommodation and other parties to promissory notes and bills, were cited in note 60, *ante*, and in note 642, *ante*. (One of the makers of a joint and several promissory note is not competent for another, his co-defendant. *Newell v. Salmons*, 22 Barb. 647.)

(7) *Dickinson v. Prentice*, 4 Esp. N. P. C. 32.

(8) *Ibid*.

(9) *Humphrey v. Moxon*, Peake N. P. C. 52. See *Pool v. Bousfield*, 1 Campb. 55; *Le Sage v. Johnson*, Forrest, 23.

(10) *Rich v. Topping*, Peake N. P. C. 224; *Beard v. Ackerman*, 5 Esp. 119.

In an action on a promissory note or bill by an indorsee, the indorser is in general a competent witness, either for the plaintiff or the defendant, he may be called by the plaintiff to prove his own indorsement,(1) and by the defendant to prove that the bill has been paid,(2) or that it is void on the ground of not being properly stamped, having been actually made in London, though dated in a foreign country.(3) In these cases there is no interest to disqualify the witness from giving evidence for the plaintiff; for although the circumstance of the plaintiff succeeding in the action may prevent him from suing the witness, it is not certain that it will have this effect; and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor: the witness is also competent for the defendant, for if the plaintiff fail he is not prevented from suing the witness.(4)

In an action by an indorsee against an acceptor, issue being joined on a plea of payment, a prior indorsee, who has received money from the defendant to pay to the plaintiff the amount of the bill, is a competent witness for the defendant.(5)

If a bill has been drawn for the accommodation of the indorser, he is a competent witness for the plaintiff, to prove that the latter gave him value for the bill;(6) for the reason upon which an accommodation drawer or indorser has been held incompetent for the defendant, namely, on the ground of a liability to costs, does not apply, when the witness is called on the part of the plaintiff. And in a very recent case, where a bill had been accepted for the accommodation of the drawer, who had misapplied the bill, and the acceptor brought trover to recover it from a third party, it was decided by the Court of Common Pleas, that the drawer was a competent witness for the plaintiff, on the ground that whichever way the verdict went, he would be liable to one or other of the parties, and therefore stood indifferent. It was argued in this case, that if the plaintiff failed, the witness would be liable to him for the costs, but the court said there was no principle, upon which the witness could be held liable to the plaintiff for the costs of an action, which the latter was unable to support.(7)

It was held, in the case of *Buckland v. Tankard*,(8) that in an action by an indorsee against the acceptor, the indorser of a bill was incompetent for the defendant to prove that he indorsed the bill to the plaintiff upon trust to enable him to obtain payment from the defendant on account of the

(1) *Richardson v. Allan*, 2 Stark. N. P. C. 334.

(2) *Charrington v. Milner*, Peake N. P. C. 6.

(3) *Jordaine v. Lashbrooke*, 7 T. R. 601.

(4) See *Bayley on Bills* (5th ed.), 536.

(5) *Reay v. Packwood*, 7 Ad. & Ell. 917.

(6) *Shuttleworth v. Stephens*, 1 Campb. 408.

(7) *Fancourt v. Bull*, 1 Bing. N. C. 681.

(8) 5 T. R. 578.

witness himself, and not for any consideration, or with intent to convey any interest on the bill. The reason given for the rejection of the witness was, that if the plaintiff succeeded, the witness would be put to much greater difficulty in getting back his money than if the plaintiff were defeated. This appears to be the only case which has been decided on such a ground, and from the leading cases on this subject, which rest on the broad ground of immediate certain interest, such a circumstance may now more properly be considered as having a strong influence on the witness, than as forming any solid objection to his competency. We have seen that in the case of *Edmonds v. Lowe*,⁽¹⁾ which was an action by an indorsee against the drawer of a bill, the acceptor was considered incompetent for the defendant to prove that the plaintiff had received the bill from him upon condition that he should get it discounted, and that he had not done so; but this was upon the special ground, that under the circumstances of that case the acceptor would have been liable to indemnify the defendant against the costs, if the plaintiff obtained a verdict.

In an action by the indorsee against the indorser of a promissory note, the maker is a competent witness for the plaintiff, for if the plaintiff succeeds, the witness will be liable to the defendant, and if the defendant succeeds the witness will be still liable to the plaintiff; and his liability to the one cannot exceed his liability to the other.⁽²⁾ The maker also is a competent witness for the defendant, on the same ground; as, to prove that the date of a note has been altered.⁽³⁾ But it has been ruled, that in an action on a bill against the drawer, the acceptor is not competent for the defendant to establish a set-off, arising upon a bill accepted by the plaintiff and indorsed by the witness to the defendant, on the ground that the witness would be answerable to the drawer only to the amount recovered by the plaintiff.⁽⁴⁾

(1) 8 B. & C. 407, *supra*.

(2) *Venning v. Shuttleworth*, Bayley on Bills (5th ed.), 536.

(3) *Levy v. Essex*, Chit. Bills, 413 (7th ed.).

(4) *Mainwaring v. Mytton*, 1 Stark. 83. In Bayley on Bills (4th ed. 540), it is observed on this case, "that if the drawer be protected against the holder, by a cross demand against the holder, *quere*, whether such cross demand, when set-off, is not equivalent to payment? And will not the drawer be entitled to call on the acceptor for the full amount of the bill, as much as if he had paid the full amount in money?" In an ordinary case of set-off, no doubt, this would be the case; but in *Mainwaring v. Mytton*, the set-off arose on a bill indorsed by the witness to the defendant; and if the second bill was indorsed to the defendant, by way of satisfaction or security for the amount of the first, it is clear, if the defendant obtained the benefit of it by way of set-off in an action on the first bill, he could not sue the witness, as he might have done, if he had been compelled to pay the first bill from his own resources.

SECTION VI.

Of Certain Exceptions to the General Rule on the Subject of Interest.

It has been stated, as a general rule, that all persons who gain or lose by the event of a cause are incompetent to give evidence. To this general rule, however, there are several exceptions.

Some of these exceptions depend upon acts of Parliament; as, where persons entitled to restitution of stolen goods, informers, inhabitants of parishes and other districts, are by express enactment or by necessary implication rendered competent witnesses in proceedings, in the issue of which they are interested. Other exceptions arise from necessity⁽¹⁾ or a principle of public policy; as, where evidence is received from agents, factors, or servants,—notwithstanding that they may gain or lose by the event of the particular cause, in which their testimony is required.

Objections on the ground of interest proceed upon the supposition of an undue bias in the mind of the witness, and on the public utility of rejecting partial testimony. The presumption of bias may be taken off by showing that the witness has an equal or a greater interest the other way, or that he has given up what interest he had. And the presumption of public utility may be answered by showing that it would be very inconvenient, under the particular circumstances, not to receive such testimony.⁽²⁾

In the last section, we have seen in what cases the bias, which is presumed to arise in the mind of a witness interested on one side of a particular cause, may be removed by showing that such interest is counterbalanced by an equal or a greater interest on the other side. In the present action, it is intended to consider the particular cases, in which, on principles of public policy and utility, the admission of interested witnesses is allowed by the provisions of acts of Parliament, or by the decisions of courts of law.

1. Witnesses rendered competent by statutes.

One of the most ordinary cases of exception to the general rule of interest arises in the case of the owner of stolen goods prosecuting the offender to conviction. By the statute 7 & 8 Geo. IV, c. 29, § 57, it is enacted, that in order to encourage the prosecution of offenders, if any person guilty of any felony or misdemeanor (mentioned in the statute) in stealing, taking, obtaining, converting or knowingly receiving any property, shall be indicted for such offence by or on behalf of the owner of the property,

(1) NOTE 652.—An inhabitant of the place is a witness against the surety of the collector, *ex necessitate*, though liable to be re-assessed if the party should fail. *Middleton v. Frost*, 4 Carr. & Payne, 16. And see *ante*, note 20.

(2) By Lord Mansfield, 1 Burr. 422.

or his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative; and a summary power is given to the court to award restitution. Under this enactment, the party entitled to restitution has a direct interest in procuring a conviction; but notwithstanding this interest, he is a competent witness. This exception is founded upon the policy and intention of the statute which gives the right of restitution; for the intention of the act was to facilitate the conviction of criminals by holding out an additional inducement to aggrieved parties to prosecute; and if the courts were to determine that the right to restitution produced incompetency, the consequence would be that instead of the conviction of criminals being facilitated, it would be rendered more difficult from the want of proper evidence. It is also observable, that the statute 21 H. VIII, c. 11, which first gave the right of restitution, directs that it shall be awarded in those cases where the felon shall be attainted "by reason of evidence given by the party robbed, or owner of the money, &c., or by any other by his procurement," thereby expressly recognizing the competency of the owner as a witness.⁽¹⁾ And although the modern statute does not contain these words, yet its policy is the same, and the object of the enactment is expressly stated to be, "in order to encourage the prosecution of offenders."

It has been shown in the case of an indictment under the statutes relative to forcible entries, that the right of the tenant to an award of restitution of the lands is an interest which renders him incompetent. The reason for this distinction, between the effect of a right to restitution of land and that of a right to restitution of goods, is, that the statutes relative to forcible entries do not contain any provisions which expressly or impliedly recognize the competency of the tenant; and there is not the same ground of public policy requiring the reception of his evidence. An indictment for a forcible entry may be prosecuted at common law, and upon such an indictment the tenant, not being entitled to restitution, would be a competent witness; less impediment therefore to the satisfaction of public justice arises from excluding his evidence upon an indictment under the statutes.⁽²⁾ Upon these grounds it was decided, after consideration, by the Court of King's Bench, in the case of *Rex v. Williams*,⁽³⁾ that there was no sufficient reason for establishing an exception to the general rules of evidence in the case of a statutable indictment for a forcible entry, and that the tenant, being interested, was therefore an incompetent witness.

A variety of statutory rewards were formerly payable, upon the conviction of criminals, to persons who had been active in apprehending them and procuring their conviction; and it was always held that persons

(1) By Parke, J., 9 B. & C. 550; and see by Bayly, J., *Id.* 557.

(2) See by Bayly, J., 9 B. & C. 560.

(3) 9 B. & C. 549.

entitled to these rewards were not incompetent witnesses.(1) This was upon the principle that the exclusion of their testimony would be inconsistent with the policy and spirit of the statutes giving the rewards, for (as in the case of restitution of goods before mentioned) the object of the legislature was to stir up greater vigilance in the apprehension and prosecution of criminals, which intention would be defeated, if the expectation of a reward were to disqualify a witness who would otherwise have been competent.(2) So where, instead of a pecuniary reward, a pardon is offered by the statute to any person guilty of a particular offence, on the conviction of another person upon his evidence, the party expecting the pardon is competent, such being the evident and express intention of the legislature.(3)

Upon the same ground, in actions or prosecutions for bribery, it is no objection to a witness that he has been guilty of bribery himself, and will be entitled to an indemnity under the discovery clause of the 2 Geo. II, c. 24,(4) in case of the conviction of the defendant, against whom he is called as a witness.(5) In these cases, as observed by Lord Ellenborough, the statute gives a parliamentary capacitation to the witness, notwithstanding his interest in the result of the cause; for it is not probable, the legislature would intend to discharge an offender upon his discovering another so that the latter might be convicted, without intending that the discoverer should be a competent witness.(6)

We have seen that informers, who are entitled to the whole or any part of a penalty, are in general incompetent witnesses in support of any proceeding instituted for the recovery of such penalty.(7) But in the case of *Rex agt. Teasdale*,(8) it was ruled by Lord Kenyon, that in an indictment under the statute 21 Geo. III, c. 37, § 1, for exporting machinery, an informer, who was entitled to the penalties imposed by the statute, was a competent witness, although there was no express provision in the act for admitting his evidence. In this case the informer appears to have been considered competent upon the same principle as the discoverer in cases of bribery; namely, by necessary intendment from the statute imposing the penalties, and in order to give effect to its enactments. Where a stat-

(1) See *Rudd's Case*, Leach Cr. Ca. 157, 158, 353, n.; Hawk. P. C. b. 2, c. 46, § 135.

(2) See 9 B. & C. 556; 10 Mod. 193.

(3) *Per curiam*, *Rudd's Case*, 1 Leach, 134. And see statutes 10 and 11 W. III, c. 23, § 5, and 5 Ann. c. 31, § 4 (now repealed.)

(4) *Bush v. Ralling*, Sayer, 289; *Phillips v. Fowler*, cit. Id. 291; *Howard v. Shipley*, 4 East, 180; *Mead v. Robinson*, Wille's, 425; *Sutton v. Bishop*, Bur. 2283.

(5) Section 8. A similar enactment is contained in the Municipal Corporation Reform Act, 6 W. IV, c. 76, § 55.

(6) See 4 East, 183, and by Dennison, J., Sayer, 289.

(7) NOTE 653.—*Commonwealth v. Frost*, 5 Mass. R. 57, 58; *Commonwealth v. Hargesheimer*, 1 Ashmead's R. 415.

(8) 3 Esp. N. P. C. 68.

ute can receive no execution unless a party interested be a witness, there, says Chief Baron Gilbert, he must be allowed; for a statute must not be rendered ineffectual by the impossibility of proof.(1)

On a prosecution under the statute 23 Geo. II, c. 13, § 1, for seducing artificers to go out of the kingdom, the prosecutor was held competent, though entitled to a moiety of the penalty.(2) And on a prosecution under the statute 9 Anne, c. 14, § 5, the loser of money at cards was held competent to prove his loss.(3) But it appears that these cases are not to be considered as exceptions from the general rule upon interest; for the penalties imposed by the statutes are not recoverable by force of a conviction, but only by means of a distinct suit, in which the conviction would not be evidence; and therefore the witness is wholly free from interest in the event of the prosecution, which will neither advance nor prejudice his right to the penalties.(4)

Besides the cases above noticed, in which the evidence of interested witnesses is admitted in furtherance of the intention of some act of Parliament, there are a variety of other cases in which interested witnesses are made competent by express enactment to this effect. Many of these enactments authorize the admission of the inhabitants of particular districts as witnesses upon trials, in the event of which the general body of the inhabitants of the district are interested. In these cases, the interest of any individual inhabitant (although sufficient to exclude him at common law) must be very trifling, and the various statutes alluded to have been made in order to obviate the great inconvenience that would result from excluding all the inhabitants of the district.

On an indictment for not repairing a public bridge or the highway adjoining, the inhabitants of the county, town, riding, &c., in which such bridge is situated, are rendered competent witnesses by the statute 1 Ann. st. 1, c. 18, § 13.(5)

In an action against the hundred on the statute of Winton, by a party who had been robbed, the inhabitants of the hundred were rendered competent witnesses for the defence by the statute 8 Geo. II, c. 16, § 15. The party robbed was always considered to be a competent witness *ex necessitate*,(6) for it would be useless to give him the right of action, if he were not admitted as a witness to speak to facts, which in general no person could be expected to speak to but himself.

(1) Gilb. Ev. 414.

(2) *R. v. Johnson*, Willes, 425, n. c.

(3) *R. v. Luckup*, Willes, 425, n. c.

(4) See 9 B. & C. 557, by Bayly, J., who appears to have considered that the admissibility of the witnesses in *R. v. Luckup* and *R. v. Johnson* was confined to cases of indictments.

(5) Even before the statute such evidence had been thought admissible from necessity. See *R. v. Carpenter*, 2 Shower, 47; 1 Ventris, 351; Gilb. Evid. 113.

(6) See *Bul. N. P.* 187.

By the modern statute relative to actions against the hundred, ~~for nuisances~~ arising from riotous assemblies,(1) it is enacted, "That in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, as is therein mentioned, no inhabitants shall by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants."

In actions against churchwardens or overseers of a parish for mis-spending money collected by them on behalf of the poor, parishioners, who do not receive alms or other gifts out of the parochial funds, are made competent witnesses by statute 3 W. & M. c. 11, § 12.

So also in cases where pecuniary penalties, imposed on any offence, are directed to be applied to the use of the poor or for the benefit and exoner-ation of the parish or other place, inhabitants are rendered competent witnesses on the trial of the offender by statute 27 Geo. III, c. 29, provided the penalty does not exceed £20. And in the case of summary convictions, under the provisions of the statutes 7 and 8 Geo. IV, c. 30, the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division, in which the offence shall have been committed, notwithstanding any penalty or forfeiture incurred by the offence may be payable to the general rate of such county, riding, or division.(2)

By the general rule of law, the rated inhabitants of a parish, indicted for not repairing a highway, are not competent to give evidence for the parish.(3) But by the recent statute for consolidating the laws relating to highways (not turnpike), it is enacted, "That no person shall be deemed incompetent to give evidence, or be disqualified from giving testimony or evidence, in any action, suit, prosecution, or other legal proceeding to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of that act."(4)

By the general Turnpike Act,(5) it is also enacted, That the inhabitants of any parish, township, or place, in which any offence shall be committed contrary to that act, shall not be deemed incompetent witnesses by reason of their being such inhabitants. And by a subsequent statute,(6) it is en-

(1) 7 and 8 Geo. IV, c. 31, § 5.

(2) See sect. 64 of the former statute, and sect. 29 of the latter: Where the party aggrieved is admitted as a witness, he is not to receive any portion of the penalty. Sects. 66 and 32.

(3) See 15 East, 474, and by Lord Ellenborough, 1 B. & Ald. 66.

(4) Stat. 5 and 6 W. IV, c. 50, § 100.

(5) 3 Geo. IV, c. 126, § 137.

(6) 4 Geo. IV, c. 95, § 84.

acted, That no person shall be deemed incompetent to give evidence in any action or other proceeding at law or equity, or before any justice under or by virtue of any act for making or maintaining any turnpike road, or under that act or the act of 3 Geo. IV, by reason of being a trustee or commissioner of such road, or a mortgagee or creditor of the tolls thereof, or a former lessee or collector of such tolls, or a treasurer, or clerk, or surveyor, or other officer under such act.

It will be observed, that the provisions respecting the competency of inhabitants, which have been hitherto noticed, only apply to a few particular cases, in which questions arise affecting the interests of parishes and other districts. But in order to provide more effectually against the inconvenience of excluding the testimony of the inhabitants at large, upon questions of this nature, a more general provision was made by the statute 54 Geo. III, c. 107.

By the 9th section of this statute, it is enacted, "that no inhabitant or person rated, or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly, or in part maintained or supported thereby, or executing, or holding any office thereof or therein, shall before any court or person or persons whatsoever be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, township, or hamlet, *in any matter relating to such rates or cesses*,—or to the boundary between such district, parish, township, or hamlet,—or to the settlement of any pauper in such district, parish, township, or hamlet,—or touching any bastards chargeable, or likely to become chargeable to such district, &c., or to the recovery of any sum or sums for the charges or maintenance of such bastards,—or the election or appointment of any officer or officers, or to the allowance of the accounts of any officer or officers of any such district, parish, township, or hamlet; any law, usage, statute, or custom, to the contrary in anywise notwithstanding."(1)

(1) NOTE 654.—Upon an issue whether a certain messuage is situated within a chapelry, a person who occupies ratable property within the chapelry, is a competent witness to prove that it is. Though his testimony might increase the number of contributors, yet it might also increase his burden by increasing the number of claimants for seats and sepulture. But it was held to be a case also within the statute 54 Geo. III, c. 170, § 9. *Marsden v. Stansfield*, 7 Barnw. & Cressw. 815; S. C., 1 Mann. & Ryl. 669. On a justification in trespass, that the *locus in quo* is a free wharf for the inhabitants of O., one of those inhabitants is not competent for the defendant, unless the justification be waived. *Prewitt v. Tilly*, 1 Carr. & Payne, 140.

In New York it is held that the interest arising from being a ratable inhabitant, is too remote to prevent his being a witness for the town, as in actions on bastardy bonds (*Falls v. Belknap*, 1 John. R. 486), or for penalties in *qui tam* actions. *Corwein v. Hames*, 11 John. R. 76; *Bloodgood v. Overseers of Jamaica*, 12 Id. 285. See former notes as to the testimony and confessions of corporators and ratable or rated inhabitants. And see particularly, *The City Council v. King*, 4 M'Cord, 487. It will be seen by these notes that we stand, by common law, very nearly on the footing of England upon the statute 54 Geo. III, c. 170, § 9, cited in the text, and which is given at length in a note to *Marsden v. Stansfield*, *supra*, 1 Mann. & Ryl. 670. (See later cases 4 Paige Ch. 510; 6 Hill R. 407.)

One of the earliest cases after its passing was an action of trespass against the overseers of a township, in which the question was, whether certain lands were vested in the overseers under a local act of Parliament; and the Court of Exchequer decided, that a rated inhabitant of the township was not an incompetent witness on the part of the defendants, although the lands in question, if vested in the defendants, would be vested in trust for the township and in aid of the poor rates.(1) The court considered that the statute should receive a liberal construction, and that the matter in issue related to the rates.

In a subsequent case in the King's Bench,(2) it was decided, that upon an issue directed by the court, for the purpose of trying whether a certain messuage was situated within a chapelry, a person occupying ratable property within the chapelry was competent to prove that it was so situated. The court said, the burden of making out that a witness was incompetent lay upon the party objecting to his testimony, and that nothing appeared to show that the witness would be a gainer, by proving that the messuage was within the chapelry; and as the witness was only stated to be the occupier of *ratable* property, and not actually *rated*, he was competent at common law, on the authority of *Rex v. Kirdford*. The court further said, the case was plain on the true construction of the statute, for the substantial question was, whether the owner of certain property was liable to contribute to the rates of the chapelry, which was a matter "relating to the rates or cesses" of the district. And the question, whether certain land was situate within the chapelry, was "a matter relating to the boundary between the district in question, and the adjoining district."(3)

In a later case at *Nisi Prius*, it was ruled by Lord Tenterden, in an action of debt by a surveyor of highways against his predecessor in office, to recover the penalty imposed by the highway act for not accounting, that inhabitants of the parish were competent for the plaintiff, although their evidence would tend to increase the funds in relief of the rates.(4) And this case was followed by another, in which Lord Chief Justice Tindal ruled,(5) that such inhabitants were rendered competent by the statute, upon an indictment for the non-repair of a bridge and highway within the parish, which it was alleged the defendant was bound to repair *ratione tenuræ*.

In a still more recent case at *Nisi Prius* it was ruled, on the trial of an

An inhabitant of a state, where the state is a party, is a competent witness for the state, notwithstanding any interest he may have, as such inhabitant, in the event of the suit. *The State of Connecticut v. Bradish*, 14 Mass. R. 296. And see *Gould v. James*, 6 Cowen's Rep. 369, S. P.

(1) *Meredith v. Gilpin*, 6 Price, 146.

(2) *Marsden v. Stansfield*, 7 B. & C. 815.

(3) 2 East, 559.

(4) *Heudebourg v. Langston*, Mood. & Mal. N. P. C. 402, n.

(5) *R. v. Hayman*, M. & M. N. P. C. 401.

ejection by parish officers to recover a parish-house, that an occupier of ratable property within the parish was a competent witness on behalf of the lessors of the plaintiff. Mr. Baron Alderson there observed, that the statute enacted, that the party should not be incompetent in any matter relating to rates or cesses; and that the only way in which his interest could be affected, was on the ground that the recovery of the property would diminish the rate or cesses.(1) Upon the same case coming subsequently before the King's Bench, the court decided that the witness was properly admitted, apparently upon the ground that he was competent at common law, independently of the statute.(2) And in a later case,(3) the Court of Queen's Bench held, that in ejection either by or against parish officers claiming to hold property for the parish, rated inhabitants are competent witnesses for the officers under the statute. Lord Denman, in delivering the judgment, said, the court on consideration approved of the decision in *Meredith v. Gilpin*, and could not agree with the case of *Oxenden v. Palmer*, or with the decisions to which that case had given birth.(4)

The last reported case, in the construction of the section above referred to, is the case of *Morrell v. Martin*,(5) an action of replevin against the defendant, who justified under a warrant directed to him and to a surveyor of highways for distraining the plaintiff's goods for an assessment due on a highway rate. The surveyor, being called as a witness on behalf of the defendant, was objected to as being an inhabitant of the parish, and so interested to increase the fund for the repair of the highways. But the objection was overruled by Patteson, J., at the trial, and the Court of

(1) *Doe v. Cockell*, 6 Car. & P. 525.

(2) 4 Ad. & Ell. 478.

(3) *Doe d. Boulton v. Adderley*, 8 Ad. & Ell. 502.

(4) The cases here referred to, which must now be considered as overruled by the decision in the case of *Doe d. Boulton v. Adderley*, are as follows: In the case of *Oxenden v. Palmer* (2 B. & Ald. 236), it was decided, in trespass against the surveyor of highways for a parish, who justified under a custom to take shingle from the sea beach for the repair of the roads, that inhabitant rate payers of the parish were incompetent to give evidence for the defendant in support of such custom. Lord Tenterden, in delivering the judgment of the court, said; that they entertained great doubt whether the case of *Meredith v. Gilpin* was properly decided, and observed that the statute related chiefly to the poor, and that although when the words of the ninth section, when taken by themselves, would seem to apply to any rates or cesses, yet that the court thought the matter in question did not strictly and properly relate to rates or cesses of the parish. And in the case of *R. v. Bishop Auckland* (1 Ad. & Ell. 744; 1 Mood. & Rob. 286, 287, n.), the same court decided that the rated inhabitants of a district, indicted for the non-repair of a highway, were not rendered by the statute competent witnesses for the defence. It seems to have been ruled also at *Nisi Prius* (*Tuthill v. Hooper*, 1 Mood. & Rob. 392), that in an action for medical attendance on a pauper, against an overseer who was defending on the part of the parish, and in pursuance of an order of vestry, that a rated inhabitant, who had signed such order, was not within the statute, and his testimony on behalf of the defendant was therefore rejected.

(5) 6 Bing. N. C. 373.

Common Pleas decided, that the case was one which strictly related to the rates of the parish, because, if the defendant should fail in his cognizance, it would have the effect of enabling the plaintiff to a return of the goods seized in satisfaction of the highway rate; and so the case comes strictly within the provision of the statute.

For the purpose of more effectually removing all disqualification of witnesses, arising from liability to the payment of parochial rates, it has been recently enacted by statute 3 & 4 Vict. c. 26, that no person shall be disabled from giving evidence, as a witness on any trial in any court, by reason only of being rated, or liable to be rated, to the relief of the poor, or toward the maintenance of church, chapel or highways, or for any other purpose whatever. And no churchwarden, overseer or other officer, for any parish, &c., or any person rated, or liable to be rated, as aforesaid, shall be disabled from giving evidence on any trial or other proceeding, or by reason of being liable to costs in respect thereof, when he shall be only a nominal party to such trial, &c., and shall be only liable to contribute to such costs in common with other rate payers.

In proceedings relative to seizures and penalties under the Customs Act (6 Geo. IV, c. 108), it is provided by the fifth section of that statute, that officers, and persons acting in their aid and assistance, shall be deemed competent witnesses on the trial of any suit or information on account of any seizure or penalty mentioned in the act, notwithstanding that such officer or other person may be entitled to the whole or any part of such penalty.

2. Exceptions to the rule of interest, by common law.

In addition to the statutory exceptions hitherto considered, there are some common-law exceptions to the rule of interest, which depend upon the principle of necessity, or of public policy.

Thus, it is laid down by Mr. Justice Buller, that a party interested will be admitted, where no other evidence is reasonably to be expected; and this principle was acted on in the late case of *Lancum v. Lovell*,⁽¹⁾ argued before all the judges; in which it was decided, in an action for toll claimed on a public road, that persons who refused to pay the toll were, from necessity, competent to give evidence against the claim, notwithstanding their interest in the result of the cause. This case arose before the statute 3 & 4 Wm. IV, c. 42, and the witnesses were objected to on the ground that the verdict might be used as evidence against themselves in a subsequent action for the toll; but the judges were unanimously of opinion that the witnesses were competent, notwithstanding this interest, upon the broad ground that the claim was in the nature of a public right, in which all the king's subjects were interested, and that no other evidence could

(1) 9 Bing. 465.

be reasonably expected but that of persons from whom toll had been demanded.(1)

The admission of the evidence of agents, servants, and factors has also been considered as an exception to the general rule, depending upon public policy; and Mr. Justice Buller says that this evidence is admitted "for the sake of trade and the common usage of business." (2) Formerly, when the rule of incompetency was more strict than in modern times, and when an interest in the *question* in dispute was considered as a test of competency, without reference to the inquiry whether the witness could derive actual benefit or disadvantage from the event of the cause, the reception of this description of evidence was, properly speaking, an exception to the general rule. But now, as the true criterion of competency is, whether a witness can derive any immediate gain or loss from the event of the cause, the evidence of agents, servants and factors, for the purpose of proving contracts made by them on behalf of their employers, would, probably in the great majority of cases, be admissible under the general rule, and not by any way of exception.(3) However, it is still laid down as an established

(1) The court seemed to think that the case of *Lord Falmouth v. George* (5 Bing. 286, *supra*), savored more of a *private* right; but the distinction has become immaterial since the 3 & 4 W. IV, ch. 42, which removes the objection arising from the subsequent use of the verdict.

(2) See *B. N. P.* 289; *Fortesc.* 247; by *Eyre, C. J.*, 2 H. Bl. 591. Upon the nature of this and other exceptions, see *Bentham's Rationale*, b. 9, c. 3, Vol. 5, p. 66.

(3) *NORR* 655.—*Bailey and Bogert v. Ogden*, 3 John. R. 399. An agent or attorney is a good witness, *ex necessitate*. *Mackay v. Rhineland*, 1 John. Cas. 488; *Jones v. Hake*, 2 John. Cas. 60; *Abbott v. Sebor*, 3 John. Cas. 39; *Stewart v. Kip*, 5 John. R. 256; *Cortes v. Billings*, 1 John. Cas. 270; *Burlingham v. Deyer*, 2 John. R. 189; *Fisher v. Willard*, 13 Mass. Rep. 379; *Cox's Adm'rs v. Hill*, 3 Ham. Ohio R. 423, 424; *Trouard v. Beauregard*, 1 Mart. Lou. R. 80; *Ruan v. Gardner*, 2 Cond'y's Marsh. 706, b. See the remarks of *Underwood, J.*, in *Bank of Kentucky v. M'Williams*, 2 J. J. Marsh. 260, *et seq.*; also *Hicks v. Fitzsimmons*, 2 Cond'y's Marsh. 706, and *Wallace v. Child*, 1 Dall. 7; (*St. John's Adm'r v. McConnell*, 19 Miss. (4 Bennett), 38.)

Thus, in an action to recover the difference upon a stock contract, it was held, that the broker who made the contract was a good witness to prove that he had received a parol authority from the plaintiff to make the contract (*Livingston v. Swanwick*, 2 Dallas, 300); and also to prove every part of the transaction. And the court further said, if the broker or agent were not permitted to give evidence of the instructions he received (which were oral in this case, and were usually so in similar cases), it would be impracticable to ascertain the facts that are essential to enable the court to decide upon the merits of the controversy. *Id.* An agent or attorney is a competent witness for his principal, although the witness, by his testimony, may discharge himself from a supposed liability.

Thus, in an action against an officer for not seizing goods on an execution, which had been attached on mesne process, the attorney who commenced the suit is a competent witness for the plaintiff to prove the delivery of the execution to the officer, being considered by the court an agent for the plaintiff, and his supposed liability going only to his credit. *Phillips v. Bridge*, 11 Mass. R. 242.

But in Pennsylvania an agent to sell lands is not a competent witness to prove his authority. The power of an agent to sell lands is required by statute to be in writing and proved by disinterested witnesses. *Meredith's Lessee v. Macoss*, 1 Yeates, 200; *Nicholson's Lessee v. Mifflin*, 2 Id. 38; *S. C.*, 2 Dall. 246; *Girard's Lessee v. Krebs*, cited 2 Yeates, 38; *Plumsted's Lessee v. Rudebagh*, 1 Id. 502. Nor is the agent competent to prove that a written power had been

given, and was mislaid. 2 Dallas, 246. But one who purchased lands as the agent of another was held competent to prove his authority, and to establish the purchase. *Miller v. Hayman*, 1 Yeates, 23; *Steward's Lessee v. Richardson*, 2 Id. 89.

An assumed agent may be received either to prove or negative the fact of his being such agent. *Cox's Adm'r v. Hill*, 3 Ham. Ohio R. 423, 424. Farther as to proofs by agents, and the manner in which their authority is to be established, see *Renaudet v. Crocken*, 1 Cain. R. 167; *Stewart v. Richards*, 1 Day, 406, note 1; and *Proprietors of Kennebeck Purchase v. Call*, 1 Mass. R. 483.

The cases upon the competency of *agents, servants, and trustees* are very closely connected in principle; but we shall here endeavor to place them each under their appropriate head.

We would first merely remark a distinction which some of the cases render striking; that where an action is brought *against* the principal, the master of the *cestui que trust*, for the misconduct of the agent, servant or trustee, neither is a competent witness for the defendant without a release. But where the action is brought *by* the principal, master or *cestui que trust*, although the action be grounded on the conduct of the agent, servant or trustee, and his misconduct be set up as a defence, yet he is competent for his principal to prove that the transaction was within the scope of his authority, and to repel the charge of misconduct in respect to it. However, by the modern cases this is but a general rule; and there have been exceptions made, especially in the case of actions brought for an injury to specific property while in the care and under the use of a servant; and some few of the books, both English and American, give countenance to the like exceptions in regard to agents. Such is the tendency of Mr. Starkie's remarks (3 Stark. Ev. 1728, 1729, 1730, 2d Am. ed.), which are cited at length, and with approbation, by Baylies, J., in *Denison v. Hibbard* (5 Verm. R. 598), though the case itself drew in question the competency of the plaintiff's servant. The same remarks are repeated in 1 Stark. Ev. 111, 113 (6th Am. ed.) The 8th ed. of Phil. (p. 101) gives as the result of the English cases, that where the witness is so connected with the question, that a verdict for the plaintiff would entirely relieve him from liability over, in a subsequent action, to the plaintiff, he is incompetent. The cases cited are *Rothero v. Elton*, Peak. N. P. Cas. 84, and *Morish v. Foote*, 2 Moore, 508; S. C., 8 Taunt. 454; *Wake v. Lock*, 5 Carr. & Payne, 454, also cited *infra*, and *Sherman v. Barnes*, 1 Mood. & Rob. N. P. C. 69. But in *Johnson v. Harth* (2 Bail. 183, 184, 185), which directly drew in question the conduct of the plaintiff's agent, or rather perhaps his sub-agent, he was held competent for his principal. And Harper, J., takes the distinction between an action *by*, and one *against* the principal; for in the latter case his misconduct is made the very ground of the proceeding, and is directly in issue. And the general rule seems to be well sustained by the English and American cases on which he proceeds. The same distinction is asserted by Kennedy, J., in *McDowell v. Simpson*, 3 Watts, 129, 134, 135. Yet it does not seem to prevail, at least in England, as we saw above, and shall see *infra*, especially with regard to servants, and the American cases are conflicting even in respect to the agent. The distinction between agents and servants is perhaps very difficult to maintain on principle. But we shall see, as we have before seen, in the previous notes, that the exception cannot be extended to agents and trustees, especially the former, without overturning a line of cases most formidable in number, and strong in the learning and character by which they were adjudged.

With these remarks we shall proceed to the cases, without further regard to their arrangement than that which we have suggested. And *first*—

Of agents as witnesses.—In an action involving the validity of a deed, the attorney who prepared it is competent to prove it valid, even though there be another action pending against him in which he must fail if the deed be invalid. *Hudson v. Revett*, 5 Bing. 368. A broker who effected a policy is competent as to all matters connected with the policy, though he have an interest arising from a lien on the policy. *Hunter v. Leathley*, 10 Barn. & Cress. 853. This was said to be *ex necessitate*. In an action by the sheriff against a vendee, for the price of goods sold at auction by his deputy, the latter is a competent witness for the sheriff. *Brent v. Green*, 6 Leigh, 16, 28, 29, and *Carrington v. Anderson*, 5 Munf. 32, *contra*, is not law. 6 Leigh, 29. In assumption, for use and occupation, it was held that the plaintiff's agent might prove his own parol authority to make a parol lease from him to the defendant. *McGunnagle v. Thornton*, 10 Serg. & Rawle, 251. This is contrary to some of the Pennsylvanian cases on the same subject, *ante*, and seems to be so regarded by *Duncan, J.* (10 Serg. & Rawle, 252). It contradicts *Anders-*

son v. Hayes (2 Yeates, 95). In an action for goods sold, the plaintiffs' servant for carrying them was held competent for the plaintiffs, to prove that the defendant artfully obtained them from him without ready payment, though his instructions were not to let them go without cash down. Tilghman, Ch. J., puts his competency on the ground that, from the whole of his testimony, it appeared he had not violated orders. Wilmarth v. Mountford, 8 Serg. & Rawle, 124, 126. In covenant by an executor for rent, the defendant was allowed to prove by A. that he (A.) received payment by order of the plaintiff's intestate. Buchanan v. Montgomery, 2 Yeates, 72. Note. The defendant released the witness; but *quere*, whether this was necessary. In assumpsit for the proceeds of goods shipped on board the defendant's schooner, as the goods of P., the ship's agent was held competent for the plaintiffs to prove their interest in the goods. Andre v. Care, 3 Yeates, 101. The plaintiff in detinue derived his title from a sale to him, made by an agent, who was held competent for him to prove his authority by letter, and testify to its loss and contents. Kirkpatrick v. Cigna, 3 Bibb, 244. Connelly's Heirs v. Chiles, S. P., in ejectment as to an agent who conveyed the land to the plaintiff. In assumpsit, the defendant offered a witness to prove that he was the plaintiff's agent, and, as such, received property in satisfaction of his claim. Held competent. Alexander v. Emerson, 2 Litt. 25. The attorney on record for the plaintiff is competent for the defendant to prove payment, though he claim the money as assignee. McLaine v. Bachelor, 8 Greenl. 324, 325. But some books hold him inadmissible, as being the real party. In assumpsit against the owner of a ship for money advanced to the master, for which he drew on the owner, the master is competent for the latter. Descadillas v. Harris, 8 Greenl. 298. In assumpsit by a bank on a note, the cashier is competent for the plaintiff, to prove its loss and contents. So to prove an overpayment. Stafford Bank v. Cornell, 1 N. H. Rep. 192. And this, though he had given a bond, with sureties, for the correct discharge of his duties. United States Bank v. Stearns, 15 Wend. 314. So of an action for money obtained from him through his alleged misconduct. Franklin Bank v. Freeman, 16 Pick. 535, 538, 539. He is a competent witness for the plaintiff in an action against the bank for the amount of a deposit. Johnson v. The Farmers' Bank, &c., 1 Harringt. Rep. 117. The counsel for the plaintiff is competent for him, though he intend to charge a commission for receiving and remitting the avails of the recovery. Slocum v. Newby, 1 Murph. 423. The agent of the proprietor of land conveyed to A. and then to B.; on an issue whether the former conveyance was on good and valuable consideration, he was held competent as a witness to sustain the first deed. Alston's Ex'rs v. Jones's Devisees, 1 Murph. 45. In an action for money received by the defendant for the plaintiff's use, the defence was payment to A. as the plaintiff's agent, who was held competent for the defendant to prove a parol authority. Blackledge v. Scales, 1 Murph. 179. In a like action, the plaintiff's case was, that his agent gambled his money into the defendant's hands, at the game of *faro*. Held that the agent was not a competent witness for the plaintiff without his release. Allen v. Lacy, Dudley, 81. But in another case, where the plaintiff's agent had been negligent—*e. g.* a notary in giving notice to charge the plaintiff's indorser—yet he was received for the plaintiff, to prove a waiver of notice by a promise from the indorser, though it was admitted that, had the action been *against* the principal for the neglect of his agent, the latter would have been incompetent for the former, because the record would be evidence. Johnson v. Harth, 2 Bail. 183, 184, 185. See our notice of this case, *supra*. An agent from whom his principal's goods were obtained by a fraudulent representation of the credit of a third person, was held competent as a witness for his principal, in an action for the fraud. Raymond v. Howland, 12 Wend. 176. In an action of account by one joint owner against another for the proceeds of timber owned by them and sold by their joint agent, he was held to be a competent witness for the plaintiff, to prove that, by direction of the defendant, he had applied the whole proceeds to the payment of a debt due to him by the defendant individually. Spencer v. Barnum, 4 Verm. Rep. 298. In this case, too, the agent knew that the timber was joint property, and so was, doubtless, accountable to the plaintiff. The court, per Baylies, J., likened it to the case of a trespasser testifying against his joint trespasser. In trover, the defendant offered the agent of the true owner of the goods, to prove that he, as agent, had sold them to the defendant; and that the proceeds were, by agreement of the principal, to be applied in paying a debt due from him to the witness. The court treated him as a vendor in his own right, subject by law to the imputation of an implied warranty in favor of his vendee, and so incompetent. Saunders v. Addis, 1 Bail. 49. In debt, for the use of a town, on the collector's official bond for not paying

over moneys to the clerk of the commissioners of the poor, the clerk was held a competent witness for the plaintiff, to negative the fact that he had received the moneys. *State v. Davidson*, 1 Bail. 35.

In assumpsit on a note, and issue on a plea of payment, the question was how certain moneys received by the plaintiff's attorney, had been applied, whether to extinguish the plaintiff's demand, or another debt in favor of C., against the defendant, of which the attorney also had the control. He, the attorney, was held competent for the plaintiff to prove that the defendant agreed, at the time of payment, that the moneys should be applied on the claim in favor of C. *Marshall v. Nagel*, 1 Bail. 308, in connection with *S. C.*, Id. 266. In assumpsit, for not accepting and paying for stock, the plaintiff offered the defendant's agent as a witness to prove the sale, who swore that he purchased the stock, without disclosing the name of his principal. Held incompetent without a release; for he was liable to be treated as the principal vendor, and to be sued as such, and was, therefore, called to throw off his *prima facie* liability upon another. And *McBrain v. Fortune* (3 Camp. 317), and *Ripley v. Thompson* (12 Moor. 55), were very properly treated, as in point. *Hickling v. Fitch*, 1 Miles, 208, 209. In these notes are several cases, that, where one of two joint debtors are sued, he who is not sued, shall not be received for the plaintiff, against the other; for he comes to throw a share of the debt off himself, and fasten it on the defendant. And see several cases to the same effect, cited *infra*. In *scire facias* on a judgment, the defence was payment to, and a discharge by the plaintiff's attorney, in fact; but the answer was, that the discharge was obtained by a fraud committed on the attorney, and he was held a competent witness for the plaintiff to prove it. *Irwin v. Allen*, 1 Pennsylv. Rep. 444, 447. So of an attorney on record, in the suit, who, by mistake, received the principal sum, omitting the costs, and gave a general discharge, his client, though learning from him but part of the circumstances, having directed him to proceed with the suit, at his, the client's expense. *Steward v. Riggs*, 1 Fairf. 467. In ejectment, the defence was, that the defendants held by a valid lease, from one having no actual or express authority at the time, to give it; but a general power, to be made out by previous acts of the plaintiffs, and their subsequent recognition. Held, that the agent was a competent witness for the defendant to prove these facts (*McDowell v. Simpson*, 3 Watts, 129; *Myers v. Anderson's Heirs*, 1 Wright, 513, 514); for, said, he is liable indifferently, to either party, according to circumstances. The attorney on record is competent, as a witness for the plaintiff, though the latter be indebted to him, and he expect to obtain some of the money in payment. *Geisse v. Dobson*, 3 Whart. Rep. 34. Otherwise, if a portion of the recovery be assigned to him (*Morris' Adm'r v. Bills*, 1 Wright, 343, 344); or he is to have a portion of the money, when collected. *Commonwealth v. Moore*, 5 J. J. Marsh. 655, 656. An agent, selling goods with warranty of soundness, and a personal guaranty of the truth of the warranty, was made liable to the vendee by an award. In an action by the same vendee against the principal, founded on the same warranty, the agent was held competent for the defendant, as a witness, inasmuch as his fate was fixed by the award, and could not be changed by the event. *Jackson v. Wright*, 3 Whart. Rep. 601, 606, 607. Otherwise, had it not been for the award. *Richardson v. Dorr*, 5 Verm. Rep. 917. In assumpsit for goods sold, the plaintiff called a witness who purchased them, the bill being made out to him in his own name; and he drawing for the price. Held not competent. *Hewitt v. Lovering*, 3 Fairf. 201, 203, and the books there cited. The plaintiff's agent, as such, retains the attorney to prosecute his cause. This does not render the agent incompetent, as a witness for the plaintiff. He is not personally responsible to the attorney. *Morris v. Wadsworth*, 17 Wend. 103, 117. So, though he take an active part in obtaining security, &c., if he be not personally responsible; and though he has long acted as the party's agent in respect to the land in question, and received delivery of possession, and made an entry in his name. *Smith v. White*, 5 Dana, 376, 382. In assumpsit against a school district, for rent of a school room, the prudential committee of the district is a competent witness for the plaintiff, to prove that he hired it for the defendant, and that a school was kept in it. *Allen v. School District No. 2*, 15 Pick. 35, 39. In assumpsit for goods sold, the plaintiff's attorney, who sold the goods for him, and caused the suit to be brought, was held competent for him, to prove his demand. *Zino v. Verdelle*, 9 Lou. Rep. (Curry) 51. It was held that an agent who had sold land, was a competent witness for defendants in ejectment, who did not derive title from his sale; though said that on the trial of an action by his principal, against one claiming under his, the agent's sale, he would not be a competent witness for the latter. *Swearingen v. Fields*, 1 Dana,

387, 388. On a bill by a judgment and execution creditor to compel the sheriff's vendee to complete his purchase of land, sold to him under the execution, the sheriff is a competent witness for the plaintiff. *French v. Sturdevant*, 8 Greenl. 246, 249. See *Mockbee's Adm'r v. Gardner*, cited *infra*, from 6 Har. & Gill, 176.

Secondly, of the competency of trustees.—An executor was received, as competent to prove transactions between himself, as such, and the guardian of the children of his testator, in an action between the guardian and a third person. *Fenwick v. Forrest*, 6 Harr. & John. 415. As to the competency of a trustee in chancery, though a party in the cause, see *Hawkins v. Hawkins*, 2 N. Car. Law Repos. 627. The doctrine of implied warranty of title does not extend to executors, and other trustees, selling goods, lands, &c., therefore they are competent to support the title of their vendees. *Mockbee's Adm'r v. Gardner*, 2 Harr. & Gill, 176. And see *French v. Sturdevant*, *supra*, cited from 8 Greenl. 246. But they may make themselves incompetent by an express warranty, as where a collector, selling land, added an express personal covenant for the title. *Richardson v. Dorr*, 5 Verm. Rep. 9, 17. The trustee and agent of an incorporated village, is competent as a witness for the village, in a suit with regard to its property. *Trustees of Watertown v. Cowen*, 4 Paige, 510, 513. So, a trustee of a savings' bank. *Middletown Savings' Bank v. Bates*, 11 Conn. Rep. 519, 522. And see *Randel v. Chesapeake and Delaware Canal Co.*, 1 Harringt. 233, 295.

Most of the English cases, as to the competency of the trustees, are very well summed up in the late treatise of Willis on Trustees, pp. 227, 228, 229, republished in the Law Lib. No. for December, 1835.

With respect to a trustee who is not a party in the cause, and having no interest in the subject matter of dispute, except as a trustee, the cases are entirely uniform that he is admissible. *Jones v. Sasser*, 1 Dev. & Batt. 452; *Potter v. Burd*, 4 Watts, 15, 17; *Newman v. Milbourne*, 1 Hill's Ch. Rep. 13. *E. g.* a general guardian for the plaintiff. *Den ex dem. Newton v. Ayres*, 1 Green, 153. A captain of a company, in a prosecution for a fine, to a part of which he was entitled for the use of the company. *Burt v. Dimmock*, 11 Pick. 355, 356; *State v. Wilson*, 7 N. Hamp. Rep. 543, 548. So the executor of a distributee is not incompetent to testify in a cause wherein his testator would have been incompetent, because he was a distributee. *Howard's Adm'r v. Burgen*, 4 Dana, 137. A father has no such interest in his child's personal property, as to preclude his being a witness for him in a suit involving its title; though he is a guardian by nature. That gives him no control over the child's property; and his competency is not therefore open even to the objection that he is a trustee. *Fonda v. Van Horne*, 15 Wend. 631, 633. So a general guardian, though he be entitled to the care of the property, expect to support the child, and be paid by the property in question, and though he have retained counsel, and taken an active part in conducting the cause. *Den ex dem. Newton v. Ayres*, 1 Green, 153, 156.

Thirdly, of the competency of servants.—The mere relation of servant does not disqualify, any more than that of agent or trustee. But servants are not competent, either for the plaintiff or defendant, when answerable to them in respect to the matter in issue.

That the servant of the plaintiff driving his carriage, &c., for an injury to which, while in the care of the servant, the plaintiff sues, is not competent for him, see in addition to the cases *ante*, note 629, the following cases: *Wake v. Lock*, 5 Carr. & Payne, 454; *Heming v. English*, 6 Id. 542; *Harding v. Colley*, Id. 543; *Allen v. Lacey*, Dudley, 81; also cases cited *supra*, at the introduction of this head. In *assumpsit*, for money committed to the defendant, as a common carrier, it appeared that his servant received the money to deliver to H. for the plaintiff's use, to be transmitted to him, which the defendant contended was done; but the plaintiff offered II. to prove that he never received it. Held, that he was inadmissible; for a recovery and satisfaction would exonerate him. *Denison v. Hibbard*, 5 Verm. R. 496, 498. See our notice of this case, *supra*. But some cases are to the contrary. In an action on a policy of insurance on a steamboat, which was defended on the ground of the master's negligence, he was held a competent witness for the plaintiff. *Powell v. Cincinnati Ins. Co.*, 7 Ham. R. pt. 1, pp. 266, 282, 283. In an action by the vendee of a vessel, against the vendor, on a warranty that it was seaworthy, the master in whose care the vessel was alleged to have been lost for unseaworthiness, was held competent as a witness for the plaintiff. *Newbold v. Wilkins*, 1 Harringt. 43.

As to the defendant. In case, for digging near, and injuring the plaintiff's wall, the defend-

principle, that the evidence of agents employed in ordinary transactions of commerce, is admissible *ex necessitate*,⁽¹⁾ notwithstanding they may be interested; and cases sometimes arise, in which the reception of their evidence could only be warranted on this ground.

There are many cases which have been decided with reference to the competency of factor and agents to give evidence of matters within the scope of their employment. It has been held, that a factor may prove a sale in the course of his employment, though he is to receive a poundage on its amount;⁽²⁾ or though he is to be entitled to what he has bargained for beyond a stated sum.⁽³⁾ And a broker, who has effected a policy, is a competent witness, *ex necessitate*, to prove all matters connected with the policy, notwithstanding he may have an interest arising from a lien on the policy.⁽⁴⁾ It is laid down by Eyre, C. J., that the exception is not confined to mere agents and brokers, but that every man who makes a contract for another comes within the description; but in a later case it appears to have been considered by Lord Tenterden, that the principle of the exception did not apply where the only agency or connection between the parties arose out of the particular transaction in question.⁽⁵⁾

It is the common practice to admit servants and carriers, to prove the payment of a receipt of money, or the delivery of goods on behalf of their master or principal.⁽⁶⁾ Thus, if money has been overpaid by a servant,

ant's workman who dug, is not competent for him, without a release. *Mitchell v. Hunt*, 6 Carr. & Payne, 351. So, a carrier's servant, who carried a parcel, is not competent for him, in case for negligence in carrying it. *Harrington v. Caswell*, 6 Carr. & Payne, 352. In case against the owner of a ship, for losing the shipper's (plaintiff's) goods, the master is not a competent witness for the defendant. *Gardner v. Smallwood*, 2 Hayw. 349. In case against a town for special damage arising from the non-repair of a bridge, the surveyor of highways of the district where the bridge is situated, is not a competent witness for the defendant. *Yuran v. Inhabitants of Randolph*, 6 Verm. R. 369, 373.

But a distinction must be taken, that where the man sued for the injury was himself present, and engaged in the immediate direction of his servant (*e. g.* the owner and master sued for his helmsman's negligently sailing his canal boat, so as to come in collision with the plaintiff's boat, he, the master, immediately superintending), the servant is a competent witness for the defendant. The negligence of the servant, for which he is answerable over, is not in question. The act is, that of the master. *Noble v. Paddock*, 19 Wend. 456. Beside, it may be added, that they stand in the nature of voluntary joint wrongdoers, one of whom is always a witness for or against the other.

(1) By Lord Tenterden, 8 B. & C. 408; by Parke, J., 10 B. & C. 864.

(2) *Dixon v. Cooper*, 3 Wils. 40; 1 Atk. 248.

(3) *Benjamin v. Porteus*, 2 H. Bl. 520; *R. v. Phipps*, B. N. P. 289.

NOTE 556.—But a collector of taxes who was to receive a commission on the amount of cash paid into the treasury, was held incompetent for the state, in an action involving a claim for taxes, which it was his business to collect, this not being a case to which the exception arising from necessity and the usage of trade applies. *Treasurer of the State v. Nall*, Tuyl. 5.

(4) *Hunter v. Leathley*, 10 B. & C. 858.

(5) *Edmonds v. Lowe*, 8 B. & C. 408.

(6) By Holt, C. J., 11 Mod. 262, B. N. P. 289. See 4 T. R. 589, 590; *Matthews v. Haydon*, 2 Esp. N. P. C. 509; *Spencer v. Golding*, Peake N. P. C. 129; *Adams v. Davis*, 3 Esp. N. P. C. 48.

or paid by mistake, he is a competent witness in an action to recover it back.(1) And where the question was, whether, by the custom of a manor, a fine was due to the lord during his minority on the tenant's admission, the steward of the manor was allowed to give evidence for the lord, though it was objected that he would be entitled to a fee on admission, which he would lose if the tenant were not admitted.(2)

But though agents and brokers are competent to prove a sale or contract in the ordinary course of their employment, it was decided (before the statute 3 & 4 Wm. IV, c. 42, § 26), in an action against the principal for misconduct or negligence, that they were not competent to prove that a contract had been properly executed. Thus, in an action against an agent for misconduct, in purchasing goods of an inferior quality, Lord Chief Justice Gibbs rejected, as an incompetent witness, the broker of the defendant, who was called to prove that he had purchased goods of the best quality.(3) And where a person had entered into a contract for the purchase of goods in his own name, it was ruled, that he was not a competent witness in an action for goods sold and delivered, to prove that he purchased them as the agent for the defendant.(4)

So also, where the act of the servant has been out of the ordinary course of his employment and a mere breach of duty, the principle does not apply; and it has been ruled, that in such a case the servant is incompetent without a release. Thus, in an action to recover back money which had been intrusted to the plaintiff for a special purpose, and paid by the servant in illegal insurances, he was considered incompetent. And before the stat. 3 & 4 Wm. IV, c. 42, it was considered as a settled rule, in actions against a master for the negligence of his servant, that the servant was not competent to disprove the fact of his negligence.(5) The cases on this subject have already been fully discussed in treating of incompetency by reason of a liability over, and in considering the effect of the late statute on this class of cases.

Some other cases may be added, which will range more conveniently within this section than any other.

Upon issues sent from courts of equity, it is not an unusual thing to direct that the parties to the suit shall be examined at the trial as witnesses. It has been said in a case in the Court of Chancery upon this subject, that upon an order of this nature no objection is waived, except

(1) *Martin v. Howell*, 1 Stra. 647; *Barker v. Macrae*, 3 Campb. 144.

NOTE 657.—*Cortes v. Billings*, 1 John. Cas. 270. And see 1 Hen. & Munf. 540.

(2) *Champion v. Atkinson*, 3 Keb. 90; Rep. temp. Hard. 360.

(3) *Gevers v. Mainwaring*, 1 Holt N. P. C. 139.

(4) *McBraine v. Fortune*, 3 Campb. 317. See the preceding section as to the effect of the stat. 3 & 4 W. IV, c. 42, § 26, on incompetency arising from liability over.

(5) NOTE 658.—See *ante*, note 629, where the cases to the point in the text, are all quoted and considered.

that which arises from the party being plaintiff, or defendant in the cause.(1) And it has been ruled in a late case at Nisi Prius, that where a witness is interested in the result of a suit in equity, in consequence of the decree in the suit being evidence for or against his own claims on a subsequent occasion, he is not made competent upon the trial of an issue directed in such suit, by the statute 3 & 4 Wm. IV, c. 42, § 26, the language of which, as we have seen, only applies to cases where the objection is "on the ground that the verdict or judgment in the action" would be admissible for or against the witness.(2)

It has also been treated as an exception to the general rule, from necessity, that in an action for a malicious prosecution, the evidence which the defendant gave before the grand jury in support of the indictment, or his deposition before magistrates in support of a charge of felony,(3) is under special circumstances, admissible on his behalf at the trial of the action. In *Johnson v. Browning*, the evidence so given by the defendant's wife, who was the only person present at the time of the supposed felony, and who, as the report says, could not herself be a witness, was admitted by Holt, C. J., on the ground, "that otherwise one that should be robbed would be under an intolerable mischief, for if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without the possibility of making a good defence, though the cause of prosecution were ever so pregnant."(4)

An exception, in the case of a person interested in the costs of a criminal prosecution, may occur on the trial of an indictment which the defendant removes by certiorari. In this case, the prosecutor is entitled to costs on the event of the indictment being found in his favor, but he is nevertheless a competent witness, upon the special ground of the policy and intention of the statute; for the object of the statute was to discourage the removal of indictments; and if the defendant could disqualify the prosecutor from giving evidence, by removing the indictment, such removals would be encouraged and multiplied.(5) Upon an indictment for the non-repair of a road, power was given to the court by the Highway Acts,(6) to award costs against the prosecutor, if the prosecution appeared to be vexatious; but this provision does not affect the prosecutor's competency;(7) the evidence of the prosecutor is receivable according to the

(1) See *Rogerson v. Whittington*, 1 Swanst. 39. The precise meaning of this observation seems not very clear, but it appears to assume that a party to a suit is incompetent, *qua* party, and without reference to any interest in the event. But see the judgment of Tindal, C. J., 7 Bing. 398.

(2) *Stewart v. Barnes*, 1 Mood. & Rob. 472.

(3) *Jackson v. Bull*, 2 Mood. & Rob. 176.

(4) See also *B. N. P. 14*, citing *Cobb v. Car*, 1746.

(5) *R. v. Muscot*, 10 Mod. 193.

(6) See stat. 13 Geo. III, c. 78, § 64.

(7) *R. v. Hammersmith*, 1 Stark. N. P. C. 357.

general rule; and, besides, the interest is uncertain, as the power of awarding costs is in the discretion of the court.(1)

There are yet a few cases, which are exceptions to the general rule of evidence, and made so for the purpose of preventing an abuse or perversion of the rule.—Where a witness offers to surrender or release his interest, and thus does all in his power to remove the objection to his testimony, but the other party refuses to accept the release, it will not be competent to such party to object to the witness's testimony, and his evidence may be received.(2) Or, if the interest may be removed by the release of one of the parties to the cause, and such party offers to remove it, and the witness refuses, he cannot thereby deprive the party of his testimony.

In the case of *Anstey v. Dowsing*,(3) Lee, C. J. expressed an opinion, that a legatee was not competent to prove the due execution of the will, although payment of the legacy was tendered to him, which tender he refused. But the ground of this opinion was, that, even if he had accepted the legacy, he still would have been incompetent, as having been interested at the time of attestation; a point on which, although there has been some difference of opinion, the greatest authorities are in support of the contrary proposition, namely, that the payment of the legacy would restore the competency of the witness.(4)

If a witness has acquired an interest in the subject matter, for the mere purpose of depriving the party to the suit of the benefit of his testimony, this ought not to exclude him from giving evidence. It was ruled by Lord Holt, in the case of *Barlow v. Vowel*,(5) that if a man be a witness of a wager, and afterwards bet himself, this shall not be a reason to except against his being sworn to prove the wager. And from analogy to this case, Lord Kenyon and Mr. Justice Ashurst were of opinion in the case of *Bent v. Baker*(6) (where, on the trial of an action on a policy of insurance, the broker had been called as witness for the defendant, but rejected, because he had underwritten the policy after the defendant), that even if it were true in general, that one underwriter could not be a witness for another, yet the witness ought to have been admitted in that case, as the defendant had acquired an interest in his testimony before the witness had

(1) See *R. v. Cole*, 1 Esp. 169.

(2) *Goodtitle v. Welford*, Doug. 134; by Buller, J., 3 T. R. 35.

(3) 2 Str. 1253.

(4) *Wyndham v. Chetwynd*, 1 Burr. 414; *Doe d. Hindson v. Kersey*, 4 Burn's Ecc. Law, 97.*

(5) *Skin. 586*. See *Rescous v. Williams*, 3 Lev. 152; and *Cowp. 736*.

(6) 3 T. R. 27.

* By st. 1 Vict. c. 26, § 15, it is enacted, If any person shall attest the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, interest, &c., of real or personal estate shall be made (except charges or directions for the payment of debts), such devise, &c., shall be void so far as concerns the person attesting, or the wife or husband, or other person claiming under such person, &c., and, notwithstanding the devise, such person attesting shall be admitted as a witness to prove the execution, its validity or invalidity.

signed the policy. And they laid down, as a general principle, deducible from the case of *Barlow v. Vowel*, that where a person makes himself a party in interest after a plaintiff or defendant has an interest in his testimony, he may not by this deprive the plaintiff or defendant of his testimony.

However, it appears to be questionable, whether this proposition is not expressed in too large and general terms. The incompetency of a witness on account of interest must depend rather on the nature of the interest, than upon the time of acquiring it. The question on the *voir dire* is, whether he is interested at the time of his examination. If he is directly interested at that time, he is not a competent witness in general without a release, and it seems to be no answer to the objection to show that he has become interested only since the commencement of the action, or since the time of his being acquainted with the fact which he is called to prove. Thus, before the 3 & 4 W. IV, c. 42, upon a trial on a customary right of common, a witness was incompetent, who admitted upon the *voir dire*, that he was in the occupation of a messuage, and that he claimed a similar right of common as annexed to his tenement; and it could not be material, whether he had been in possession for a number of years or had the tenement only just before the trial of the cause. In either case he appeared to be equally incompetent: yet in the latter it might be said, that he had acquired his interest after the party had become interested in his testimony. The case of *Barlow v. Vowel* must be considered as having been determined on the ground of fraud: the witness proposed to be examined was the original witness of the wager; it was a fraud, therefore, to deprive the party of the benefit of his testimony.(1)

In the subsequent case of *Forester v. Pigou*,(2) where the defendant in an action on a policy of insurance called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the *voir dire* the witness stated, "that he had paid the loss to the plaintiff, upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff, promising to return the money in that event," an objection was taken to his competency, on the ground of his being interested in the event; the point was argued on the other side upon the authority of *Barlow v. Vowel*, and it was said, the witness had not become interested until after the commencement of the action, and that the plaintiff ought not to be allowed to defeat, by his own act, the interest which the defendant had in the witness's testimony; but the witness was considered to be incompetent and rejected; for although he would not be disqualified by any agreement *fraudulently* entered into between him and the plaintiff for

(1) By Lord Ellenborough, in *Forester v. Pigou*, 1 Maule & Selw. 9, in which the case of *Barlow v. Vowel* was referred to.

(2) 3 Campb. 380; S. C., 1 Maule & Selw. 9.

the purpose of taking off his testimony, yet, on the other hand, the pendency of a suit could not prevent third persons from transacting business *bona fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. A motion was afterwards made for a new trial on account of the rejection of this witness, as well as of another also, who was similarly situated; and a new trial was granted for the purpose of ascertaining more particularly the precise time when the undertaking was made to the witnesses; but the court added, that if a person who is under an obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that is to be determined by the event of the suit, he becomes as much interested in the event as if he were a party to a consolidation rule.(1)

(1) NOTE 659.—The rule, as laid down in *Barlow v. Vowel*, and *Bent v. Baker*, that where a person makes himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he shall not by so doing deprive the party of the benefit of his testimony, has been recognized as sound law in the states of New York, Maine, Kentucky, and in the Circuit Court of the United States sitting for the district of Tennessee, in 1812, and with some modification in Connecticut and Pennsylvania. Thus, in an action of ejectment, the lessors of the plaintiff claimed as heirs of N. W., who died seized of the premises in question. The defendant offered in evidence a will of N. W., by which the whole of the testator's estate was devised to E. W. The plaintiff then offered a witness to prove, that at the time of executing the will the testator was *non compos*, or that the will had been obtained by unfair practices, to which the defendant objected that the witness had acquired an interest in the premises, under the devisee; but he was held to be competent. Kent, J., said, "that the interest, in order to exclude the witness, must not have arisen after the fact to which he is called to testify happened, and by his own act, without the interference or consent of the party by whom he is called; because, in that case, it would be in the power of the witness, and even of the adverse party, to deprive the person wanting his testimony of the benefit of it." *Jackson ex dem. Woodhull v. Rumsey*, 3 John. Cas. 234.

So, where a witness offered by the plaintiff, had an action then pending against the defendants, and in which the parties had filed an agreement that that action should abide the event of the present suit. The defendant objected to the competency of the witness on the ground of his interest, arising out of this agreement. The objection was overruled by the judge, and a verdict being taken for the plaintiff, subject to the opinion of the court, it was decided that the witness was competent, his interest having arisen subsequently to the happening of the facts which he was called to prove, and more particularly as his interest was created by the act of the party objecting to his competency. *Burgess v. Lane et al.*, 3 Greenleaf's R. 165.

So in an action of detinue, to recover a slave, which the defendant had purchased at a sheriff's sale, it appeared that a witness introduced by the plaintiffs, had, after the event which he was called to prove, and at the request of the defendant, become his surety to the sheriff for the price of the slave. It was contended by the defendant, that if the plaintiffs should succeed in this action, and establish their right of property to the slave, he (the defendant) and the witness would be discharged from their obligations for the purchase money at the sheriff's sale, and consequently the witness was directly interested in the success of the plaintiff. But the court said, that any objection to the competency of the witness, on account of that obligation, came with a very ill grace from the defendant, and should not exclude the evidence; for the right of property asserted by the plaintiffs, not only originated before the execution of the

obligation, but the obligation was executed by the witness through the procurement of the defendant, and without any participation of the plaintiffs; and if, after the event which he is called to prove, the witness becomes interested by his own act and without the interference of the party by whom he is called, such subsequent interest will not render him incompetent. And the reason is still stronger where the interest of the witness (as in this case) is occasioned by the procurement of the party objecting to his competency. *Baylor v. Smither's Heirs*, 1 Litt. 105, 107.

So on the trial of an ejectment the plaintiffs produced one Donelson to prove their beginning corner. Donelson objected to being sworn, upon the ground that he was interested. It appeared that he was the locator and surveyor of the land claimed by the plaintiffs; and that long after the location and survey, he purchased of the defendant a part of the land in controversy, but before the commencement of the suit. The question was, whether under these circumstances the witness should be *compelled* to give testimony: and, *by the court*, "I am perfectly satisfied that the witness should be compelled to testify. There can be no doubt that the rule" (that where the interest of the witness arises by his own act, after the event which he is called to prove, it will not disqualify him), "is supported by the principles of justice, and a train of well settled adjudications has put the matter to rest. The witness is coerced, because, as there was once a period when the plaintiffs had a right to the benefit of his testimony, the witness shall not be permitted by his own act, or the act of the party against whom he is called, to deprive him of that right. The rule is, however, different, where the interest is occasioned by the act of the law, or the party who requires the benefit of the testimony. But where it arises, as before remarked, by the act of the witness, it is a *wrong* in the witness, of which, from a well known rule of law, he shall not take advantage. *Tatum's Ex'rs v. Lofton & Anderson*, 1 Cooke, 115, decided in the Circuit Court of the United States, for the seventh circuit, in 1812, in Tennessee.

The same doctrine was held by the Superior Court of Connecticut, in 1796. On the trial of a cause, it appeared that a witness called by the defendant was the surety of the plaintiffs (they being non-residents) for the prosecution of the suit. The witness objected to being sworn, claiming it as a matter of right that he was not compellable to testify against his own interest. But it was decided by the court that parties have an interest in the testimony of witnesses, and that a witness by his own voluntary act should not deprive them of it. *Simons v. Payne*, 2 Root, 406. And in a subsequent case, where a witness, similarly situated, refused to be sworn for the same reason, the judge overruled the objection, and ordered him to testify. On a motion for a new trial, the Supreme Court of Errors decided that the party having acquired an interest in his testimony prior to his becoming surety for the adverse party, his interest thus created, constituted no reason for withholding his testimony. But the court intimate that the rule in *Bent v. Baker* is laid down too broadly, and that (according to the case of *Forester v. Pigou*, cited in the text), a person must not be prevented from transacting business for his own advancement in life; nor, if this be done *bona fide*, be compelled to testify against himself. "Yet," they continue, "this principle has no bearing on the present case. The interest of this witness was not acquired in the common course of business for his own profit, but by agreement with the defendant, without any expectation of personal benefit. It would be dangerous in the extreme to permit the right of a party to his testimony to be destroyed by his voluntary act, performed at the request of the adverse party." *Phelps v. Riley*, 3 Conn. R. 266.

The principle of the last case, appears to prevail in Pennsylvania. In an action by the indorsee of a promissory note against the maker, the defendant called the indorser as a witness. On his examination on the *voir dire*, it appeared that five or six weeks before the trial the plaintiff had executed to him a release of all right of action, founded upon his indorsement. On the morning of the trial, just before the service on him of the subpoena, the release was destroyed by his consent before the plaintiff's counsel, and the witness said, "he expected it was because he was called forward as a witness, that the release was destroyed." He also stated that he considered himself interested in the cause, and bound to pay the money, if the defendant could not be compelled to pay it, and added that he was unwilling to be examined. The witness being excluded by the Court of Common Pleas, the defendant excepted to their decision and brought a writ of error. The Supreme Court reversed the judgment, and remarked, that "on this point there is little difficulty; the witness and the plaintiff united in a contrivance to deprive the de-

In a more recent case in the Common Pleas, where the plaintiff in an action on a charter party had communicated to the attesting witness an interest in the profits which were expected to arise from the adventure, the witness who refused to release his interest was rejected as incompetent at the trial; and the court held, that this evidence was inadmissible, upon the ground that he had derived his interest immediately from the plaintiff, who proposed to call him, and that the plaintiff could not justly complain

defendant of his evidence. This, the law will not endure. If a man, who is privy to a fact, should afterwards become interested, in the usual course of business, his evidence is not to be admitted. It would be unreasonable to expect that he should sacrifice his own interest, for the sake of preserving himself free from interest, for the benefit of another. In such case, therefore, the witness being interested at the time of trial, is incompetent. But the case is very different when a man knowing himself to be relied on by his neighbor, takes pains to become interested for the purpose of injuring him, especially if this be done in concert with the adverse party. Such conduct is very improper; it is, in truth, fraudulent in the eye of the law; and notwithstanding an interest thus acquired, the witness is considered as competent." *Long v. Baillie*, 4 Serg. & Rawle, 222.

One not a party, becoming interested in the testimony of the sheriff to establish a fact, may call him afterwards to prove it, though the sheriff, in doing so, contradict a return he made in the interim in a case between others and him against whom he is called. The court say he could not disqualify himself as a witness by an act over which the party had no control. *Caldwells v. Harlan*, 3 Monroe, 349, 352.

A witness can in no case disqualify himself in point of interest by his own voluntary act, though he may be disqualified by operation of law. Thus, if he come in and make himself a party in the cause, still he shall be sworn for another who had an interest in his testimony. *McDaniel's Will*, 2 J. J. Marsh. 332, 333.

Thus stand the American cases, one of which would seem to have yielded too readily to the qualification put forward in *Forester v. Pigou*. In that very case, the party objecting participated in the act by which, as he insisted, the witness became disqualified for the defendant's purpose. But beside its being almost a solecism to say that a witness may, by his own *honest* act, deprive a party of his testimony which would establish a fraud (the defence alleged in that case), can the rule rest on the narrow ground assumed in that case, that, to avoid the effect of the acquired interest, the witness must hold some special relation to the parties which binds him to be a witness in a degree stronger than a like obligation which rests upon every citizen? He is not, though he should be holden still admissible, at all restricted in the exercise of his rights. If he has interested himself in a fair transaction, he cannot complain that he is called to speak to it. If the claim or defence be unfounded or illegal, he still has the physical right to interest himself in it at the peril of being called on to tell the truth; and the party objecting has no greater reason to complain of an interest thus created against him, than the party offering the witness, that he should be deprived of the very testimony on which his most important rights may depend. The witness is of course received on the ground that his interest was acquired by his own act, disconnected with the party offering him.

(Witnesses who have been examined and afterwards become interested, and are made parties in the same suit, have been permitted to read their depositions in their own favor, upon the ground that when they were examined they were not incompetent to testify in the cause as witnesses. *Goss v. Tracy*, 1 P. Wms. 237; 2 *Vernon*, 699; *Haws v. Hand*, 2 Atk. 615; *Glynn v. The Bank of England*, 2 Ves. sen. 42. So in respect to the protest of a notary. *McKnight v. Lewis*, 5 Barb. 681. But where the subscribing witness to a note purchases it, he has voluntarily disqualified himself, and cannot prove the execution of the note by proving his own handwriting. *Edwards v. Perry*, 21 Barb. 600.)

that his witness was disqualified, when he himself was the cause of his disqualification.(1)

Lord Raymond, in the case of *The King v. Fox*,(2) admitted the prosecutor to be a witness, although he had laid a wager, that he should convict the defendant; and the true reason seems to be, not because the witness had made the wager at a time when public justice became interested in his testimony, but because it would be against public policy to allow a witness, by any such gratuitous act, to exclude himself from giving evidence. In addition to this, it may be observed, that the wager would now probably be considered absolutely void, on a principle of public policy, as tending to produce an improper bias on the mind of the witness, and therefore, as directly prejudicial to the administration of justice.

SECTION VII.

Of the Mode of Objecting to the Competency of an Interested Witness, and of the Means of Restoring Competency.

It is proposed to consider, in the present section, the regular mode of objecting to the competency of a witness on the ground of interest, and the means of restoring his competency.(3)

The rule formerly was, that the objection ought to be made on the *voir dire*, and that if made after the examination in chief, it would not have the effect of excluding the witness. But the strictness of the rule on this subject has been relaxed, and now, if it be discovered during any part of the witness's examination, or even after his cross-examination, that he is interested, the objection may be taken, and his evidence will be struck out.(4) It has, indeed, been laid down, that the objection may be taken

(1) *Hovill v. Stephenson*, 5 Bing. 493. Best, C. J., in delivering the judgment of the court, said, the case of *Forester v. Pigou* was stronger than that before the court. It was also held that evidence of the witness's handwriting was inadmissible. In general, where an attesting witness, subsequently to the execution of the instrument, becomes interested by operation of law, evidence of his handwriting is admissible. *Post*, Part 2.

(2) 1 Str. 652.

(3) NOTE 660.—The presumption is in favor of competency, till the contrary be shown. *Cotchet v. Dixon*, 4 M'Cord, 341; per Lanman, J., in *Chance v. Hine*, 6 Conn. R. 232. And the nature of the interest must be stated in the objection, so that the party may, if in his power, remove it. *Bernard v. Vignaud*, 10 Mart. Lou. R. 633, 637, 638. And the ground of objection not being stated in the record, though the witness was the vendor of the party, the court, on appeal, would not notice it. *Id.*

(The later decisions also hold that it rests with the party seeking to reject a witness on the ground of incompetency, to prove the facts which render him incompetent (*Pegg v. Warford*, 7 Md. 582); unless they already appear from the evidence before the court. *Hiscox v. Hendree*, 27 Ala. 216.)

(4) See *Turner v. Pearce*, 1 T. R. 720; *Stone v. Blackburn*, 1 Esp. 37; by Lord Ellenborough, 2 Campb. 14. (See note, *ante*, 48.)

at any stage of the cause;(1) but it was ruled at *Nisi Prius*, in a case before Gibbs, C. J., where the examination of a witness had been completed, and he had left the box, but, was recalled by the judge for the purpose of asking him a question, that it was too late then to object to his competency.(2) The case of *Dewdney v. Palmer*,(3) decides, that after a witness has been dismissed from the box without objection to his competency, the adverse party will not be allowed to call a witness to prove his incompetency, not even to prove him the real party to the suit.

It seems also, that when witnesses have been examined on interrogatories, which are afterwards read on the trial of a cause, it is too late to object to their competency on the ground that they appear from the depositions to be interested; and that the objection ought to have been taken at the time of examination, or upon application to the court to suppress the depositions before their production at the trial.(4)

The party, against whom a witness is called, may examine him respecting his interest on the *voir dire*,(5) or may call another witness, and produce other evidence in support of the objection.(6) If the fact of interest is satisfactorily proved by other evidence, the witness will be rejected, though he may have ventured to deny it on the *voir dire*.(7)

Where the interest of the witness arises from some written instrument not produced, he may be examined as to the contents of it on the *voir dire*.(8) The general rule, which requires the production of the instru-

(1) By Lord Kenyon, 1 Esp. 37.

(2) *Beeching v. Gower*, Holt N. P. C., 314. Where a party has been fully apprised of the grounds of a witness's incompetency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at *Nisi Prius*, whether an objection to the competency of a witness can be postponed.

(3) 4 Mees. & Wels. 664.

(4) *Ogle v. Paleski*, Holt N. P. C., 485; *Anon.*, 2 Tidd's Prac. 812 (9th ed.)

(5) (See note 48, *ante*.)

(6) The interest of the witness may be shown either by examining him on his *voir dire*, or by other evidence; but the party objecting cannot resort to other evidence after having examined the witness himself. *Hosack v. Rogers*, 8 Paige Ch. 229; 25 Wend. 313; *Schnader v. Schnader*, 26 Penn. State R. 384. The objection to the witness must be promptly made. *Baughner v. Duphorn*, 9 Gill, 314; *Lewis v. Morse*, 20 Conn. 211. If his interest first appear on his direct examination, after he has been sworn in chief, or on his cross-examination, his testimony will be excluded if objected to on the ground of his incompetency. *Lester v. McDowell*, 18 Penn. State. R. 91. But if no objection be made at the time, or no motion to strike out his testimony, it must be considered as evidence in the cause. *Heeley v. Barnes*, 4 Denio R. 73. See also *ante*, note 48.)

(7) The old rule appears to have been that the statement of a witness, who had been examined as to the fact on the *voir dire*, and denied that he was interested could not be contradicted. See by Lord Hardwicke, in *Lord Levant's Case*, 9 St. Tr. 647 (folio ed.); 10 How. St. Tr. 506.

(Where his incompetency is first proved by other evidence, the witness cannot be sworn to prove that he is competent. *Hall v. Connecticut River S. Co.*, 13 Conn. R. 319. See also *ante*, note 48.)

(8) (See note 48; *Ault v. Rawson*, 14 Ill. 844; *Howell v. Ashmore*, 2 New Jer. 261.)

ment itself, or that a notice to produce it shall be given before a witness can be examined as to its contents, does not apply to such a case; for the objecting party may be ignorant of its existence before the examination of the witness, and he cannot be supposed to know that a particular witness would be called on the other side.(1) If, however, the witness himself produces the instrument, it ought, of course, to be read as the best proof of the witness's situation.(2)

When the objection arises from a witness's answer on the *voir dire*, it may likewise be removed on the *voir dire*.(3) Thus, in an action brought by a chartered company, where a witness for the plaintiff admitted on the *voir dire*, that he had been a freeman of the company, but added that he was then disfranchised, Lord Kenyon ruled, that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent.(4) In a case where a witness, examined on a settlement question, stated on the *voir dire*, that he occupied a cottage in the appellant's township, but that he was not rated, nor did he pay any public rate, the Court of King's Bench held, that there was no ground for objecting to his competency, and that it was not necessary for the appellant, who called him, to produce the rate as the best proof of his not being rated.(5) So, in an action by an administrator, where a witness called for the plaintiff admitted that he was next of kin, and was objected to on this ground, but answered on re-examination that he had released all his interest, this was held by Lord Ellenborough to remove the objection.(6) So in an action by an indorsee of a bill of exchange drawn by J. S. on the defendant, where the defendant pleaded that J. S. was an accommodation drawer, and no value given, J. S., being called as a witness for the defendant and objected to, was allowed to prove on his examination that he had been released by the defendant, and to give parol evi-

(1) *Stebbins v. Sackett*, 5 Conn. R. 258, 261.)

(2) *Butler v. Carver*, 2 Stark N. P. C. 434.

(3) NOTE 661.—When a witness is called and objected to on the ground of interest, if he answers on his *voir dire* generally that he is interested, he should be rejected. If the party calling him wish to show the nature of his interest, as that it is ideal or such as will not exclude him, he should follow up the examination by particular questions. *Williams v. Matthews*, 3 Cowen's Rep. 252.

(4) *Butchers' Co. v. Jones*, 1 Esp. N. P. C. 162; *Botham v. Swingler*, Peake N. P. C. 214; *S. C.*, 1 Esp. 164.

(5) *R. v. Gisburn*, 15 East, 57.

(6) *Ingram v. Dade*, Lond. Sitt. after Mich. T. 1817; *Wandless v. Cawthorne*, Mo. & Ma. 321, note; *Carlisle v. Eady*, 1 C. & P. 234.

NOTE 662.—But the interest being shown on the *voir dire*, if the witness hold a release, he may say so; and thus remove his interest, though the release be not present. *Carlisle v. Eady*, 1 Carr. & Payne, 232. A witness on his *voir dire*, showing his interest under a deed, may show it discharged on the same oath (speaking orally). *Fanning v. Myers*, Anth. N. P. Cas. 47, 49.

dence of the contents of the release; and this ruling at Nisi Prius was afterwards confirmed by the Court of Queen's Bench.(1)

Where the party calling a witness, who has been objected to on the *voir dire*, attempts to remove the objection by other independent proof, and not by a further examination of the witness on the *voir dire*, he will be subject to all the ordinary rules of evidence, and the best proof will be required according to the nature of the case. Thus, if another witness is called to prove that a witness, objected to on the ground of interest, has been released, he cannot be allowed to speak of the contents of the release, but the release itself, if in existence, ought to be produced.(2)

Whatever interest a witness may have had, if he is divested of it by release(3) or payment,(4) or by other means,(5) when he is ready to be sworn,(6) there is no objection to his competency. Thus, it is said "to have been solemnly agreed by the judges, that where a person had a legacy given him, and did release it, he was a good witness to prove the will."(7) So a release from the drawer of a bill of exchange to an acceptor, will render the latter a competent witness.(8)

(1) *Lunnis v. Rowe*, 10 Ad. & Ell. 606. The case of *Goodhay v. Hendry* (Mo. & Ma. N. P. C. 319), and another case, referred to in p. 321, *u. Id.*, which were not according to the rule above laid down, must be considered as overruled by *Lunnis v. Rowe*.

(2) *Corking v. Jarrard*, 1 Campb. 37. And see by Lord Kenyon, *Botham v. Swingler*, 1 Esp. N. P. C. 164.

See *ante*, note 49.

(4) NOTE 664.—In an action by executors, a paid legatee was held a competent witness to increase the estate, nothing appearing that the estate was insufficient to pay its debts. *Clark v. Gannon*, Ry. & Mood. N. P. Rep. 31.

(5) NOTE 665.—See *ante*, note 630.

(6) NOTE 666.—The interest of the witness, in order to disqualify him, must exist at the time of the examination. *Henry's Lessee v. Morgan*, 2 Binn. 497; *Ludlow v. Union Ins. Co.*, 2 Serg. & Rawle, 119.

(7) *Vin. Ab. tit. Evidence*, 14, n. 63, cited by Lord Mansfield, 1 Burr. 423. The competency of the witness does not depend on the language of the statute. *Id.* 417.*

NOTE 667.—So a release by a devisee. *Cook v. Grant*, 16 Serg. & Rawle, 198.

(8) *Scott v. Lifford*, 1 Campb. 249.

(3) NOTE 663.—See *Ragland v. Wickware*, 4 J. J. Marsh. 530, 531, 532; *West v. Kerby*, *Id.* 57. The release comes too late, if it be after the deposition taken (*Keyl v. Burling*, 1 Cain. Rep. 14; per *Tilghman, C. J.*, in *Steele v. Phoenix Ins. Co.*, 3 Binn. 311; *Wynn v. Williams*, 1 Alab. Rep. 136); unless it be retaken, after the interest is thus removed. It may then be received. *Hiddix's Heirs v. Hiddix's Adm'rs*, 5 Litt. 201. So of a release after the witness's examination

* Lord Chancellor Hardwicke established the will of Lord Allesbury on similar proof, in the year 1748. See 1 Burr. 427. And in *Wyndham v. Chetwynd* (1 Burr. 414), where the subscribing witnesses were creditors of the testator, they were admitted to prove the will, as their debts had been paid. So in *Doe dem. Hindson v. Kersey* (4 Burn. Ecc. Law, 97), three of the judges were of opinion, that a subscribing witness was restored to his competency, if all his interest had been released or extinguished at the time of the examination. *Lee, C. J.*, in *Anstey v. Dowsing* (2 Str. 1258), and Lord Camden, *C. J.*, in *Doe on the demise of Hindson v. Kersey*, were of opinion, that if a subscribing witness was interested at the time of attestation, nothing *ex post facto* could give effect to his attestation. In the former of these cases, Mr. Justice Dennison differed from *Lee, C. J.*, on this point. See 1 Burr. 427, 428.

The reader is referred to stat. 1 Vict. c. 26, §§ 14, 15, 16 and 18, as to the situation and competency of attesting witnesses, devisees or legatees, creditors, and executors. *Supra*, p. 114, note.

in court. *Doty v. Wilson*, 14 John. Rep. 378; *Wynn v. Williams*, 1 Alab. Rep. 136. But he may be released and then re-examined, on his interest appearing at any time, even on his examination in chief. *Ten Eyck v. Bill*, 5 Wend. 55; *City Council v. Haywood*, 2 Nott & M'Cord, 308; *Wynn v. Williams*, 1 Alab. Rep. 136; *Stevenson v. Jacox*, before Van Ness, J., *Saratoga Circ.*, May, 1818. *Cowen's Treat.* 602; *Tallman v. Dutcher*, 7 Wend. 180. On the objection being made, however, the judge should not allow the witness to proceed conditionally, his testimony to be allowed on a release afterwards being executed; but should stop the witness, though the objection be merely that the release is defective in form, provided the party insist that the witness should stop. Otherwise the witness may proceed while the party is amending the release. *Doty v. Wilson*, 14 John. Rep. 378.

A continuance or postponement of the trial will not be granted in order to enable a party (who happens to be absent from the trial, for instance) to release a witness, nor a nonsuit taken off, nor a new trial be granted with that view. *Talbott v. Clark*, 8 Pick. 51; *Bank of Illinois v. Hicks*, 4 J. J. Marsh. 129; *Newton v. Higgins*, *post*, note 270. And see *Tenant v. Strachan*, 1 Mood. & Malk. 377; *S. C.*, 4 Carr. & Payne, 31. So where a witness had declined at the trial to release his interest, the court refused to grant a new trial, on the ground that he had misapprehended the effect of the release, and was then ready to execute one. *Kellen v. Bennett*, 12 Moore, 393. A release delivered to the wife is valid, though her husband be absent. *Bioren's Lessee v. Keep*, 1 Yeates, 576. So a witness may render himself competent by depositing a release in the clerk's office, for the use of the absent party. *Perry v. Fleming*, 2 N. Car. Law Repos. 458. And see 1 Yeates, 30.

A witness whose competency is restored by release, may be examined generally and at large, as if the interest had never existed. He is not to be confined to any particular point, to which it was stated that he was material. *Carroll v. M'Whorter*, 2 Bay, 463.

As to the cases in which a release properly introduced may be made available, the following may be added to those in the text.

The assignor of a covenant, being released, was received as competent for the assignee in an action in his name against the covenantor. *Ford v. Hale*, 1 Monroe, 23. A common informer, entitled to one-half the penalty, may release to the defendant and so be a witness against him. *City Council v. Haywood*, 2 Nott & M'Cord, 308; *Respublica v. Ray*, 3 Yeates, 65; *Torre v. Sumners*, 2 Nott & M'Cord, 207. But not if he be liable for costs. *Rapp v. Le Blanc*, 1 Dall. 63. In a suit against one of two joint makers of a note, the other was held competent for the defendant, on being released by him. *Ames v. Withington*, 3 N. H. Rep. 215. And in a proceeding by foreign attachment, the principal (the plaintiff's debtor) was held competent for the plaintiff on being released from all the debt due to the plaintiff, except what might be found in the hands of the trustee. *Wallace v. Blanchard*, 3 N. H. Rep. 395. In an action by an indorsee against an indorser, the maker who had secured the note to the former by judgment and mortgage, was held competent for the defendant, on being released by him. And so is the first indorser of a bill of exchange a competent witness for a subsequent indorser, in an action against him by the holder, on being released by the subsequent indorser. *Griffith v. Reford*, 1 Rawle, 196. Several persons agreed to bear equally the expense (over and above what they got by subscription) of getting up a remonstrance to Parliament. One of them being sued for articles purchased for the common benefit released another, and offered him as a witness. Held admissible; for the defendant could recover against any other no more than his ratable share; so that no one could claim over against the witness; and in taking the accounts of the company, in respect to the particular claim, members must look to the defendant, and not to the witness. *Duke v. Pownall*, 1 Mood. & Malk. 430. See, in connection with this case, the note of the reporters, *Id.* 432. A bankrupt is not a witness for his creditor, though released by him, if the result of the witness's testimony would give the creditor a right to prove under the commission. The creditor should also release the assignees. *Perryman v. Steggall*, 8 Bing. 369. In ejectment the plaintiff attempted to impeach the deed under which the defendant claimed, as fraudulent. The grantor of the defendant, after being released from his covenants in the deed, was held a competent witness for the defendant to support the deed. *Jackson ex dem. Mapes v. Frost & Haff*, 6 John. Rep. 135; *Bridge v. Eggleston*, 14 Mass. Rep. 245. So a vendor of a chattel with warranty is receivable, on being released by the vendee, to support the title of the latter. *Vannoright v. Foreman*, 1 Mart. Lou. Rep. (N. S.) 352, 353, 354. So, if the tenant derive title under a grantor, with full

covenants, though not as his immediate grantee, a release of the covenants by the tenant will render the grantor competent for him. *Jackson ex dem. Bond v. Root*, 18 John. Rep. 60. A bankrupt's creditor is competent for the assignees, on releasing the estate, in consideration that one of the assignees undertakes to pay him his debt. *Sinclair v. Stevenson*, 1 Carr. & Payne, 582.

The indorsee of a bill of exchange sued two defendants (partners) on an acceptance by one of them in the name of the firm. Previously to the action, the partner who accepted the bill became bankrupt, and pleaded his certificate in bar, on which the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial against the other. Held that the bankrupt, having released his interest in the surplus of his effects, was a competent witness for the defendant, to prove the circumstances under which the witness accepted the bill. This decision went on the statute 49 Geo. III. c. 121, § 8, which requires the solvent partner to prove his claim for contribution, as a debt under the commission; so that the certificate bars all claim for contribution. It would have been otherwise before the statute. *Affalo v. Fourdrinier*, 3 Mo. & Payne, 743, 747, 748. For a similar statute provision in the New York insolvent laws, *vide* 2 R. S. 22, 23, §§ 32, 33. On the above English statute, upon a release similar to that in *Affalo v. Fourdrinier*, the drawer of a bill accepted for his accommodation, was received to testify against the indorsee, in favor of the acceptor. *Ashton v. Longes*, 1 Mood. & Malk. 127. In an action between the owners of adjoining lands, where the question was to the boundaries, the heir of the grantor, under whom the defendant claimed, on being released by him from all claim which he might have against the heir, on account of the covenants contained in the deed of the ancestor, was admitted to prove the boundaries. *Bowman v. Whittemore*, 1 Mass R. 242. A creditor of the plaintiff, to whom he had assigned all his effects, in trust for creditors, was received to testify for the plaintiff, who sued for part of those effects, on releasing all his interest in the fund. *Main v. Newson*, Anth. N. P. Cas. 11, 12. The principal not sued is, on being released by the surety, a competent witness for the latter. *Bank of Limestone v. Penick*, 5 Monroe, 25, 27. And see *Hunter v. Gatewood*, Id. 269, that without such release he would not be competent. One of two joint and several makers sued on a promissory note, cannot, by releasing his co-maker, not a party, make him a competent witness, for the defendant; for a verdict for the defendant would not bar an action against the witness, who would otherwise be liable to a suit on the note. *Pendleton v. Speed*, 2 J. J. Marsh. 508. So of a surety, jointly bound with his principal in a bond. *Wallace's Ex'rs v. Twyman*, 3 J. J. Marsh. 460, 461. An indorser of a promissory note, who has a release from the indorsee, is a competent witness for him, in an action against the maker. *Barnes v. Ball*, 1 Mass. R. 73. And this, though the note was indorsed with the understanding that the indorser should be a witness, and would swear to a new promise, on the part of the maker. *Moore v. Viele*, 4 Wend. 420. So if the action be against an indorser. *Talbot v. Clark*, 8 Pick. 51. On an issue to try the right of property between the garnishee in a foreign attachment and the attaching creditors, any of the latter are not competent witnesses, though they assign or release their claims; for the record will still be evidence for or against them, in any action growing out of the proceeding. *Forretier v. Guerrineau's Creditors*, 1 M'Cord, 304. In assumpsit for work, by a member against the deacons of a Shaker society, certain members were received as witnesses for the defendants, on exchanging releases, cutting off all claim and liability, by reason of the suit. *Waite v. Merrill*, 4 Greenl. 102, 109, 110, 116; *Anderson v. Brock*, 3 Greenl. 243, S. P. Where S., as the agent of M., effects an insurance on his account, but without any authority from him; in an action by S. against the insurer, for a return of premium, on account of the voyage having never been undertaken; M. having been released by S. from all claim for the premium is a competent witness for him. *Steinback v. Rhinelander*, 3 John. Cas. 269. *Quere*, would not M. be competent without a release? In trespass for taking and impounding the beasts of the plaintiff, the defendant proved that he acted as the agent and servant of G., on whose land the beasts were found, and after executing a release to G., offered him as a witness to prove the beasts were taken *damage feasant*. Held, that he was admissible. *Hasbrouck v. Lown*, 8 John. Rep. 377. A sheriff was sued for the misconduct of his deputy in the execution of the duties of his office. Being released by the sheriff, he was offered by him as a witness, and held admissible. *Turner v. Austin*, 16 Mass. R. 181. Where A. sold goods to B., and sold the same goods to C., on the same terms as he purchased, and A., after the sale to C., having converted the goods, C. brought trover against A., it was held, that B. being released by C., was a competent witness for him to prove the sale to himself and the purchase by the plaintiff from him;

and that there was no principle of public policy which would prevent a witness who had no interest, or who was rendered disinterested by a release, from proving a contract made by himself. *Smith v. Rutherford*, 2 Serg. & Rawle, 358.

If the release be offered and read without objection, for want of its being proved, this is a waiver, and the objection cannot be raised, on motion for a new trial. *Doe ex dem. Tatem v. Payne*, 4 Hawks, 64.

This head involves the various questions of the person who has the power to release, whether in his own right or as an agent, trustee, &c.; the person who is to take the release, the form of the release, the manner of execution, the time when it should be given, its consideration, and its effect, when everything legally within the power of the party and the witness has been done in order to attain their purpose.

The person having such a legal claim or interest in himself as to bar the admission of the witness, whether it be the party or the witness himself, may release it *bona fide*, even though he be an infant (*Walker v. Ferrin*, 4 Verm. R. 523, 527; and see *Rogers' Ex'rs v. Berry*, 10 John. R. 132); though the release from an infant would be void, if it were a part of a system of collusion to present the appearance without the reality of a release, however binding it might be on an adult as between the parties. *Walker v. Ferrin*, *ut supra*. A *prochein ami* or *guardian ad litem*, has no power to release the right of the infant. *Id.* Nor has any attorney to prosecute or defend the cause, without a special power for that purpose, authority to release the rights of his client. *Walker v. Ferrin*, 4 Verm. R. 533, 538; *Murray v. House*, 11 John. R. 464. The attorney should have a special power for the purpose duly sealed, if the party intends to be absent at the trial; and then his release, and even his stipulation to give one, if the witness be examined in virtue of such stipulation, will be valid; for the court said they would compel him, on motion, to give a release. *Heming v. English*, 6 Carr. & Payne, 542; *S. C.*, 1 Cr., Mee. & Rosc. 568; and 5 Tyrwh. 185. Where a town is a party, it may release its treasurer or other officer by a vote. *Ford v. Clow*, 8 Greenl. 334. And this must be done by the town; for the selectmen, as such, have no power to release. *Yuran v. The Inhabitants of Randolph*, 6 Verm. Rep. 369, 373, 374. Yet doubtless this would be otherwise where town officers are themselves parties as such. Nothing is perceived in such case to prevent their releasing any more than an executor or other trustee, who may clearly do so. *Seymour's Adm'r v. Beach*, 4 Verm. R. 493, 501. A covenant of warranty running with the land, may and should be released, not by the covenantee, if he have parted with the title, but by the present owner of the land claiming under the covenantee, though all the deeds through which he claims be with warranty. *Leighton v. Perkins*, 2 N. Hamp. R. 427; *Pile v. Benham*, 3 Hayw. 176; *Abby v. Goodrich*, 3 Day, 433, explained in *Clark v. Johnson*, 5 Day, 373. A husband, a defendant in ejectment, claiming to be seized *jure uxoris*, may release a covenant for quiet enjoyment in a deed given to his wife, and so make the covenantor a competent witness for him. *Ford v. Walsworth*, 19 Wend. 334. See *Capehart v. Adm'rs of Huey*, 1 Hill Ch. R. 409.

The form of the release should be adapted to the interest. The words *all demands* are of the broadest import, and will discharge future rights and common possibilities. They were held sufficient to cut off the right of a releasing partner to a surplus of the partnership effects. *Wilson v. Hirst*, 4 Barn. & Adolph. 760. A release by the attorney of the plaintiff to a witness who was liable to him for costs, of "all fees, costs and charges," was held sufficient. *Doe ex dem. Dully v. Allbutt*, 6 Carr. & Payne, 131. A release to an executor of all claim on the estate renders the releasor having an interest in the estate competent for the executor, though it omit the name of the latter. *Oliver v. Vernon*, 4 Mason, 275. Whether a private corporator, in order to restore his competency as a witness for his corporation, must release his whole interest as a corporator, or only that which he has in the subject matter of the suit, *quere*. *Richardson v. Freeman*, 6 Greenl. 57. See two cases decided in Maine, *ante*, note 663, p. 122. A release of a warrantor of a horse being by mistake dated before the sale, and so void on its face, the court received parol proof of the time of the delivery of the release, and thus gave it effect. The sale and warranty, though ostensibly by the witness alone, was, in legal effect, from him and his partner; yet a release to the witness alone was held to extinguish his interest. The words were "from all and every claim and demand growing out of or arising from the sale." *Churchill v. Bailey*, 1 Shepl. 64, 70. In assumpsit by the holder against the maker of a note, a release to the indorser of *his interest in the particular action pending*, will not render him competent for the

plaintiff, because it leaves him open to a subsequent action on the note. *Kennon v. McRae*, 2 Porter, 389, 400. See *Commercial Bank v. Hughes*, 17 Wend. 94, 97.

The release need not be actually delivered from the releasor to the releasee. If it be intended to operate, or present the appearance of an operation to the court, it shall have that effect, though the releasee give his note intending still to be liable; and, on being rejected for the fraudulent attempt to impose upon the court, the releasor destroyed the release, without its ever coming to the hands of the releasee. But a release given by an infant under such circumstances, though sanctioned by his guardian *ad litem*, was holden to be a mere nullity. *Walker v. Ferrin*, 4 Verm. R. 523, 526, 527. A release to a witness examined on commission in New York, purported to be certified by notaries; and the commissioners returned the release with the commission certifying that the release was handed to them and accepted by the witness from them, who then swore that he had no interest. Held, that the release was sufficiently proved and properly executed. *Allen v. Lacy, Dudley*, 81. A release good in form is available, though not actually delivered, but only entered on the minutes of the court. *McCausland v. Neal*, 3 Stew. & Port. 131. But it is void, if it be neither signed nor sealed. *Kennon v. McRae*, 2 Porter, 389.

As to the time when a release is to be given, the cases all agree that, on detecting the interest at any time before the witness has left the stand, he may then be released, and examined over again. The wife accepted a release to her husband, and then made her deposition; but her husband did not accept it till afterwards. Yet her deposition was received. *Van Dusen v. Friuk*, 15 Pick. 449.

With regard to the consideration, whether of a release or other instrument intended to remove interest, there need be none actually passing between the parties, especially if the releasor be an adult; for, *per curiam*, "Where a party has so divested himself of interest that he cannot resume his title by compulsion of law, he is competent." *Dellone v. Rehmer*, 4 Watts, 9, 10.

The effect of the release, when duly executed by the proper party, depends on the nature of the interest and the various relations which the witness holds to the parties in the cause. It may, we think, at this day, be safely affirmed, though with some exceptions, that any interest which disqualifies the witness may be released or discharged in some way. If it be without the reach of a release, &c., it is such an interest as the law would pronounce so remote as not to exclude the witness. *Henderson, C. J.*, very sensibly remarked, in *State v. Kimbrough* (2 Dev. 431, 438, 439): "The argument is entirely incomprehensible to us, how an interest so remote and contingent, so much of a bare possibility, so much of a *nothing*, if I may so express it, that it cannot, by reason thereof, be released or assigned, should disqualify a witness." In that case a witness was received for the state in a capital case, on releasing his estate expectant on the death of the accused. So a bankrupt may release his allowance even before he has obtained his certificate. *Schneider v. Parr*, Peak. Add. Cas. 66.

A legal interest can be released, though mere prejudice or feeling, &c., cannot. The latter must, therefore, be endured, and go to the credibility of the witness. But if he will not release his interest, he will not be trusted as competent; and this is the true ground of his incompetency. The law goes as far as it effectually can towards removing an improper influence upon the witness's mind. It does not stand upon the degree of interest, therefore; but whatever its amount, it demands that it should be removed. *Best, C. J.*, in *Hovill v. Stevenson*, 4 Bing. 493.

The general doctrine that a witness may be restored to competency by a proper release, though entered into expressly for that purpose, is impliedly asserted in all the cases on the subject, and expressly by some. *Lilly's Lessee v. Kitzmiller*, 1 Yeates, 28; *Dawson v. Morris*, 4 Yeates, 341. And when a case of difficulty or nicety arises, it is examined on the same principles as if the release were pleaded or given in evidence by the releasee, in an action to enforce the right intended to be cut off. See *Bank of Pennsylvania v. McCalmont*, 4 Rawle, 307, 310, 311. On its being found operative in itself, its relative effect in the restoration of competency arises in various ways; sometimes it works a total obliteration of all interest, sometimes the creation of a balance, sometimes an inclination of the witness against the party calling him, and sometimes as the reduction of an interest otherwise effectual, to such remoteness, contingency or uncertainty, as no longer to be regarded by the law. We shall continue the examples furnished by the cases,

without much attention to the particular ground on which the release works its intended effect. In most instances that is quite obvious.

The release by the vendee, of his vendor or warrantor, of lands or goods, whether the warranty be express or implied, in order to render the vendor competent in an action by or against the vendee concerning the title, is a familiar instance. *Clark v. Johnson*, 5 Day, 373, 381; *Caston's Ex'rs v. Ballard*, 1 Hill, 406; *Van Hoesen v. Benham*, 15 Wend. 164. So a release of the assignor of a mortgage in an action by his assignee. *Lithgow v. Evans*, 8 Greenl. 330. In an action by a bailee against a stranger, his bailor may be released, and made competent for the plaintiff. *Said in Chelsea v. St. Clair*, 1 N. Hamp. R. 190.

The surety being sued alone, his principal may be released by him, and so made competent. *Reed v. Boardman*, 20 Pick. 441. In an action by the indorsee against one who indorsed for the maker's accommodation, the latter was thus rendered competent for the defendant. *Van Schaack v. Stafford*, 12 Pick. 565. So in assumpsit against the surety, one of two joint makers of a note, the other being principal, was held competent for his surety, on a like release. *Harmon v. Arthur*, 1 Bail. 83. And in such and the like cases, a release of the *costs alone* restores the competency of the principal, by creating an equal interest between plaintiff and defendant. *Perryman v. Steggal*, 5 Carr. & Payne, 197. And see *Bank of Limestone v. Penick*, 2 Monroe, 100, 101. A constable's sureties being sued, he was held to be a competent witness for them, on their giving him a proper release. *Willard v. Wickham*, 7 Watts, 292.

Another instance is of a witness releasing his interest in a fund which his testimony may affect beneficially to himself; as if he be called in behalf of a decedent's estate to a share of which he is entitled as a distributee or legatee. *Van Horne's Ex'r v. Brady*, 1 Wright, 452; *Boon v. Nelson's Heirs*, 2 Dana, 391, 392; *Cox v. Norton*, 1 Pennsylv. R. 412, 414. Sometimes this may be done on releasing his interest, not generally in the fund; but merely in the subject matter of the suit. *Torrence v. Graham*, 1 Dev. & Batt. 284, 286. So a witness supposed to have a lien on the subject of recovery, was received for the plaintiff, on releasing it. *Raymond v. Howland*, 12 Wend. 176, 179.

In an action against a sheriff for his deputy's neglect, the latter may be made competent for the sheriff, by a release. *Jewett v. Adams*, 8 Greenl. 30.

In an action by a bankrupt's assignee, the bankrupt was denied to be competent for the plaintiff, till three releases were executed, one by himself to his assignee, secondly by all his creditors to the bankrupt, third by the assignee, who was not a creditor to the bankrupt. A year after the commission issued having elapsed, it was presumed that all the creditors had come in and proved their debts. And therefore a release from all who had proved was held sufficient. *Carter v. Abbott*, 1 Barn. & Cress. 444.

The son conveyed his land to his father; then McKee obtained judgment against the son alone; and then Gilchrist obtained a judgment and execution against the son and his father and caused the land to be sold. McKee alleging that the son's sale was fraudulent, claimed the avails of the execution sale on his senior judgment. On the trial of an issue upon the question of fraud between these two judgment creditors, the father, on being released from all liability to the junior judgment creditor, was held a competent witness for him. *McKee v. Gilchrist*, 3 Watts, 230, 234.

It may, perhaps, be now taken as settled, both in the English, and a majority of the American courts, that the exclusion of a party whether nominal or real, or both, from being a witness in his own cause, rests mainly on the ground of his interest; and that policy, though it operates in some instances, exerts an influence comparatively small. There are several other decisions verifying this remark, some of which we shall proceed to give here, and others will present themselves in various parts of these notes. The case of *Stevens v. Bransford* (6 Leigh, 246), was the case of a sheriff who had taken a bond on seizing property, pursuant to the Virginia statute, to pay all persons having claim to the property, their damages. In an action in the sheriff's name, on the bond, the sheriff was willing to be sworn as a witness for the defendant, who offered him; and the question whether he was competent, was debated by the judges upon his interest in defeating the plaintiff, to whom he might be liable, if he had a real claim, and the sureties should prove insufficient. Four judges sat, and they were equally divided. But none of them raised a serious doubt whether his merely being a party, should exclude him.

It is remarked in the 8th ed. of this work, by Amos & Phil. p. 47, note 1, that the privi-

leges of parties to suits, in not being compelled to appear as witnesses, has often been confounded with their interest. The privilege is considered under a distinct head, at pp. 157, 158, where the general rule is laid down that "a party on trial before a jury, is never *compelled* to give evidence for the opposite party against himself; and this rule is applied to nominal and real parties; though it is said that he may, by his own consent, give such evidence against himself, or a party joined with him, the privilege being personal to himself.

It is added, p. 158, note 3, that it does not appear to have been considered whether persons whose admissions are evidence against parties to a suit, on the ground of their being the real, though not nominal, parties to a suit, are privileged from giving evidence. It need scarcely be observed that such privilege has often been recognized on this side of the Atlantic. *Ante*, note 19.

In England, it has been recently said, that, where one defendant out of several, justifies a trespass in right of A. but submits to a verdict, A. not having employed the attorney, is a competent witness for the other defendants on distinct issues; and that one who is, without his consent, made lessor of the plaintiff, may, after a verdict for the defendant, on his demise be called as a witness in support of other counts. Lord Denman, C. J., in *King v. Baker*, 2 Adolph. & Ellis, 333. In that case, several defendants in replevin, made several cognizances under distinct persons. The plaintiff consenting to the acquittal of one defendant, the person under whom he made cognizance, was received as a witness for the other defendant. *Upton v. Curtis*, cited in text, is corrected by the case now cited. These are instances of parties real, though not nominal. So, by the decision of an American court, a merely nominal party may be received on being divested of all interest. An administrator, one of the plaintiffs, was held competent for them, on releasing to the distributees all his claim for commissions, and paying to the prothonotary all the costs of the suit past and to come, and agreeing that, in no event should they be refunded, it not appearing that he was in danger of being charged for a devastavit. *Patton's Adm'r v. Ash*, 7 Serg. & Rawle Rep. 116, 123, 124. See *ante*, note 36. All this is necessary, however, or he cannot be received. *Gebhart v. Shindle*, 15 Serg. & Rawle, 235; *Beard v. Cowman's Ex'r*, 3 Har. & McHen. 152. Nor would like steps render him competent, if he had been an administrator defendant. *Conrad v. Keyser*, 5 Serg. & Rawle, 370. One defendant in ejectment having quit the possession, and assigned all his interest to the other defendant, and being released from all liability to the person of whom he purchased, was held admissible as a witness for the plaintiff, he, the witness, not objecting. *Patterson's Lessee v. Hagerman*, 2 Yeates, 163; *Diermond's Lessee v. Robinson*, 2 Yeates, 324, S. P.

In Pennsylvania, a party plaintiff may be rendered competent in one of two ways. In the first place, by a simple assignment before suit brought, which is holden to throw the whole interest, and an exclusive liability for costs on the assignee, who afterwards sues in the assignor's name, and so to make him competent for his assignee. *Wistar v. Walker*, 2 Brown, 166, 169, 170, 171; a leading case, and the principle of this practice fully shown. *Steele v. The Phoenix Ins. Co.*, 3 Binn. 312; *Canby v. Ridgway*, 1 Binn. 496; *Fetterman v. Plummer's Adm'r*, 9 Serg. & Rawle, 20, 21, 22; *Davis v. Barr*, 9 Serg. & Rawle, 137; *Clement v. Bixler*, *infra*; *Martin v. Stille*, 3 Whart. R. 337. And though the assignment be simple and absolute, the assignee need not release the assignor. *Martin v. Stille*, 3 Whart. R. 337, 342. There is an exception, however, where the assignment was made in order to pay a precedent debt of the assignor, unless it was expressly agreed to take it in payment; for a failure to recover would revive the absolute liability of the witness for the debt. *McGinn v. Holmes*, 2 Watts, 121. Another method, though both be the real and nominal plaintiff, is an assignment of all his interest in the cause, before or at the time of trial; and the payment of all the costs so far accrued on the part of the defendant; with the deposit of a sum of money, deemed sufficient by the court to cover the future costs of the defendant, and a stipulation that the deposit shall go towards defraying such future costs absolutely and without recall. *Ash v. Patton*, 3 Serg. & Rawle, 300; *Patton's Adm'r v. Ash*, 7 Serg. & Rawle, 116, 123, 124; *Conrad v. Keyser*, 5 Serg. & Rawle, 370; *North v. Turner*, 9 Serg. & Rawle, 244; *Browne v. Weir*, 5 Serg. & Rawle, 401, 403; *Washington, J.*, in *Willings v. Consequa*, 1 Pét. C. C. R. 308; *Willing v. Peters*, 12 Serg. & Rawle, 177; *Fetterman v. Plummer's Adm'r*, 9 Serg. & Rawle, 20, 22; *Richter v. Sellin*, 3 Serg. & Rawle, 425, 437; *Clements v. Bixler*, *infra*; *Hoak v. Hoak*, *infra*; *Campbell v. Galbreath*, 5 Watts, 423; *McLughan v. Boyard*, 4 Watts, 308, 312. Some cases say the stipulation not to claim a return, need not be

express, but is implied in the payment and deposit for such a purpose. *Conrad v. Keyser*, 5 Serg. & Rawle, 370; *North v. Turner*, 9 Serg. & R., 244, 249. And see *Clement v. Bixler*, *infra*. Merely giving security for costs will not do. *Clement v. Bixler*, 3 Watts, 248. Nor a deposit for part, and a promise by the plaintiff to pay future costs, if any more should accrue. *Hoak v. Hoak*, 5 Watts, 80. *A fortiori*, a mere stipulation to pay both past and future costs (*Campbell v. Galbreath*, 5 Watts, 423), or a mere assignment, without more. *Harris v. Ohio Ins. Co.*, 1 Wright, 544.

But the right is not reciprocal. The defendant has no power to restore his own competency (*Conrad v. Keyser*, 5 Serg. & Rawle, 370, and see *Shelby v. Smith's Heirs*, 2 A. K. Marsh, 504, 507), which has led some of the Pennsylvania judges to think the rule a hard one. *Hoak v. Hoak*, 5 Watts, 81, 82, per Kennedy, J.; *Cox v. Norton*, 1 Pennsylv. R. 412, 414, per Huston, J.

Nor can the plaintiff, even under the liberal doctrine of Pennsylvania, at all times make himself competent by the usual assignment, payment and deposit. His interest may not be assignable in its nature, as if it arise from a personal tort. See cases *infra*. And it is said in one case of a trustee, that a mere formal assignment for such a purpose, either before or after suit brought, does not divest his interest; that he can still claim the trust fund on its being recovered, and it was so held, where the administrator had assigned the debt to the distributee before suit, and brought an action for the assignee's use. *Sypher v. Long*, 4 Watts, 253. *Quere*; for an administrator may assign a particular debt; though he cannot assign his *trust*, as such. The machinery being adequate, it is not perceived that the objection is so great as in case of a party having the beneficial interest. See *Patton's Adm'r's v. Ash*, and *Beard v. Cowman's Ex'r*, *supra*. The rule is universal, that a mere trustee, not being a party, nor personally interested, is a competent witness in favor of the trust fund. An assignment legally effective, though the witness may expect a re-transfer of the right, restores competency in other cases (*Dellone v. Rehmer*, *infra*), and why not in this? But in *Sypher v. Long*, the counsel was retained by the administrator. That would sustain the decision; for he was liable for costs. See 4 Watts, 254.

Another case for discharging interest is, where the witness to be rendered competent occupies the position of a real, but not a nominal plaintiff, or (it is presumed) defendant. That the rule applies to a real though not a nominal defendant, see *Benjamin v. Smith*, 12 Wend. 404. In such a case the books all seem to agree that his competency may be restored; but, as most books say, not by a simple release, assignment, or other discharge of his interest; for he is, if a plaintiff, moreover liable for costs to the opposite party. This has been often held in respect to real plaintiffs who are considered such by reason of their being *cestuis que trust* or assignees of the whole or any part of the money in dispute (*Gallagher v. Milligan*, 3 Penn. R. 177; *Mackinley v. M'Gregor*, 3 Whart. R. 369, 374, 375, 399, 400; *Ontario Bank v. Worthington*, 12 Wend. 593; *Lake v. Auburn*, 17 Id. 18); and in *Benjamin v. Smith* (12 Wend. 404), a real defendant; though *quere* of this, since the case of *Miller v. Adsit* (18 Wend. 672). There must be an actual payment for past, and an absolute deposit for future costs, as in other cases. *Campbell v. Galbreath*, 5 Watts, 423. But this is denied in New York, and a bond of indemnity to the assigning party held sufficient. *Lake v. Auburn*, 17 Wend. 18, 19. It was held in one case, that an assignment by *cestui que trust* must, in order to restore his competency, be not only legally effective in form, but on actual consideration (*Hoak v. Hoak*, 5 Watts, 80, 83); but this case seems to stand alone, and is contrary to the practice, because an assignment or release expressing without seal, or importing a consideration *by seal*, removes the legal and equitable interest as between the parties, whether there be an actual consideration or not. In *Martin v. Stille*, the assignment was expressed to be for the nominal consideration of \$1, and was in truth a mere gift; yet held good. 3 Whart. R. 342, 343. The whole is reduced at least to a mere honorary interest, or a belief of interest, which never disqualifies. And that very point was held in *Dellone v. Rehmer* (4 Watts, 9, 10), where counsel sought to question the consideration of the assignment. In that case a distributee assigning under hand and seal, to her mother, who gave her a bond, at one year, to pay her nett distributive share, after deducting the claim in question in a suit against the administrator, was held competent for the latter. And *per curiam*: "Where a party has so divested himself of interest that he cannot resume his title by compulsion of law, he is competent, though he believe himself interested." They likened it to an expectation of benefit, a matter of mere honorary obligation or belief of interest. *S. P.*, *Taylor's Adm'r v. Colvin*, 1 Wright, 449. In trespass *quare clausum fregit* and issue on the title, the *cestuis que trust* of the plaintiff were received as witnesses to support the title, on a simple release, without paying or making a deposit

for the costs of the defendant (*Martin v. M'Cord*, 5 Watts' R. 493), which seems incompatible with several other cases, *supra*, especially in Pennsylvania. The cases in New York are not uniform on this point. In *Soulden v. Van Rensselaer* (9 Wend. 293), it was held that the *cestui que trust* parting with his interest, was liable to the costs of defence, but only on the contingency that the real party should become insolvent. The case was, therefore, one of contingent and remote liability, which never goes to competency. *Nelson, J.*, pp. 295, 296. That reason, though it seems to be very sound, has certainly been disregarded in later cases. *Ontario Bank v. Worthington*, 12 Wend. 593, 597. It is doubtful, however, whether in this case, the *cestui que trust* had parted with his interest; he seems still to have had a claim upon a deposit, if the suit succeeded. See *Id.* pp. 595, 596, 597. In *Ward v. Lee* (13 Wend. 41, 43), which was assumpsit by one for a sum of money due to two, on the party off the record releasing, though a partner with the plaintiff, he was received as competent for the plaintiff, without anything more. The point of liability for costs to the defendant does not appear to have been raised or thought of. *Curcier v. Pennock*, 14 Serg. & Rawle, 51, 54. *Pickett v. Cloud* (1 Bail. 362), *contra*; for he is accountable for the debts of the firm, and so is interested to increase the fund, beside being liable to the defendant for the costs (*Id.* 364, 365); but this, in *Curcier v. Pennock* (*supra*), is called too remote and indirect to form an objection. Per *Tilghman, C. J.* In like manner, where a bill was filed by one distributee against an administrator to compel a distribution to the complainant and several others, including P. and his wife; on P. assigning all his and his wife's interest to the complainant, he was held a competent witness for the complainant. *Blackerby v. Holton*, 5 Dana, 520, 523. The case of a real, though not a nominal defendant, illustrative of our present head, we before instanced in *Benjamin v. Smith* (12 Wend. 404, 407). The action was case for a false return to the plaintiff's *fi. fa.* against the sheriff, who defended, under the indemnity of A. and B., having applied the proceeds of the levy and sale in question upon their *fi. fa.* as being prior to the plaintiff's. Although B. assigned and was discharged of all his interest, as between him and A. and the sheriff, still he was held incompetent by reason of his liability for costs to the plaintiff. But we may doubt, as said before, whether, since *Miller v. Adsit* (18 Wend. 67), such liability be any longer an objection.

The practice of assigning the interest of the plaintiff, &c., with a view to render him competent, was pointedly censured and denied to be law, by *M'Lean, J.*, in *Scott v. Lloyd* (12 Pet. 145, 149; and see per *Huston, J.*, in *Cox v. Norton*, 1 Pennsylv. R. 414); though the cases recognize the right to restore the interest of any other person by assignment, release, &c. Where a suit was brought on a bond of principal and sureties, the former, having confessed judgment and been discharged from execution under the United States Insolvent Law, was held competent as a witness for the other defendants on being released by them. *United States v. Leffler*, 11 Pet. 86. So where the maker and his surety, the indorser, were sued jointly, the former, having confessed judgment and being released by the indorser, was held competent as a witness for him. *Tilford v. Hayes*, 2 Yerg. 89. *Quere*, unless in such a case, there would be a separate taxation of costs. The interest of a legatee, &c., *e. g.*, where he is offered to sustain a will, may be removed as well by an assignment of his interest to a third person as by its release to the executors, &c. *Cates' Adm'r v. Wacter's Heirs*, 2 Hill, 442. A *cestui que trust* stood by in silence and saw his trustee convey, was holden to be concluded, and to have parted with his interest for the purpose of restoring competency. *Taylor v. Taylor*, 2 Watts, 357.

A claim for a trespass *de bonis*, &c., was held assignable for such a purpose; but it was doubted of one for a slander, assault, &c., or other personal wrong. *Vid.* *The People ex rel. Stanton v. —*, 19 Wend. 73. It was held that though the assignee be absent, his assent will be presumed if the assignment be beneficial to him. *North v. Turner*, 9 Serg. & Rawle, 244. The plaintiff, an assignor, is still incompetent, if he have guarantied the payment to his assignee, though the latter may have assigned to another without guaranty; for the guaranty was said to run with the bond into whose hands soever it might pass. *Reed v. Garvin*, 12 Serg. & Rawle, 100, 103, 104. *Quere*.

A plaintiff in a pending action, who had obtained his certificate as a bankrupt, was held competent for his assignees, though their names were not formally substituted (*Brown v. The Ins. Co. of Pennsylvania*, 4 Yeates, 119; *M'Clenachan v. Scott*, stated in note to *Field v. Biddle*, 2 Dall. 172; *M'Ewen v. Gibbs*, 4 Id. 137, S. P.); but the last case states that the assignees first entered into security for costs, and the nominal plaintiff (the bankrupt) released his interest at the bar.

We now proceed to some miscellaneous means of restoring interested persons who are not parties, to competency.

Several observations made under the next preceding head in respect to restoring competency by release, will in substance apply to this, especially to the means of restoring by an assignment or transfer of interest. The assignment being between proper parties and drawn up in due form, need not always be actually delivered to the assignee. A stockholder of a bank, who executed a transfer of his stock to his daughter, then at a distance, and delivered it to the cashier without her knowledge, but for her use, was held competent for the bank. *Smith v. The Bank of Washington*, 5 Serg. & Rawle, 318. And see *North v. Turner*, *supra*. As we also saw by several cases *supra*, no actual consideration for the payment is necessary.

A widow distributee having accepted a specific legacy in full of all her claim upon the estate, including dower, was held a competent witness for the estate. *Gebhart v. Shindle*, 15 Serg. & Rawle, 235. See *Seagar's Ex'rs v. The State*, 6 Har. & John. 162, for a restoration of competency by a singular concurrence of circumstances. A vendor with warranty was held competent for his vendee, on being discharged under the Maryland insolvent act. *Quimby v. Wroth*, 3 Harr. & John. 249. A married woman, a distributee of an intestate, was held not to be rendered competent for the administrator, by her husband's written receipt in full of her interest. *Dunnington's Ex'r v. Dunnington's Adm'x*, 3 Harr. & John. 279. An indorser of a writ (which in several states binds him as security for costs to the defendant) may be restored by the plaintiff depositing a sum which the court shall deem sufficient to cover the defendant's costs, if he succeed. *Roberts v. Adams*, 9 Greenl. 9. The indorser of a note having obtained his certificate as a bankrupt, was held competent for the indorsee, in an action by him against the maker. *Murray v. Marsh*, 2 Hayw. 290. A stockholder was held competent for a solvent bank, on assigning his interest to the bank in payment of his debt. *Bank v. Green*, 3 Watts, 374. In a suit for contribution, founded on advances by one part owner of a vessel against another who held his share as trustee, the *cestui que trust* of the defendant was sworn as competent for him, on his (the witness's) releasing his interest. *Clark v. Longworth*, 1 Wright, 189. One interested as having engaged to pay the amount to be recovered, was holden restored to competency, on the principal depositing with him a check for a sum of money equal to his liability; and on his executing a sealed receipt to the principal for the sum, expressed to be in full for all claim as surety. And *Savage, Ch. J.*, said the witness thinking it sufficient and discharging the defendant, and it being apparently so in fact, all interest was removed. "If the plaintiffs recovered, the witness would pay the amount out of the money, and return the balance. If the defendant succeeded, he was bound to return the whole." And he was accordingly held a competent witness for the defendant. *Manchester Iron Manuf. Co. v. Sweeting*, 10 Wend. 162, 165. A stockholder was held competent for his company, on simply assigning his stock, though indebted to the company, whose by-laws forbade a debtor so to assign without notice and consent, &c.; for all his interest is gone, subject to the lien created by the by-law on the stock. *Gilbert v. Manchester Iron Manuf. Co.*, 11 Wend. 627; *Utica Ins. Co. v. Cadwell*, 3 Wend. 296. And this though he declare his intention to repossess himself of the stock, and that he assigned it for the purpose of being a witness, there being no express understanding with the assignee that it should be restored. *Stall v. The Catskill Bank*, 18 Wend. 466. A receiptor of goods attached in the cause, may be rendered competent, like bail, by depositing a sum of money sufficient to indemnify him, though it was doubted whether a bond of indemnity would be sufficient. *Allen v. Hawks*, 13 Pick. 79, 85; *Beckley v. Freeman*, 15 Id. 468. And in the last case the same thing was also held as to one who had become liable as security for costs, by indorsing the writ. In assumpsit against a surviving partner, the defence was, that the plaintiff with A. and the deceased partner had covenanted to discharge all the firm debts. The plaintiff, on releasing A., offered him as a witness to prove that the covenant was delivered to the deceased to be delivered to the defendant on a condition which had never been complied with. Held admissible, for he was interested to prove an absolute delivery, as that would work payment and take away all liability from the witness. *Quere*, therefore, whether any release was necessary. *Whitaker v. Salisbury*, 15 Pick. 534, 543. In replevin by executors for slaves, the testator's widow was offered as a witness for the plaintiffs. She had renounced all right under the will and by an agreement with the plaintiffs was entitled to certain substituted provisions for her maintenance, which appeared not to depend on or have any connection with the property in

A general release of all actions and causes of action, for any matter or thing which has happened down to the time of the release, will discharge the witness from all liability depending upon the event of the existingsuit. Such a release from a defendant, who had drawn a bill of exchange, to the witness who accepted it, was held to have this effect;(1) for, as Lord Ellenborough said in that case, the transaction was already past, which was to lay the foundation of future liability; and if the drawer should have a cause of action against the acceptor, it would have reference back to the acceptance, and would be discharged by the release. A similar point arose in the case of *Cartwright v. Williams*,(2) where the defendant was the acceptor, and the witness was one of the drawers, for whose accommodation the bill had been accepted; there the witness was a bankrupt, and it was objected that

question, but were personally binding on the plaintiffs. And she was held competent. *Callis v. Tolson's Ex'rs*, 6 Gill & John. 80, 90, 91. In a like action, the widow, not having renounced, she, on the trial, released to the plaintiff all interest in the negroes, he releasing to her all claim for costs, and depositing in court money equal to those which had accrued. Held sufficient to restore her competency. *Cole v. Hebb*, 7 Gill & John. 20. In an action in the sheriff's name on a jail bond for an escape from custody under a *ca. sa.*, in favor of A. & B., the latter on being released by A. and the attorney, offered as a witness by the sheriff, and stated that he had just now agreed by parol with A. that he should have the whole debt in question; should pay B. one-fourth of its amount, and, as the witness understood, A. was to defray all the expenses of the suit. *Quere*, whether this was an assignment so as to divest B.'s interest. But held, that it was not explicitly shown that B. was discharged from the costs which had accrued in the cause. *Seymour v. Harvey*, 11 Conn. R. 275. A legatee and devisee having been paid in full, executed a release to the executor; and it not appearing that the sum in controversy would be necessary to prevent a resort to the refunding bond, was held a competent witness for the estate. *Higgins v. Morrison's Ex'r*, 4 Dana, 100, 106. In trover by a bailee, the bailor may be a witness for him, where he had settled with the bailee, who has agreed to allow him a certain sum for the goods lost. *Maine State Co. v. Longley*, 2 Shepl. 444. One transfers a note, with guaranty; on the transferee delivering up and canceling the guaranty, with intent to make the guarantor a witness, he becomes competent for the transferee. It is equivalent to a release. *Watson's Ex'rs v. McLaren*, 19 Wend. 557, 561.

A new head of restoring competency in England has been raised by the late stat. 3 & 4 W. IV, c. 42, §§ 26, 27. It provides that where a witness would be held incompetent, by reason that the verdict or judgment would be evidence for or against him, he shall nevertheless be examined, his name being first indorsed on the record, the effect of which as evidence is thus to be deemed taken away.

As we are not aware of any similar statute in the United States, the decisions giving application to the above statute can be but remotely useful; and we shall do no more than cite them, with the remark that the earlier of these decisions withheld the statute from several cases to which it has been since extended. The only cases which we have been able to find are these; *Braithwaite v. Coleman*, 8th ed. Phil. Ev. 109; *Burgess v. Cuthill*, 1 Mood. & Rob. 315; S. C., 6 Carr. & Payne, 282; *Mitchell v. Hunt*, Id. 351; *Hodson v. Marshall*, 7 Id. 16; *Faith v. McIntyre*, 4 Id. 44; *Pickles v. Hollings*, 1 Mood. & Rob. 468; *Creevey v. Bowman*, Id. 495; *Stewart v. Barnes*, Id. 472.

(Statutes have lately been passed in several of the states declaring that no persons shall be deemed incompetent as witnesses on the ground of interest; which have been briefly noticed in another place.)

(1) *Scott v. Lifford*, 1 Camp. 249.

(2) 2 Starkie N. P. C. 342.

a release to the assignees was necessary in addition to the general release, since the defendant, as surety, might prove the debt under the commission of the witness, in case the plaintiff should recover in this action; but Lord Ellenborough held, and the Court of King's Bench were afterwards of the same opinion, that the release in question, comprehending all future claims in consequence of any cause existing at the time of granting the release, would extend to bar any claim of the defendant as surety on the bill, this being an inchoate cause of action then existing.⁽¹⁾

(1) See also by Best, C. J., 4 Bing. 652. And see *Wilson v. Hirst*, 2 B. & Ad. 760.

NOTE 668.—A present right, though to take effect *in futuro*, may be presently released. Co. Litt. 265 *a*. Thus, where the wife's administrator sued for money due to her in her lifetime, her husband was received to testify for the plaintiff, on his releasing his contingent interest in his wife's estate, to her administrator. A release in these words, "All his right, &c., to any sum or sums of money which might be recovered in the said cause," was held sufficient. *Woods v. Williams*, 9 John. R. 123.

But cases may arise where a release would be unavailable. Thus, one claiming common of fishery as an inhabitant of S., cannot, by a release to the other inhabitants, and to the plaintiff, be rendered a competent witness for another inhabitant to maintain the common right. *Jackson v. Fountain*, 2 John. R. 170. See *Abby v. Goodrich*, 3 Day, 433.

In assumpsit against R. and others, one B. was offered as a witness for the plaintiff, but objected to because he was liable to the plaintiff jointly with R. for one item of the plaintiff's claim. The plaintiff thereupon released B. from all claims of the plaintiff against B. alone, or in conjunction with R.; but excepted his claim against B. and the other defendants. The release, was holden sufficient; for it turned the witness's interest in favor of the defendants. *Bulkley v. Dayton*, 14 John. 387. But a release by a tenant in possession to his landlord of all his (the tenant's) interest, still leaves him interested to support his possession; and he cannot therefore testify for his landlord. *Vincent v. Huff's Lessee*, 4 Serg. & Rawle, 298.

On an information for a seizure of goods under the revenue laws, the informer being entitled to a moiety, and also liable for costs, is of course not made competent by a release of his right. *Rapp v. Le Blanc*, 1 Dall. 63.

A release, to be effectual, must be directly from the person to whom the witness or party is liable. Thus, where the action was on a limit bond, and brought against one of two joint debtors and his surety in the bond, for his (one of the co-debtor's) escape from execution issued on a judgment against him and his co-debtor. Held, that the other co-debtor, offered by the defendants as a witness, could not be released by the surety, but that the release must be from the principal (the co-debtor sued). *Ransom v. Keyes*, 9 Cowen's R. 128. So a distributee, to make himself competent for the surviving partner of the intestate, must release directly to the administrator, not to the surviving partner. *Allen v. Blanchard*, 9 Cowen's R. 631.

One release to two joint acceptors of a bill, releasing both jointly, is sufficient. *Rex v. Bayley*, 1 Carr. & Payne, 435.

In trover for a barge, the plaintiff claimed it under purchase from Buckman, and proved the purchase and payment. The defendants claimed that Buckman had before sold to Wilson, of whom they purchased, and offered Buckman as a witness. On objection, it was doubted whether any release were necessary; but if it were, a release being produced from Wilson to Buckman, was held sufficient. The court said no release from the defendants would avail any thing, for they had no remedy against Buckman, but only against Wilson. *Radburn v. Morris*, 1 Mo. & Payne, 648.

To make a distributee a competent witness for the administrator, a release of all demands from the beginning of the world up to the time of giving the release, is insufficient, for this will not touch the fruit of the present action, which is not the subject of a demand till recovered. *Mathews v. Smith*, 2 Younge & Jervis, 426.

A member of a corporation having a common fund, is not a witness to sustain its interest,

But in an action by an administrator, where a witness called for the plaintiff was entitled to a distributive share of the intestate's estate, it was held by the Court of Exchequer, that his competency was not restored by giving to the administrator a release of all causes of action from the beginning of the world to the date of the release; (1) it was said, such a release would not affect the witness's right to a share of the proceeds of the action, in case the administrator recovered. (2)

In an action by a minor who appears by his guardian, a release by the latter will not be sufficient, the guardian not having any authority to release. (3) A release of a bond debt by one of several obligees will oper-

though he release all interest in the subject of the suit; for he may, notwithstanding the release, avail himself of the sum when paid in as part of the fund. *Doe ex dem. Mayor and Burgesses of Stafford v. Tooth*, 3 Younge & Jervis, 19.

It behoves the plaintiff releasing a witness, that he do not affect or discharge his cause of action. That may sometimes be, in which case the defendant may avail himself of it, to reduce damages, or by plea *puis darein continuance*. One of these consequences was insisted upon against a landlord who had sued the sheriff for removing goods of the tenant without payment of rent. The landlord released the tenant in order to make him a competent witness, when the sheriff insisted that the claim against him was thereby discharged; that he might plead the release; or, at least, the plaintiff could recover no more than nominal damages. The conclusion was not denied; but it was held that a release to the tenant did not touch the cause of action against the sheriff, which was now independent of the claim against the tenant. *Thurgood v. Richardson*, 4 Carr. & Payne, 481.

(1) NOTE 669.—The widow of a grantor of land with warranty, was released generally by the defendant (the grantee), and especially from all claims by reason of her being a grantor in the deed from her husband. The objection being still persisted in, on the ground that her interest consisted in a claim to a residuary share in her husband's personal estate, the defendant proved that her husband died insolvent. Held, that she was competent. *Jackson ex dem. Howell v. Delancy*, 4 Cow. 427.

Where, in an action by an administrator, the heir released to him all his interest in the action, and there was no evidence that the intestate left any real estate, which might be relieved from the claims of creditors, by a recovery in the action, the heir was held to be a competent witness for the administrator. *Boynton v. Turner*, 13 Mass. Rep. 391.

A bankrupt or insolvent debtor, who has been discharged from his debts, and has released his claim to the surplus of his estate, is a competent witness for his assignees. *Jaques v. Marquand*, 6 Cow. R. 497.

In an action by a surviving partner for a debt due the firm, a release from the widow of the deceased partner will not render her a competent witness for the plaintiff, for he (the survivor) is liable to the personal representatives of the deceased partner for a share of the sum recovered, and not to the widow, whose claim for the distributive share of her husband's estate is against the personal representatives, and not against the plaintiff. *Allen v. Blanchard*, 9 Cow. R. 631. Another reason is, that if the plaintiff fails in the action, the estate is liable to contributions to the costs, the payment of which would diminish the widow's share. This interest is not reached by her release.

(2) *Matthews v. Smith*, 2 Y. & J. 426.

(3) *Fraser v. Marsh*, 2 Stark. N. P. C. 41.

NOTE 670.—Where a witness was objected to by the defendant, as having given a written guaranty of the debt to the plaintiff, the counsel of the latter delivered up the guaranty to the witness with authority to destroy it. Held, that the relation of counsel and the possession of the guaranty, warranted the presumption that he had authority from his client so to deliver. *Merchants' Bank v. Spicer*, 6 Wend. 443.

The selectmen of a town cannot, without a vote of the town for that purpose, release a

ate as a release by all;(1) and a release to one of several obligors will have the same effect as to all the others, whether the bond be joint, or joint and several.(2)

In a case at Nisi Prius, where it appeared that several persons had agreed equally to bear the expenses of a joint undertaking, and an action was brought against one of them, it was ruled, that another of the contractors was rendered a competent witness for the defendant, if released by him, though the rest did not join in the release.(3)

It seems to have been ruled by Lord Tenterden, in an action brought against one of several persons, who were partners in business, that the defendant could not, by means of a release, make his partner a competent witness for him;(4) and in an earlier case, Lord Alvanley is said to

witness, so as to make him competent. Neither can that be done by an agent appointed to defend the suit, by virtue of his general powers as agent. *Angel v. Pownal*, 3 Verm. R. 461.

(1) *Bayley v. Lloyd*, 7 Mod. 250.

NOTE 671.—So a release by one of several partners. *Bulkeley v. Dayton*, 14 John. R. 387. Or from one of two coach proprietors, sued for negligence, to the person employed as guard to the coach. *Whitmore v. Waterhouse*, 4 Carr. & Payne, 383. A release by one of two ship owners suing for an injury done to their ship, which the defendant imputes to the neglect of their master, will render the latter a competent witness for the plaintiffs; for their action against the master would be joint for the negligence, which one of the two might release. *Hockless v. Mitchell*, 4 Esp. R. 86.

(2) Co. Lit. 232 a; 2 Roll. Abr. 412 (G.); 1 Bos. & Pul. 630.

NOTE 672.—*Willings v. Consequa*, 1 Pet. C. C. R. 301. One release to two joint acceptors of a bill, releasing both jointly, is sufficient (*Rex v. Bayley*, 1 Carr. & Payne, 435); (but is not sufficient, if it be to one only. *Wells v. Peck*, 23 Penn. State R. 155. See *Falconer v. Clark*, 7 Md. 177.)

(3) *Duke v. Pownall*, Mo. & Ma. N. P. C. 430.

(4) *Simons v. Smith, Ry. & Mo. N. P. C. 29*. The reason for this decision is not mentioned.

NOTE 673.—In an action of assumpsit against A. and B., as partners, on a partnership contract, A., who was not found or served with process, was offered as a witness in favor of B., and held admissible, after having been released by B., on the ground that the suit having abated as to him, by the return on the process of "no inhabitant," he was no longer a party to the suit; and as to his interest, that was hostile to the party calling him; since a recovery and satisfaction against B. would bar a future action against A., and B.'s release would protect A. from any claim for contribution. *Leroy, Bayard & Co. v. Johnson*, 2 Pet. R. 186.

A release from one to the other of two persons, being partners, or jointly liable to the payment of a sum of money, in a case where contribution might be enforced by one against the other, renders the released party a competent witness for the releasor, in a suit against him alone, by the creditor; although without such release the witness would be directly interested in the event of the suit. *Bagley v. Osborne*, 2 Wend. R. 527. The same doctrine was held by Washington, J., in the case of *Willings v. Consequa* (1 Pet. C. C. Rep. 306). The decision in these cases rests upon the principle, that when a plaintiff brings his action at law against a part of several parties jointly liable, and fails to recover, the judgment will be a bar to any future action brought by him against any, or all of the joint debtors; and if he recovers against a part of the joint debtors, he thereby discharges the others from all liability, both at law, according to the doctrine laid down in *Robertson v. Smith* (18 John. R. 456), and *Gibbs v. Bryant* (1 Pick. R. 118), and in equity, as held by Kent, Chancellor, in *Penny v. Martin* (4 John. Ch. R. 566), contrary to the English case, cited in the text, by which it was held, that although the remedy at law was gone, yet the plaintiff might, by bill in equity, enforce his claim against the parties not sued, in case the defendant, against whom judgment was recovered, should die or become insol-

vent. See also *Sheehy v. Mandeville*, 6 Cranch, 253, where it was held that a recovery against one of two joint makers of a note does not discharge the other. See *Pendleton v. Speed*, and *Wallace's Ex'rs v. Twyman*, stated *ante*, note 663; also *Duke v. Pownall*, stated *ante*, in the same note; also *Waite v. Merrill*, and *Anderson v. Brook*, stated in the same note.

In assumpsit against one of several makers of a promissory note, the others were held competent for him, on being released from all contribution. *Carleton v. Whitcler*, 3 N. H. Rep. 196.

In Louisiana an action was brought by partners in their own names for a demand which their former partner had sold to them in this way: on retiring from the firm he assigned to them all claims "which are or may be owing to the firm." He was held a competent witness for the firm; this assignment not amounting to a warranty of the claim. *Merriam v. Worsham*, 4 Mart. Lou. R. (N. S.) 198. And see *ante*, note 631.

The difficulties attending the discharge of interest in an ordinary joint debtor not sued, so as to make him competent for the defendant, were considered *ante*, note 631, and note 640, and where he is a partner, *ante* in this note. It will be seen by these notes, that his competency for either party has been thought materially to depend on the effect of the verdict in the immediate suit, and the liability of the witness, in the event of the insolvency or death of the defendant. *Gardiner v. Levaud*, 2 Yeates, 185, S. P. The text holds that his competency for the defendant cannot be restored, by any arrangement between the witness and the defendant (*James v. Bostwick*, 1 Wright, 142, 143, 144, S. P.), while several American cases hold that it can. The latter position has lately been adopted as law in England, and the former cases to the contrary disregarded. General releases were interchanged between the defendants and their copartner, which were held to restore his competency, as cutting off his liability to contribute, his right to any surplus in the partnership fund, &c. The case is also remarkable as disposing of the question how his interest would be affected by the verdict. At the bar it was objected that if in favor of his copartners, the defendants, it would be a bar as to him. And see several American cases cited above and in note 631; *Gardiner v. Levaud*, 2 Yeates, 185; *Bill v. Porter*, 9 Conn. R. 28, 29; *Scott v. Colmesnil*, 7 J. J. Marsh. 418. This the court conceded; but said that it would be equally so if in favor of the plaintiffs—and the defendants having released him from contribution, it was, in respect to the verdict, a case of balanced interest. *Wilson v. Hirst*, 4 Barn. & Adolph. 760. The release, as there, must be by all the defendants. One cannot release for himself and copartners, *inter se* (*Bill v. Porter*, 9 Conn. R. 23, 29, 30); and there must be mutual releases; one from the defendant alone will not do. *Wilson v. Hirst*, *supra*; *Black v. Marvin*, 2 Pennsylv. R. 138; *M'Coy v. Lightner*, 2 Watts, 347, 351.

"It is true," says *Williams, J.*, in *Bill v. Porter* (9 Conn. R. 28), "that the judgment is not against him [the witness], nor does execution issue against him; but by virtue of that judgment, the partnership effects may be taken in execution, in the same manner as if all the partners had been made defendants." *Quere*, unless he be named in the process, and pursued as a joint debtor. *Carter v. Connell*, 1 Whart. R. 392, 398; S. C., 2 Id. 542, 561, 562. In *Black v. Marvin* (*supra*), the court said: "The joint funds will be decreased by an execution against either." *M'Coy v. Lightner*, *supra*, S. P. *Bagley v. Osborne* (12 Wend. 527), should also have been mentioned as a case of mutual releases; and in *Willings v. Consequa* (1 Pet. C. C. Rep. 301), the witness not only took a release, but assigned his interest in the subject matter of the suit to his copartners. But the witness was in that case a party.

Yet there are several cases in which a release from partners defendant, to another partner not sued, has been alone holden sufficient. That was so in *Le Roy, Bayard & Co. v. Johnson* (2 Peters, 186). See Id. p. 194, per *Washington, J.*, for the reason; which is, that the witness being released from contribution to the defendant, his copartner was interested to procure a recovery against and satisfaction from him, and so discharge himself; not noticing that a verdict for the defendant would work the same effect, nor that a recovery would diminish the fund. Other cases are to the same effect. *Wilson v. Smith*, 5 Yerg. 379, 388, 408; *Willings v. Consequa*, *supra*. The reasoning in *Bagley v. Osborne* (*ut supra*), goes to the same point; and a late MS. case decided by the Supreme Court of New York, expressly adopts the release of the defendant alone as sufficient. The question was a good deal discussed in *Carter v. Connell* (1 Whart. R. 392, 398, and S. C., 2 Id. 542, 561, 562), wherein the process was against all the partners, but returned *non est inventus* as to the witness, who was released by his alleged copartners. It appears by 2 Whart. R. 562, that a statute of Pennsylvania leaves a partner still liable, though

have expressed an opinion,(1) that a partner of the defendant could not be made a competent witness for him by means of a release, on the ground, that if the defendant died or became insolvent, the plaintiff would have a right, by a bill in equity, to compel all the partners to contribute. But in a late case in the Court of King's Bench, this doctrine appears to have been overruled. It was there decided, that in an action against two partners to recover the balance of a banking account extending over several years, a witness called for the defendants, who admitted that he had been a partner with the defendants during a part of the time over which the account extended, was rendered competent by general releases from the witness to the defendant, and from the defendants to the witness.(2)

In the recent case of *Jones v. Pritchard*,(3) it was held, in an action brought against one part owner for work done to a vessel, that another part owner is a competent witness for the defendant after a release; a release from the witness was not considered necessary.

The Court of Common Pleas lately determined, in the case of *Beckett v. Wood*,(4) an action for wages brought by the plaintiff as secretary of an intended joint stock company, against one of the provisional committee of the company, that another member of the committee was a competent witness for the defendant, on being released by him; for, after releasing

not served with process in the cause. In New York, the joint property would be liable to execution in such a case, as if all had been brought into court. In 1 Whart. R. 398, it is said: "Judgment in favor of the plaintiff would authorize a payment of this debt by the defendants out of the partnership funds, or it could be enforced by execution, which would not be the case if the plaintiff failed." If the witness be not named in the suit, and if, as is holden by several cases, it comes to be clearly established that a verdict either way in a suit against the others, individualizes the debt, and forever discharges the witness, the question upon his competency on a release to, though not from him, may receive a different determination, even by those courts which hold mutual releases to be necessary. In assumpsit for work done to a vessel against one part owner, another part owner is competent for the defendant on being released by him. *Jones v. Pritchard*, 2 M. & Wel 199.

Another position in which a partner may sometimes be placed is, where he, being a dormant partner, the suit is brought by the known and active partner alone, for a joint debt. The dormant partner has, in such a case, sometimes been received, on releasing his interest to the plaintiff, as competent for him. *Ward v. Lee*, 13 Wend. 41, 43; *Curcier v. Pennock*, 14 Serg. & Rawle, 51, 54; *Ante*, note 623. This, however, is denied in other cases, and apparently on very strong ground; because the fund for payment of their joint debts will not only be increased by the recovery, but the witness is liable to the defendant for costs. *Pickett v. Cloud*, 1 Bail. 362, 364, 365.

In a very peculiar case the interest of a partner off the record was much examined, and found to be balanced; and he was therefore received as competent. *Gregory v. Dodge*, 4 Paige, 557; S. C., on appeal, 14 Wend. 593, 602, 604, &c.

(1) *Cheyne v. Koops*, 4 Esp. N. P. C. 112.

(2) *Wilson v. Hirst*, 4 B. & Ad. 760. It was considered that the future right, which was released, had a foundation and original inception at the time of the release, and was a necessary and common liability, and that, therefore, the rule in *Lampet's Case* (10 Rep. 506), was satisfied.

(3) 2 M. & Wel 199. See *Young v. Bairner*, 1 Esp. 103; *Goodacre v. Breame*, Peake, 174; *Jennings v. Griffiths*, R. & M. 42; *Moody v. King*, 2 B. & C. 558.

(4) 6 Bing. New Cas. 380.

the witness, the defendant could not himself have set up against any other joint contractor a demand for that share of contribution, which, but for his own release, he might have derived from the witness, and which, by such release, he must be taken to have voluntarily abandoned against all; consequently no other joint contractor could afterwards have called upon the witness for contribution.(1)

A residuary legatee is not rendered a competent witness, in an action by an executor to recover a debt due to the testator, by releasing all claim to the debt in question; for if the plaintiff fail in the suit, although he would not be liable for costs to the opposite side, he must pay costs to his own attorney; and the executor would be entitled to the allowance of these costs out of the estate, the action being brought *bona fide*; thus, independently of the debt to be recovered, the residue would be diminished. The witness, therefore, has still an interest to support the action, and can only be rendered competent by releasing the residue, or by a release of the costs of the action from the attorney.(2)

Where the defendant executed a release to witness at the trial, but, before the release was given to the witness, it was handed to the plaintiff's counsel, who objected to the form, in consequence of which it was altered and re-executed, the release was held sufficient, and a new stamp was considered unnecessary.(3) And in a late case, in which the defendant executed a release to one of the witnesses before the trial, and gave it to his attorney, and at the trial it appeared that another witness would require to be released, and his name was accordingly inserted, and the release re-

(1) NOTE 674.—Where the defence to an action of trespass was, that the *locus* had been used by all the inhabitants of Staten Island as a free and common fishery, it was held that an inhabitant of Staten Island was not competent to prove the right of common, and that a release of his right, offered by the witness, did not remove the objection, since it could pass no right to the plaintiff, nor extinguish any interest which the witness had. The right belonged to the witness, not in his individual capacity, but as an inhabitant of Staten Island. And although the witness might bind himself by covenant not to exercise the right, he could not assign or release it, as it was local and personal. *Jacobson v. Fountain*, 2 John. R. 170.

A stockholder in a bank, who, on being called as a witness and objected to as being a stockholder, assigned his stock, was held to be a competent witness for the bank, though the bank charter contained a provision that no transfer of stock should be valid until it was registered in a book to be kept by the bank for that purpose, and all debts due from the assignor to the bank were paid; and though the transfer had not been registered, nor any evidence given that the assignor had paid, or was not indebted to the bank, the transfer was held valid as between the assignor and assignee, the above-mentioned provision being intended solely for the protection of the bank. *Bank of Utica v. Smalley*, 2 Cowen's R. 770.

(2) *Baker v. Tyrwhitt*, 4 Campb. 27. See *Carter v. Abbot*, 1 B. & C. 144, and *Perryman v. Steggel*, 8 Bing. 369, as to its being necessary for the bankrupt to release his surplus to his assignees, or to obtain releases from his creditors, besides being released by the party who calls him. In *Carter v. Abbot*, three releases were given. In *Perryman v. Steggel*, the general release was held insufficient.

NOTE 675.—See *ante*, note 669.

(3) *Alton v. Farren*, 5 Carr. & P. 513.

executed before it had been delivered out of the attorney's possession, it was held by the Court of Exchequer, that the instrument was still *in fieri* at the time of the re-execution, and did not, therefore, require a fresh stamp.(1)

Where the defendant has suffered an incompetent witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, and the plaintiff has obtained a verdict, a new trial will not be granted, on the ground that the release has not been given, but the witness will have a remedy on the undertaking.(2)

When a witness is objected to as a member of a corporation whose interests are in question, his competency may be restored either by his resignation (which will be effectual even by parol, provided it has been accepted, and another person elected in his place),(3) or by disfranchisement. The method of disfranchisement is said to be an information in the nature of a *quo warranto* against the member, who then confesses the information, and upon that there is judgment of disfranchisement.(4) This judgment must be such as cannot be avoided; for if it appear that the witness can avoid the judgment for irregularity (as he may, if he has never been summoned, and knew nothing of his disfranchisement), he is not competent.(5)

It has been shown that the competency of a witness who is the defendant's bail may be restored by applying to the court to strike out his name from the bail piece, or by depositing a sum of money in court at the trial of the cause as a security for the debt and costs.(6) So, a witness called for a plaintiff, who is liable to the defendant upon a bond for the costs of an action, will be allowed to deposit the amount of the penalty of the bond with the officer of the court, and his evidence will then be received.(7) It has also been noticed, that if a witness offers to release or surrender his

(1) *Spicer v. Burgess*, 1 C., M. & R. 129; 4 Tyr. 598. *Quere* as to the sufficiency of a single stamp on a release to two witnesses. See by Lord Lyndhurst, 4 Tyr. 605.

(2) *Heming v. English*, 1 C., M. & R. 568; 5 Tyrw. 185.

(3) *R. v. Mayor, &c., of Ripon*, 2 Salk. 432; Com. Dig. tit. Franchise, F, 30.

(4) *The Case of the Mayor, &c., of Colchester*, 1 P. Wms. 595, n.

(5) *Brown v. Corp. of London*, 11 Mod. 225.

NOTE 676.—See *ante*, note 674.

(6) *Baillie v. Hole, Mo. & Ma. N. P. C.* 290. And see *Pearcey v. Heming*, 5 Car. & P. 503.

NOTE 677.—See *ante*, note 629.

(7) *Lees v. Smelt*, 1 M. & Ro. 329.

NOTE 678.—Per Thompson, J., in *Jacobson v. Fountain*, 2 John. R. 176, S. P.; per Washington, J., in *Willings v. Consequa*, 1 Pet. C. C. R. 308, S. P.

Accordingly the wife of a legatee was received to prove the will, on the release of the husband being executed, though not received by the personal representatives. *Brayfield v. Brayfield*, 3 Har. & John. R. 208. And see per Tilghman, C. J., in *Ludlow v. Union Insurance Co.*, 2 Serg. & Rawle, 119, 132. See also *Bent v. Baker*, 4 T. R. 27.

interest, and executes a release accordingly, his competency is restored, though the party refuse to accept his release.(1)

(1) NOTE 679.—See Norris's Peake, 234.

It is proper to remark, on concluding this head of restoring competency by the acts of the parties and witnesses, that the court are entitled to be satisfied that all the steps taken are in good faith, being honestly intended to divest the witness of all interest, and not collusive, or merely colorable. This may be fully gathered from what Tilghman, G. J., and Yeates, J., said in *Steele v. Phoenix Insurance Co.*, 3 Binn. 313, 316, 317.

A T R E A T I S E
ON
T H E L A W O F E V I D E N C E.

B O O K T H E S E C O N D.

P A R T T H E F I R S T.

C H A P T E R I.

O F E V I D E N C E I N A C T I O N S O N P R O M I S S O R Y N O T E S A N D B I L L S O F
E X C H A N G E.

(UNDER the former practice it was incumbent upon the plaintiff in an action on a promissory note, or bill of exchange, to prove, in the first place, under the general issue, that the note or bill was either in express terms, or in legal effect, the same as described in the declaration or complaint.(1) If the proof failed in this respect, so that there appeared to be a variance between the pleading and the proof, the plaintiff could not recover, though ready and able to prove a valid cause of action differing in some slight particulars from that stated in his declaration. It was necessary to prove allegations of matter of substance substantially as stated; and allegations of matter of description literally.(2)

(1) NOTE 680.—* * See the text, Vol. I, Chap. 12, and the notes thereto, for the statutes and decisions relative to variances and amendments. The courts are clothed with an almost unlimited discretion, to disregard variances and allow amendments, upon terms or otherwise, so as to prevent a failure of justice. And see 1 Gr. Ev. § 73, and notes; and 1 Metc. & Perkin's Dig. pp. 145 to 162. The exercise of this discretion, is not, in general, subject to review by other tribunals. 1 Gr. Ev. § 73, and note. But if the judge exercises his discretion in a manner clearly and manifestly wrong, it is said, the court will interfere and set it right. *Hackman v. Fernie*, 5 M. & W. 505; *Geach v. Ingall*, 9 Jur. 691. See *ante*, Vol. II. Bills of Exceptions, in the text and notes.* *

(2) By Lord Tenterden, C. J., *Stoddart v. Palmer*, 3 Barn. & Cress. 4.

If the written instrument described in the declaration corresponded in substance and legal effect with the instrument produced in evidence, it was sufficient. Thus, when a bill was made payable to the order of a person, it was sufficient to allege it to have been made payable to himself.(1) If the defendant accepted the bill by an agent, the acceptance was properly stated to have been made by the principal;(2) and a bill payable to a fictitious person might, as it may now, be declared on as a bill payable to bearer.(3)

A misdescription of the note or bill declared on, *e. g.*, a misstatement of its date, was held fatal, for the technical reason that it was not the same instrument described in the plaintiff's declaration.(4) At the same time,

(1) *Smith v. Maclure*, 5 East, 476.

NOTE 681.—An order drawn by a contractor on the department at Washington, payable "to my order, \$— for value received," &c., was held not to be a negotiable bill of exchange; for, in the case of the government, the event on which payment is to depend, is one of *public notoriety*, and the holder never expects it to be paid otherwise than out of the funds of the drawer. *Reeside v. Knox*, 2 Whart. R. 233.

A note for the payment of money, *under seal*, though in all other respects like a promissory note, is not negotiable, and an action cannot be maintained upon it in the name of a person to whom it is transferred. *Clark v. The Farmers' M. Co. of B.*, 15 Wend. 256. See statutes of the states, *Edwards on Bills and Notes*, 264–285.

A promissory note, expressing no time when payable, is, in judgment of law, payable on demand, and draws interest from its date. *Gaylord v. Van Loan*, 15 Wend. R. 308. (And notes payable on demand, must, as against an indorser, be presented for payment within a reasonable time. 1 Cowen, 397; 3 Wend. 75.)

(2) *Heys v. Ezeltine*, 2 Campb. N. P. C. 604; *Johnson v. Mason*, 1 Esp. R. 90; *Babcock v. Beman*, 1 Kernan R. 200.

(3) *Minet v. Gibson*, 3 T. R. 481; *Collis v. Emet*, 1 Hen. Blac. 313; *Gibson v. Hunter*, 2 Hen. Blac. 187, 288. See *Bennett v. Farnell*, 1 Campb. N. P. C. 130, 180, c. So where the name of the payee is in blank, the bearer may insert his own name. *Atwood v. Griffin*, 1 Ry. & Mo. 425; *Plets v. Johnson*, 3 Hill N. Y. R. 112; and a check drawn, payable to the order of bills payable, stands on the same footing. *Willets v. Phoenix Bank*, 2 Duer R. 121.

NOTE 682.—In an action on a note in writing. "Good for ——— on demand;" held, that the plaintiff must prove his title to the promise declared on: that it was *given to him*. The person alone to whom it was delivered can maintain an action upon it. *Brown v. Gilman et al.*, 13 Mass. R. 158.

The payee of a negotiable note may allege that the note is payable to himself without stating *or order*; and it is no material variance. *Fay v. Goulding et al.* 10 Pick. 122. However, if the plaintiff be an indorsee, it seems to be necessary to allege that the note was payable to the payee or his order. *Id.*

The declaration described four promissory notes in one count; held good. *Dade v. Bishop*, 1 Ala. R. 263.

(4) 2 Campb. N. P. C. 307, n.

NOTE 683.—*Sheehy v. Mandeville*, 7 Cranch, 208. It is not necessary to recite a contract in *hæc verba*, but if it be recited, the recital must be strictly accurate. Thus, a note payable sixty days after date, is a note different from one payable immediately, and cannot be given in evidence under a count which does not state when the note is payable. The variance in such case is also fatal on default; the default dispenses with the proof of the note, but not with its production. * * Proof of a note dated 26th July does not support a declaration stating the date as the 25th (*Stephens v. Graham*, 1 Serg. & R. 506; *Tallis v. Howarth*, *Wright* 303); and it is a fatal variance to describe an undated note as having a date. *Hawley v. Real Estate Bank*, 4 Pick. 508. * *

when the declaration stated that on such a day the defendant drew a bill of exchange, without alleging that it bore date on that day, the day named was held immaterial.(1)

A few more instances will be sufficient to illustrate the former rule which required that the proof should conform to the pleadings. Thus, where there was a variance, in the place of payment, between the instrument set forth and that proved, it was held fatal; as where the place of payment was omitted in the declaration, when it formed part of the contract,(2) not being inserted by way of memorandum;(3) or where it was intended merely as a memorandum, and was stated as a part of the contract.(4) So, where the direction of the bill was misstated;(5) or the consideration of the bill was improperly described,(6) as where a bill was

If the instrument be declared on according to its legal effect, that effect must be truly stated. If there be a failure in this respect, the plaintiff in this case, any more than where the contract is recited in the particular words, cannot give the instrument in evidence. *Id.* It has been held, however, that unless the objection be made at the trial, it is too late after a verdict, to call that in question. *Pike v. Evans*, 15 John R. 210. It is proper to observe, that the variance in this case was not in respect to the description of a written instrument. In the case of *Williams v. Andrews* (11 Conn. R. 326), which was on a receipt to deliver particular articles to the officer, "being of the value of seventy-five dollars;" held, that it was not necessary to state their value in the declaration; it is sufficient to state the substance and legal effect. * * Where a bill is payable in dollars and cents, a misdescription as to the cents is fatal. *Pilie v. Mollere*, 14 Martin, 666. * *

(Under the present rules of pleading, both here and in England, such mistakes are amendable on the trial, and without costs. Code of N. Y., § 169; *Bacon v. Comstock*, 11 How. Pr. R. 197. And see *Hall v. Gould*, 3 Kernan R. 127.)

(1) *Coxon v. Lyon*, 2 Campb. N. P. C. 307, n.

NOTE 684.—The date is not the essence of the contract. The plaintiff may declare according to the truth of the date of a note, without averment as to any mistake; and may show the mistake in evidence. *Phoenix Ins. Co. v. Walden*, Anth. N. P. 226; *Hague v. French*, 3 B. & P. 173. In 2 Salk. 659, the deed declared on, was dated the 30th of March, Anno Domini 1701, the oyer was on the 30th of March, 1701, and held no variance. Such variances are immaterial, and should be disregarded. *Henry v. Brown*, 19 John. R. 49. * * And see *Chitty on Bills* (11th Am. ed.), p. 563, and notes. * *

(2) *Roche v. Campbell*, 3 Campb. N. P. C. 247; *Hodge v. Fillis*, 3 Campb. N. P. C. 463; *Sanderson v. Bowes*, 14 East, 500; *Tregothick v. Edwin*, 1 Stark. N. P. C. 468.

NOTE 685.—In an action upon a constable's receipt, and the declaration alleged the promise to deliver the articles taken, at the sign-post in *Winchester Old Society*, and the receipt produced was to deliver them at the sign-post in *Winchester Centre*; parol evidence was admitted to show that *Winchester Old Society* and *Winchester Centre* are one and the same place; held, that it was no variance. *Andrews v. Williams*, 11 Conn. R. 326. The declaration did not purport to recite the writing; it only set out the material part of the contract for the breach of which the plaintiff declared, without any allegation adapted to the fact of the different names of this sign-post. *Id.*

(3) *Price v. Mitchell*, 4 Campb. N. P. C. 200; *Hartley v. Wilkinson*, 4 M. & S. 25.

(4) *Exon v. Russell*, 4 Maule & Sel. 505. See *Hardy v. Woodroffe*, 2 Stark. N. P. C. 319; *Sproule v. Legg*, 3 Stark. N. P. C. 157; and 1 & 2 G. IV, c. 78.

(5) *Gray v. Milner*, 2 Stark. N. P. C. 236; 3 B. Moore, 90. See *Anon.*, 12 Mod. 447.

(6) NOTE 686.—"When the consideration of a contract is executory, or its performance depends upon some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver performance of such precedent condition, or show some excuse for the non-performance."

payable to the drawer's order for *value received*, and the value was alleged to have been received by the drawer, instead of the drawee.(1)

In like manner, the plaintiff often assumed a special burden of proof, arising from the form of his allegation; as where, suing on a note, payable in chattels, that acknowledged value received on its face, and he alleged the particular consideration for which it was given;(2) or where he alleged, an indorsement in a particular manner, "his own hand being thereunto subscribed."(3)

Yelv. 76, n.; Hilt v. Campbell, 6 Greenl. R. 109. In this case, the promise in the note was to pay the sum when the horse should be sold; and the declaration alleged the promise to pay when the horse should be sold, or in a reasonable time; the case found that the horse never was sold, but died in consequence of the defendant's misconduct; held, that the variance was fatal. The court (Mellen, J.) said: "The plaintiff declares on an express contract, and, therefore, unless the words made use of in describing the promise, 'or in a reasonable time,' are a part of the express promise, there is a fatal variance."

The plaintiff in such case should state the facts specially: when no time is mentioned when payment is to be made, they will give effect to the contract, by construing the promise to be a promise to pay in a reasonable time. But in the above case the words "or in a reasonable time," were inconsistent with the promise. The variance was as to the terms of the contract, which is always fatal. Robbins v. Otis, 1 Pick. 368; Newcomb v. Bracket, 16 Mass. R. 161. So, if the declaration alleges a promise to pay on demand, but the evidence is of a promise to pay at a future day, which has not arrived. Eaton v. Whitaker, 6 Pick. 465. It seems, however, that a proof of a promise beyond what is averred, but embracing that also, cannot prejudice the defendant. It is not setting forth a different promise, but failing to set forth the whole, to the prejudice of the plaintiff only; the variance in such case is not fatal. Alvord v. Smith et al., 5 Pick. 232. * * But see Rossiter v. Marsh, 4 Conn. R. 196, and Saxton v. Johnson, 10 John. R. 418, stated *post*, note 687. * *

A promise to pay the *specified sum with interest after four months*, the limitation as to the time of payment was held applicable to the *whole* promise—as well *principal* as *interest*. Hobart v. Dodge, 1 Fairf. R. 156. It is different, where the promise is to pay the debt *on demand* (with a comma at the end of that word), with interest *after six months*. This limitation extends only to the interest, and it cannot be applied to the principal. Rice et al. v. West, 2 Fairf. R. 323; Newman v. Kettelle et al., 13 Pick. 418.

(1) Highmore v. Primrose, 5 Maule & Sel. 65; Preddy v. Henby, 1 Barn. & Cress. 675. And see Grant v. Da Costa, 3 Maule & Sel. 351; Jones v. Mars, 2 Campb. N. P. C. 306.

NOTE 687.—In an action on a promissory note, executed by defendant, and not averred to be for value received; and the note in evidence, purported to be for value received; held, that the variance was fatal. Rossiter v. Marsh, 4 Conn. R. 196; Saxton v. Johnson, 10 John. R. 418. In the last case, the words *value received*, were not in the note, but were in the first count of the declaration; the court said, they "were used and intended for a description of the note declared on; and not as an averment inserted by the pleader. Held, also, that as the note had no consideration appearing on the face of it, and none being averred, it was not admissible in evidence under the money count. A variance exists, as well where words are omitted, as where they are supplied. Lawes' Assump. 106.

(2) Jerome v. Whitney, 7 John. R. 321; Saxton v. Johnson, 10 John. R. 418; Knill v. Williams, 10 East, 431.

(3) Levy v. Wilson, 5 Esp. N. P. C. 108. See Holmsley v. Loader, 2 Campb. N. P. C. 450; Jones v. Mars, 2 Campb. N. P. C. 305.

NOTE 688.—In an action on a promissory note, alleged to have been made by the defendant, "his own proper hand being thereunto subscribed;" if it appear that the defendant's name was written by another person, with his authority, it is sufficient; and these words may be rejected as surplusage. Booth v. Grove, 1 Mo. & M. 182; 3 C. & P. 335. The wife, by authority of the

Where an action was brought against three persons, and the declaration described two of them as partners, and then alleged that the defendants made their certain promissory note in writing, "their own proper hands being thereunto subscribed, bearing date, &c.," and the note produced on the trial was proved to have been signed by one of the defendants personally, while the signature of the firm was signed by one of the firm, the variance was declared immaterial.⁽¹⁾ The execution of a note by one of two partners is the act of both, so that the allegation that they made the note is supported by producing it and proving that it was signed by one of them

husband, may indorse the bill; and although she sign her own name, it was held to pass the interest in the bill to a *bona fide* holder. *Prestwick v. Marshall*, 7 Bing. 565. Three persons, not partners in trade, having separately indorsed the bill for the accommodation of the drawer; and on its being dishonored, paid the same equally to a person who had discounted the note subsequent to their indorsements; the court held that they might proceed jointly against a previous indorser, by striking out their indorsements. *Low v. Copestake*, 3 C. & P. 300. Best, C. J., said: "The plaintiffs did not possess themselves of this bill by any joint payment, but by separate payments. But, allowing it to be so, why may they not strike out their indorsements, and proceed as the possessors of the bill?"

Wherever a promise is made by an agent, it is considered in law as made by the principal, and he is holden for its performance; and it is difficult to perceive why the same doctrine does not apply and govern in cases where a promise is made to an agent. Trustees, &c., in *Levant v. Parks et al.*, 1 Fairf. R. 441; *Worcester Turnpike v. Willard*, 5 Mass. R. 80; *Gilman v. Pope*, Id. 491; *Taunton, &c., v. Whiting*, 10 Id. 336. And a promise made to the treasurer of a corporation, or his successor in office; held, that the action might be sued in the name of the trustees of the corporation. *Trustees, &c. v. Parks et al.*, *supra*.

A note made payable to a land agent of the state, is, in legal contemplation, payable to the state, may be sued in the name of the state; the agent being but the servant of the state. *The State v. Boies et al.*, 2 Fairf. R. 474.

Where the declaration averred that B., T. and G., acting under the firm of B., T. & Co., indorsed the said note in writing, the proper name and style of the firm of A., L. & Co., being thereunto subscribed, evidence that one of the makers and one of the indorsers subscribed and indorsed the note, with the names of their respective firms, was held sufficient. *Manhattan Co. v. Ledgard*, 1 Caines' R. 192. But in an action against two or more persons, on a promissory note with a joint name or firm, if the declaration contain no averment that the defendants were partners, or acted under the firm, but that the defendants *made the note in their own proper hands and names thereunto subscribed*, proof that one of the defendants subscribed the note, is not sufficient to prove the contract as laid. *Pease et al. v. Morgan*, 7 John. R. 468; *Pate v. Bacon et al.*, 6 Munf. R. 219.

Where the declaration on a bill alleged it to have been drawn by one Hannah P. on, and accepted by the defendant, and afterwards indorsed by the said H. P. to the plaintiffs, the bill appeared to be indorsed "pro H. P.," in the handwriting of one J. P., and a witness stated that his employers had dealings with a Mrs. P., and that he had seen bills drawn and indorsed in the same form and handwriting, which had been paid; and held, that upon a question of authority, the statements of the witnesses were admissible, without the production of such bills, and the court, after an affidavit that the real name was Hannah, and that the bill was drawn and indorsed by her son, J. P., by her authority, refused a new trial. *Jones v. Turnour*, 4 C. & P. 204. * * An indorsement made by a *mark* is good. *George v. Surrey*, 1 Mood. & Malk. 516. And a mark is a good signing within the Statute of Frauds. *Baker v. Denning*, 8 Ad. & El. 94. Where a party placed the figures 1. 2. 8. upon the back of a bill of exchange, by way of substitute for his name, intending thus to bind himself as indorser, it was held to be a valid indorsement, although it appeared he could write. *Brown v. The Butchers and Drovers' Bank*, 6 Hill, 443. * *

(1) *Porter v. Cummings*, 7 Wend. 173.

in the firm name, and that they were partners.(1) So in an action against an indorser of a note made by a firm, it is not necessary in describing the note to state the names of the partners at large as makers; the firm name makes the description sufficiently certain.(2) So also, where the plaintiff, an indorsee, derives his title to a note through a firm, he is not required to state in his declaration the names of the persons composing it.(3)

A variance in the name of the indorser,(4) or between the allegation and proof as to the time of the indorsement, was not held material;(5) nor was it held necessary to prove the day of presentment as laid, except in an action against a drawer or indorser.(6) As against the acceptor, the time of the acceptance was not deemed material.(7)

A misnomer of the defendants in the complaint, could only be taken advantage of by a plea in abatement; and a variance between the names by which they were described in the instrument on which the action was brought, and the names by which they were sued, was held immaterial.(8) So, where the parties to the action were properly described in the declaration, it might be shown that the bill or note was intended for them, though they were misdescribed in it.(9) But where the names of two

(1) Vallett v. Parker, 6 Wend. 615.

(2) Bacon v. Cook, 1 Sand. Sup. Ct. Rep. 77.

(3) Cochran v. Scott, 3 Wend. 229.

(4) Forman v. Jacob, 1 Stark. N. P. C. 47.

(5) Young v. Wright, 1 Campb. 139.

(6) Forman v. Jacob, *supra*; Bayley on Bills, 317 (4th ed.).

(7) Bayley on Bills (4th ed.), 317. See Young v. Wright, 1 Campb. N. P. C. 139; Forman v. Jacob, 1 Stark. N. P. C. 46; Jackson v. Pigott, Ld. Raym. 364, *contra*.

NOTE 689.—Molloy v. Delves, 7 Bing. 428; 4 C. & P. 492. Here the drawer merely wrote his name at the bottom of a blank piece of paper; held, that this was an acceptance of a bill subsequently signed by the drawer; and in such case the holder need not prove any custom of merchants thus premartely to accept an intended bill, and although the declaration state in the usual form, the drawing of the bill, and that the *drawee afterwards* accepted, that was considered no variance.

Time and place are usually laid under a *scilicet*, this being supposed to obviate the necessity of strict proof, by showing that they were not intended as a positive averment; still, if the time or place be material, and the gist of the action, it is, although stated under a *scilicet*, conclusive and traversable, and it is only when immaterial, that it may be rejected as superfluous. Dunl. Prac. 288; Vail v. Lewis et al., 4 John. R. 450. The words under the *scilicet* are not to be rejected, if they are essential to the declaration, and are of a nature to be traversed. Hastings v. Lovering, 2 Pick. 222; 2 Saund. 290, a. See also Gleason v. M'Vickar, 7 Cowen, 42.

The declaration must not vary from the bill or note as to the time of payment. Thus, where the declaration stated no time of payment, but the note produced was payable in sixty days after date; the variance was held to be fatal, although the question arose upon the execution of the writ of inquiry. Sheehy v. Mandeville, 7 Cranch, 208. The default only confessed the note stated in the declaration, but no other; a variance, therefore, is equally fatal after a default as before.

(8) Boughton v. Frere, 3 Campb. 29; The Trustees, &c. v. Tryon, 1 Denio R. 451; Wood v. Bulkley, 13 John. R. 486; 1 Hill R. 102.

(9) Willis v. Barrett, 2 Stark. N. P. C. 29.

NOTE 690.—Andrews v. Williams, 11 Conn. R. 331; Wardell et al. v. Pinney, 1 Wend. 217.

defendants, sued as makers of a promissory note, differed from their names in the instrument produced, it was held that a third defendant might take advantage of the variance, the other defendants not having been served with process by their mistaken names, though they had been outlawed.(1) A variance in the name of the drawer of the bill, (who was no party to the action), was in the case of *Whitwell v. Bennett*, held fatal.(2) But in

In this case, the declaration contained a count on a note payable *to the order of the plaintiffs*. The note given in evidence was payable to the order of *Wardell, Van Buren & Co.*; it being proved that the plaintiffs were partners under the firm of *Wardell, Van Buren & Co.*; held, no variance; although it was not alleged in the declaration, that the note was thus made payable, or that the plaintiffs were partners.

It was decided in *Spalding v. Mure* (6 T. R. 363), that as a plea in abatement of a joint debtor not sued, could be pleaded only while *he was alive*—that averment being material; if dead, the old rule applied, and the plaintiff must be nonsuited for a variance between the contract charged, and the one proved. It seems not necessary to notice the decease of the joint debtor in the declaration, though it is more formal to do so; but if there be a joint indebtedness charged, the evidence must be the same to authorize a recovery on the note. *Mott v. Petrie*, 15 Wend. 317. It was accordingly held, in this case, that the defendant, sued as the surviving maker of a joint promissory note, might prove payment of the note, by his joint debtor, and thus defeat a recovery, although before transfer of the note to the plaintiff, he acknowledged it to be due, and promised to pay it. The case of *Bosanquet et al. v. Wray et al.* (6 Taunt. 597), is to the same effect in principle. Held, that the partners in one house could not sue those of another *at law*, where one of the house of the plaintiffs was also a member of the other, for partnership transactions; and that it made no difference whether the action was brought before or after the death of the common partner. The fact of the remedy surviving to and against the different parties, did not alter the nature of the contract, nor vary the principles governing it. The rule as to partners in this respect being equally applicable to joint debtors. *Mott v. Petrie*, *supra*.

(1) *Gordon v. Austen and others*, 4 T. R. 611. And see *Dickenson v. Bowes and others*, 16 East, 110.

NOTE 691.—In *Waterbury v. Mather and Maurin* (16 Wend. 611), where, in a suit against two defendants, in assumpsit, in which one was arrested, and the other returned *not found*, it appeared on the trial, that the defendant not brought in was *misnamed* in the declaration, being called *John* instead of *George*, the plaintiff was nonsuited for the variance. But had both been arrested, the misnomer could have been taken advantage of only by plea in abatement. *Id.* Held, also, that a plaintiff, in such case, may avail himself of the statute allowing process to be issued against a defendant by a *fictitious name*, on the ground that his name was not known to the plaintiff, unless an averment to that effect is contained in the declaration, or is alleged by way of replication to a plea of misnomer. *Id.*

(2) 3 Bos. & Pull. 559. (But see *Morris v. Wadsworth*, 17 Wend. 103. The true rule is that the plaintiff must allege the contract according to its legal effect. *Rockfeller v. Hoysradt*, 2 Hill R. 616.)

NOTE 692.—*Petrie v. Woodworth*, 3 Caines' R. 219. So, if the surname of the obligor in the body of a bond, vary by a slight misspelling, producing scarcely any change in the pronunciation from that in the subscription; it is no objection that he has been sued by the name subscribed, and not by that in the body of the obligation. *Meredith v. Hinsdale*, 2 Cai. R. 362. A promissory note was stated in the declaration to have been drawn by the defendant, by the name of "Christopher Bulkley;" it being proved that this was the defendant's usual mode of signing his name, it was held, that there was no material variance. *Wood v. Bulkley*, 13 John. R. 486. A bill of exchange signed by *Elijah B.*, cannot be given in evidence under a declaration on a bill drawn by *Elisha B.* *Craig v. Brown*, Pet. R. 130.

"Where the prosecutor has undertaken to set out the lottery ticket, *literatim* in words and figures following, this imports a tenor—a transcript, and implies the very same. Where a let-

the case of *Forman v. Jacob*,⁽¹⁾ in an action by the indorsee against the acceptor of a bill of exchange, Lord Ellenborough held, that a variance between the real name of an indorser (which was the name on the bill), and the name alleged in the declaration, was immaterial: "Whether the name on the bill be the party's false or true name is immaterial, if it be his name of trade: the only question is as to the identity of the person."

Nor was it a material variance, under the general issue, that the bill of exchange stated in the declaration as having been drawn,⁽²⁾ or accepted⁽³⁾ by the defendant, was proved to have been drawn or accepted by others jointly with him. Such an objection could only avail when the fact was pleaded in abatement.

(Recent statutes, conferring upon courts and judges a liberal discretion in the amendment of pleadings, have greatly changed and improved the law in respect to the conformity required between the pleadings and proof. The rule now is, that the pleadings must or may be made to conform to the facts proved, and that this may be done at any stage in the cause, where the opposite party has not been misled, or will not be prejudiced by the amendment.⁽⁴⁾)

ter, omitted or changed, makes another word, though it be insensible, the variance is fatal. *Queen v. Drake*, 1 Salk. 660. The case of *Williams v. Ogle* (2 Str. 889), is the only case to be found, on *nul tiel record*, the change of a letter in a name, which did not alter the sound, as *Se-grave* and *Seagrave*, was not held to be a fatal variance. But, it is but a short statement of three lines, and the reporter adds a *quere tamen*, where the party has something else to go by than the sound. It is true, Chitty, in his Criminal Law, gives credit to this case, which the reporter himself had discredited. The sound in names is what governs in cases of pleas of misnomer, questions of identity; there, it does not depend on the omission of a letter making another word, but another sound; for I think it has been determined that in these cases, *Shakespeare*, *Shackspere*, are the same, because *idem sonans*. But if you omit the s in the middle, and give it another sound, there is a failure, as *Shakepear*. *Burrall*, *Burrill*, *Burrell*, are certainly *idem sonans*, and so is *Burwell*; but I do not suppose that in an indictment for forgery, setting out the instrument in *hæc verba*, that stating it to import to have been given by *Burrill*, would be supported by a paper, signed *Burwell*; now, the *idem sonans* must hold in every case of description, or there is nothing in it."

"Sound may be the substance of a name, and when it is a matter of substance, it might hold, like any other allegation of substance, but sound is not a matter *verbatim et literalim*. A name is a word, and in undertaking to set out the name *literalim*, it was not a *vox et preteritæ nihil*. Different letters will make different names, though the sound be the same. The word would then be a different word—another word; which, in all cases of description, makes the variance fatal." Per *Duncan, J.*, in *The Commonwealth v. Gillespie*, 7 S. & R. 471. In this case the indictment charged the defendant with selling a lottery ticket, in the words and figures following; and there was a variance in spelling the name of the president, as *Burrill* for *Burrall*; held fatal. It professed an exact recital; and a literal precision was required in such case, unless where it does not change one word for another. Had it been set out in the manner following, the variance would not have been fatal.

(1) 1 Stark N. P. C. 46.

(2) *Evans v. Lewis*, MS. case, cited in 1 Saund. Note to the case of *Cabbel and Vaughan*.

(3) *Mountstephen v. Brooke*, 1 Barn. & Ald. 224.

(4) Code of N. Y. § 169; *Catlin v. Gunter*, 1 Kernan R. 368. In this case the answer alleged an usurious agreement, and the evidence tended to prove an usurious agreement differing

The general principles of pleading have not been changed ;(1) the plaintiff must state in his declaration or complaint, the facts constituting his cause of action ;(2) and the defendant must, in his answer, deny each or some material allegation contained in the declaration or complaint,(3) and, as to new matter, must set forth or state the facts constituting the defence on which he relies.(4)

Lord Tenterden's Act gave the judges at the trial of civil actions and misdemeanors, the power of amending a record, where there was a discrepancy between it and the *written* evidence which supported the pleadings.(5) That act was shortly after followed by another, which gives the power of amending where the variance is between the record and the proof, whether written or oral, of civil issues on *quo warranto* or *mandamus*, or in any *contract, custom, prescription, name*, or other matter, in any particular or particulars in the judgment of the court not material to the merits of the case.(6) And that act has again and lately been followed by two others, which in still broader terms confers upon the superior courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, the power at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not ; and declares that all such amendments may be made without costs, and upon such terms as to the court or judge may seem fit ; and further, that all such amendments as may be necessary for the purpose of determining in the existing writ the real question in controversy between the parties, shall be so made.(7)

In New York, no variance between the allegation in a pleading and the proof is deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence on the merits.(8) And whenever it is alleged that a party has been so misled,

in some particulars from the one alleged ; and the variance was held immaterial, no amendment being applied for or made on the trial. Under the former practice this variance would have been fatal. *Rowe v. Phillips*, 2 Sandf. Ch. R. 14.

(1) Code of New York, section 140, abolishing old *forms* of pleading, and declaring that the sufficiency of pleadings shall be determined by the rules prescribed by the Code.

(2) Section 142 of the Code: Plaintiff must state traversable facts. *Lawrence v. Wright*, 2 Duer N. Y. R. 674 ; *Mann v. Morewood*, 5 Sand. 566 ; *Carroll v. Upton*, 3 Comst. 272 ; *Clift v. White*, 2 Kernan, 538.

(3) Section 149, and *Hamilton v. Hough*, 13 How. Pr. R. 14 ; *Gilbert v. Cram*, 12 Id. 455 ; *Wood v. Whiting*, 21 Barb. R. 190.

(4) *Cruger v. Hudson R. R.*, 2 Kernan, 201 ; *Id.* 9 ; 20 Barb. 468.

(5) 9 Geo. IV, c. 15.

(6) 3 & 4 Wm. IV, c. 42.

(7) 15 & 16 Vict. c. 76, § 222, and 17 & 18 Vict. c. 125, § 96. Neither of these statutes repeals that which preceded it. Lord Tenterden's act is still in force. *Smith v. Brandram*, 2 M. & G. 244.

(8) Code of Procedure, § 169. The variance may be disregarded, when it is clear that the op-

that fact must be proved to the satisfaction of the court, so that it may appear in what respect he has been misled;(1) and thereupon the court may order the pleading to be amended, upon such terms as may be just.(2) When the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.(3)

Where the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof.(4)

The court has ample power over its entire procedure, and may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of any party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.(5)

Amendments after trial are seldom allowed, when the effect of them will be to change the nature of the action. For instance, an amendment will not be allowed, the effect of which will be to change the gravamen and essence of the action,(6) or to change an action of tort(7) into one of

posite party could not have been misled. *Harmony v. Bingham*, 1 Duer R. 210; *Catlin v. Gunter*, 1 Kernan, 368.

(1) "It is not left to the judgment of the court, whether in a given instance the variance was calculated to mislead, and from thence to hold that it did mislead; but whenever it is to be alleged that a party has been misled, that fact must be *proved* to the satisfaction of the court; and the proof must show in what respect he has been misled." *Catlin v. Gunter*, 10 How. Pr. 321.

(2) See *Corning v. Corning*, 2 Seld. N. Y. 97. Counts in the declaration or complaint may be stricken out without costs. *Cayuga Co. Bank v. Warden*, Id. 19.

(3) See *Bate v. Graham*, 1 Kernan R. 237. An averment may be supplied on the trial. Not objected to on trial, a question of variance cannot be afterwards raised. *Barnes v. Perine*, 2 Id. 18, 486. Amendment, when made. *Hall v. Gould*, 3 Id. 127; *Prindle v. Caruthers*, 1 Smith (15 N. Y. R.) 425.

(4) § 171 Code of New York. When the action or defence is partially proved, an amendment of course, or on terms if the adverse party has been misled, may be made. *Fay v. Grimstead*, 10 Barb. 321; *Catlin v. Gunter*, *supra*; *Prindle v. Caruthers*, 15 N. Y. R. 425; 21 Barb. 26, 241, 489; 22 Id. 321.

(5) Amendments are allowed in furtherance of justice. In *Balcom v. Woodruff* (7 Barb. 13), an amendment was permitted, adding a new count to the declaration after a nonsuit, the Statute of Limitations having attached since the suit was commenced. See also *Harrington v. Slade*, 22 Barb. 161. The Code does not repeal the Revised Statutes on the subject. 2 R. S. 424. Amendments after the trial, inserting material allegations, are seldom granted. *Field v. Hawkhurst*, 9 How. Pr. R. 75.

(6) *Egert v. Wicker*, 10 How. Pr. R. 193.

(7) *Andrews v. Bond*, 16 Barb. R. 633. See also *Wilkin v. Reed*, 23 L. J. 193, C. P.; and *Robson v. Doyle*, 3 E. & B. 397; *Robinson v. Rice*, 20 Mis. (5 Bennett) 229.)

contract. In such cases the cause of action remains unproved in its entire scope and meaning, so as to constitute a failure of proof.)(1)

Besides the conformity of the bill or note with the description in the declaration, it will be incumbent on the plaintiff to show that the instrument is properly stamped. The stamps on bills of exchange and promissory notes are regulated by the 55 Geo. III, c. 184, by which statute inland bills of exchange are divided into two, and promissory notes into four classes. And, in the construction of the statute, it has been held, that the stamp is to be according to the sum due at the time the bill or note is given, and will not be varied by the reservation of interest.(2) But a note payable at two months after sight, requires a larger stamp than a note payable two months after date, because it requires a new presentment for sight.(3) A note payable to bearer generally, is in law payable on demand, and must be stamped accordingly.(4) The value of the stamp upon a bill of exchange, under the 55 Geo. III, depends upon the date on the face of it, and not on the time when it is actually drawn.(5) Payment of money into court admits the sufficiency of the stamp upon a bill or note.(6) The law respecting the restamping of bills or notes, and the remedy in case of improper stamps being affixed, has been considered in the second volume.(7)

A bill or note made abroad must have the stamp required by the laws of the foreign country in which it is made.(8) Upon this subject some

(1) Code of N. Y. § 171.

(2) *Pruessing v. Ing*, 4 Barn. & Ald. 204.

(3) *Sturdy v. Henderson*, 4 Barn. & Ald. 512.

(4) *Whitlock v. Underwood*, 2 Barn. & Cress. 157.

NOTE 693.—A promissory note for £11, payable to A. B. on demand, is a promissory note payable to bearer, on demand, within the meaning of 55 G. III, c. 184, and requires a stamp of two shillings—as not falling within the first part of the schedule applicable to promissory notes payable to the bearer on demand, and not falling within the second part, which applies only to notes not exceeding two months after date, or sixty days after sight; and is a note which may be re-issued. *Keats v. Whieldon*, 8 B. & C. 7.

A promissory note, payable to M. M. without the words “order” or “bearer,” and without any indication of the time of payment, is not a promissory note, payable to the bearer on demand, within the 55 Geo. III, c. 184, sched. part 1. *Cheetham v. Butler*, 2 Nev. & M. 453.

Stamp on bills post-dated. *Williams v. Garrett*, 5 B. & Adol. 32; *S. C. nom. Williamson v. Garrat*, 2 Nev. & M. 49.

(The Stamp Act imposes a certain tax on bills and notes, so that, when an instrument in writing is declared by the court to be a bill of exchange or a promissory note, it comes under the provisions of the statute, and cannot be enforced or used as evidence, unless it is properly stamped. And hence the decisions under the Stamp Act are chiefly useful as showing or defining the character of bills and notes—that is to say, declaring what instruments come within those terms. *Byles on Bills*, 75.)

(5) *Peacock v. Murrell*, 2 Stark. N. P. C. 558; *Upston v. Marshall*, 2 Barn. & Cress. 10.

(6) *Israel v. Benjamin*, 3 Camp. N. P. C. 40.

(7) Vol. II; and see *Bayley on Bills* (4th ed.), ch. 3.

(8) *Alves v. Hodgson*, 7 Term Rep. 241. The stamp was imposed by the laws of an English colony. *Vide ante*, Vol. II, and *Crutchley v. Mann*, 1 Marsh. 29, where it was held necessary

questions have arisen as to what shall be considered a bill drawn abroad. It has been held, that a bill drawn in Ireland with blanks for the sum, the date, and drawee's name, and transmitted to England to have the blanks filled up, is an Irish bill ;(1) and a bill has been considered as foreign, which was sketched out and accepted in England, but was transmitted to the drawer abroad for his signature.(2) If a bill purport to be drawn abroad, it will not be sufficient to show that it was drawn in England, by proof that the drawer was in England at the time it bears date.(3)

Alteration of bill.

The effect of the alteration of a bill of exchange, as to making a new stamp requisite, has been before particularly considered.(4) Where the date of a bill appears to have been altered by the acceptor, it will be incumbent on the plaintiff to show, that the alteration was prior to the acceptance.(5) The cases upon this subject will be found to have turned on the question, whether the alteration has been made with a view to correct

that a letter written in England, containing the acceptance of a foreign bill, ought to be stamped with an English stamp.

(1) *Snaith v. Mingay*, 1 Maule & Sel. 87.

(2) *Boehm v. Campbell*, Gow N. P. C. 55.

(3) *Abraham v. Du Bois*, 4 Camp. N. P. C. 269.

(4) NOTE 694.—“It would be unworthy the wisdom of the law to decide that an incautious interlineation of a word, which the same law would necessarily supply, is not an alteration either in matter or form, which would destroy the contract.” *Parsons, C. J.*, in *Hunt v. Adams*, 6 Mass. R. 522. It seems, therefore, that blanks left in an instrument may be filled after execution.

The indorsement on the back of the note forms no part of the original instrument, and the addition of the date to such indorsement by the promisee and indorser, can have no effect upon the validity of the instrument. *Howe v. Thompson*, 2 Fairf. R. 152. It is no alteration of it, and can neither destroy its efficacy or give it force.

It cannot be said that the date forms an immaterial part of a bill. Accordingly, it was held, that the alteration of the date of a note, without the consent of the defendant, avoided the note, though the holders who sued the action thereon were innocent indorsees. *Stephens v. Graham et al.*, 7 S. & R. 505. It was not the identical note the party had given. Whether an alteration is material or not, is a question of law for the court. *Id.*

An indorsement on the back of a note constitutes no part of the note. An erasure of such an indorsement will not prevent its being read in evidence. *Kimball v. Lamson*, 2 Verm. R. 138; *Commonwealth v. Ward*, 2 Mass. R. 397.

* * Altering a note from “I promise” to “we promise,” is not material. *Eddy v. Bond*, 19 Maine R. 461. And see, as to immaterial alterations, *Chitty on Bills* (11th Am. ed.), p. 181, *et seq.*, and notes; 1 Gr. Ev. § 568; *Knapp v. Maltby*, 13 Wend. 587; *Brown v. Pinkham*, 18 Pick. 172. Every alteration which changes the meaning and effect of writings is material. The unauthorized interlineations of the words “or order” “or bearer,” will vitiate. *Bruce v. Westcott*, 3 Barbour S. C. R. 374; *Scott v. Walker*, *Dudley's Georgia R.* 243; *Johnson v. Bank*, 2 B. Monroe, 310. * *

(Any material alteration made in a note, after its execution, avoids it; inserting words of negotiability, or altering the place of payment, is a material alteration. *Woodworth v. Bank of America*, 19 John. R. 391; *Clute v. Small*, 17 Wend. 238; *Nazro v. Fuller*, 24 Id. 374.)

(5) *Johnson and others v. Duke of Marlborough*, 2 Stark. N. P. C. 313. And see *Bishop v. Chambre*, 2 Ry. & Mo. 116.

a mistake, or has been an afterthought ;(1) and, where the alteration is not in consequence of a mistake, or would materially affect the responsibil-

(1) *Brutt v. Picard*, 1 Ry. & Mo. 37 ; *Kershaw v. Cox*, 3 Esp. N. P. C. 246 ; *Knell v. Williams*, 10 East. 431 ; *Farquhar v. Southey*, 2 Ry. & Mo. 14 ; *Jacobs v. Hart*, 2 Stark. N. P. C. 45.

NOTE 695.—*Henman v. Dickinson*, 5 Bing. 183 ; *Bailey v. Taylor*, 11 Conn. R. 537, *Williams, C. J.* : “The only question here (*Johnson et al. v. Duke of Marlborough*, cited in the text), arose under the Stamp Act ; for upon no common-law principle, could the defendant destroy his acceptance, by his own act.” The case, of *Henman v. Dickinson* (5 Bing. 183), seems to support the principle stated in the text. But in *Taylor v. Moseley* (6 Car. & P. 273), in an action by the indorsee against the acceptor of a bill of exchange, the bill appeared, on inspection, to have been altered in amount, and after acceptance were the words, “at Cockburn’s,” which were not in the defendant’s handwriting. Neither the plaintiff nor defendant gave evidence as to when or by whom the alterations were made : held, that it was for the jury to say, under the circumstances, whether the bill had been altered after acceptance, and that, if they thought it had, the plaintiff could not recover. Lord Lyndhurst, in this case, does not say, as was said in *Henman v. Dickinson* (*supra*), “as the plaintiff has failed to account for this alteration, your verdict must be for the defendant ;” he leaves it to the jury to find, even though the plaintiff has not accounted for it, whether the alteration was made before or after acceptance. It would seem, therefore, that the case in the Court of Bankruptcy was not recognized to that extent ; and the court in Connecticut seems to repudiate the principle of that decision. *Bailey v. Taylor, supra*. The jury are to determine from all the circumstances before them, whether the instrument is rendered invalid by the alteration. “Circumstances may be such as may require this explanation on the part of the plaintiff ; or, on the other hand, may arise where it would be absurd to require it.” Per *Williams, C. J.*, in *Id.*

An interlineation in a deed, where nothing appeared against it, was held, that it was to be presumed to be made at the time of making the deed, and not after. *Trowell v. Castle*, 1 Keb. 22, cited in *Vin. Abr.* Vol. 12, p. 58, and Vol. 13, p. 41, and also in the notes to *Co. Litt.* 225 ; *Bailey v. Taylor*, 11 Conn. R. 531, 534, *et seq.* ; *Wickes’ Lessee v. Caulk*, 5 H. & J. 41. In the case in Connecticut, where all the cases are reviewed, the learned chief justice observed : “In our own country, the weight of authority, as it respects deeds, is in accordance with these cases.” The result to which he arrives, is, that the law, also, is the same in writings not under seal. The jury are, from all the circumstances, to determine whether the instrument is valid or invalid.

An alteration of a bill of exchange, after acceptance, may be taken advantage of, on a plea that the defendant did not accept the bill. *Cock v. Coxwell*, 2 C., M. & R. 291 ; 4 D. & C. 187.

Where a bill was dated by mistake in 1822 instead of 1823, and the agent of the drawer and acceptor, without their knowledge or consent, corrected the mistake, it was held that such alteration did not vitiate the bill. *Brutt v. Picard*, Ry. & Mo. 37.

An alteration in the date of a bill of exchange after it has been accepted and indorsed, without the acceptor or indorser’s consent, will discharge them from liability, even though such alteration were made by a stranger (*Chit. on B.* 204) ; and in all cases where the date of the instrument is material, as is generally the case with bills, notes and checks, alteration or addition, as by a stranger’s obliterating the top of the figure six in a bill, dated the 26th March, so as to make it appear as dated the 20th March, or by altering the word *date* into *sight*, this will be fatal. *Id.*

* * It seems to be well settled, in England, that a material alteration, by a stranger, no less than by a party, will vitiate a writing. See *Taylor on Ev.* §§ 1305, 1311, 1312, 1313. It has been a vexed question, which the earlier authorities leave in a state of distressing doubt, whether an alteration by a stranger necessarily vitiates and avoids an instrument ; but after much apparent reluctance, and the express dissent of several eminent judges and text writers, the rule, as above stated, seems to have become firmly established, and the cases to the contrary (some of which are cited in a preceding part of this note), must be considered as overruled. “*After much doubt*” (said Lord Denman, in pronouncing the judgment of the Exch. Ch. in *Davidson v. Cooper* 13 E. & W. 352), “we think the judgment” (of the Court of Exchequer, in the S. C., 11 M. & W.

778) "right. The strictness of the rule on this subject, as laid down in *Pigott's Case*, can only be explained on the principle, that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

The American courts have not acquiesced in the rigor of the English rule. Indeed, that rule seems to be repugnant to first principles and the general analogies of the law. The writing is merely evidence of the rights of the parties, and its production, as the best evidence, is properly required in the first instance. But the law does not require impossibilities. If the writing be destroyed, or lost, the rights of which it was the primary evidence do not necessarily perish with it. The party is still required to produce the best evidence in his power. It is difficult to distinguish between the case of an instrument partially destroyed (*i. e.* altered), and one wholly destroyed, in respect of the competency of secondary evidence by reason of the inability of the party to produce better. Voluntary destruction of the whole instrument precludes a party from secondary proof of its contents; and a voluntary destruction of a material part produces the same effect. But an *involuntary* destruction (by fire or shipwreck, for example) imposes no such disability, whether it be total or partial, and whether the instrument were in the custody of a party, or of a stranger, at the time of its total or partial destruction. To say that "the party having the custody of the instrument is bound to preserve it," begs the whole question, and does not help on the argument a single step. Why is a party bound to preserve his documents any more from a robber or other depredator and spoiler, than from shipwreck, from fire, or other elemental casualty? Must he carry his documents about upon his person, and never intrust them to the custody of another? Does the law forbid confidence, and treat him who reposes it as necessarily guilty of "fraud or laches?" What if he sleep? Or they are violently taken from him? And must they who succeed to heirs' rights, equally disclaiming all human faith and confidence, snatch them from the dead man's hands, and keep them at the utmost peril, beyond the chance of harm? It is conceived, that the rule which requires the party to account for the alteration, and satisfy the jury that he is blameless in respect of it, goes as far as private justice and public policy require; and the American law seems to go no further. See 1 Gr. Ev. § 566; *Cutts v. United States*, 1 Gall. 69; *United States v. Spaulding*, 2 Mason, 478; *Rees v. Overbaugh*, 6 Cowen, 746; *Lewis v. Payn*, 8 Cowen, 71; *Jackson v. Malin*, 15 Johnson, 297, per Platt, J.; *Wilkinson v. Johnson*, 3 B. & C. 428. In the *United States v. Spaulding* (*supra*), Story, J., strongly condemned the English rule, "as repugnant to common sense and justice, as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of heaven; and which ought to have the support of unbroken authority before a court of law was bound to surrender its judgment to what deserved no better name than a technical quibble. *Swincy v. Barry* (decided in the Irish Exchequer), Jones Exch. R. 109, conflicts with the English and concurs in the American doctrine. And see *ante*, note 18. * *

An alteration which would make void a deed, will also vitiate a bill of exchange; the principle is the same in writings under seal, and not under seal. *Masters v. Miller*, 4 Term. R. 320.

Burden of proof on plaintiff when.—Erasures or interlineations in the substantial part of an instrument, are presumed to be false or forged, and must be satisfactorily accounted for, before the instrument can be received in evidence. *M'Micken v. Beauchamp*, 2 Mill. Lou. Rep. 290.

* * Whether the instrument were altered before, or after, execution and delivery, cannot be solved by the jury upon a mere inspection of the writing, for that would be to decide on conjecture and not upon proof. *Knight v. Clements*, 8 A. & E. 215; *Taylor on Ev.* § 1304; 1 Gr. Ev. § 564; *Bruce v. Westcott*, 3 Barb. S. C. R. 378; *Herrick v. Malin*, 22 Wend. 394; *Taylor v. Moreley*, 6 Carr. & P. 273; *Henman v. Dickinson*, 5 Bing. 183; *Adams v. Frye*, 3 Mete. 103; *Parry v. Nicholson*, 13 M. & W. 777. * *

The vendee of goods paid for them by a bill of exchange, drawn on him by a third person, and after it had been accepted, the vendor altered the time of payment mentioned in the bill, and thereby vitiated it; held, that by so doing, he made the bill his own, and caused it to ope-

ity of the parties, whether it has been made by the consent of the persons interested, and whether the bill or note has been negotiated, by coming to the hands of some one entitled to make a claim upon it.(1) It has been

rates as a satisfaction of the original debt, and consequently that he could not recover for the goods sold. *Alderson v. Langdale*, 3 B. & Adol. 660.

(That an unauthorized alteration of a general acceptance, by the insertion of a place of payment, discharges the acceptor, even as against a *bona fide* holder for value who took the bill without notice, see *Burchfield v. Moore*, 3 Ellis & Bl. 683. Where the alteration of the bill or note makes the contract operate differently from the original contract, it is material; as where the holder of a joint and several note signs his own name under those of the makers and transfers it, without their consent. *Gardiner v. Walsh*, 32 Eng. Law & Eq. R. 162; *Chappell v. Spencer*, 23 Barb. R. 584; *Edwards on Bills & Notes*, 681, 682. As to the explanation that should be given of an erasure, see *Newell v. Salmons*, 22 Barb. R. 647; *Abbe v. Rood*, 6 McLean, 106; *Printuf v. Mitchell*, 17 Geo. 558; and *Jordan v. Stewart*, 23 Penn. State, 244.)

(1) *Downes v. Richardson*, 5 Barn. & Ald. 674; *Cardwell v. Martin*, 1 Campb. N. P. C. 79, 180, *b*; *Outhwaite v. Luntley*, 4 Campb. N. P. C. 179; *Macintosh v. Haydon*, 1 Ry. & Mood. 362; *Kennerly v. Nash*, 1 Stark. N. P. C. 453; *Cowie v. Halsall*, 3 Stark. N. P. C. 36; *Tidmarsh v. Grover*, 1 Maule & Sel. 735. A bill or note is, *prima facie*, to be considered as issued as soon as it is passed away by the drawer or maker, or accepted by the drawee. *Bayley on Bills*, 93. There is an exception in the case of accommodation acceptances. 5 B. & Ald. 674.

NOTE 696.—A party to a joint and several note, paid part, and signed a joint note for the residue: held, that an alteration without his assent, by interlining the words *jointly and severally*, avoids the note as to him. *Perring v. Hone*, 4 Bing. 28.

In a simple contract, an immaterial alteration, however made, not at all affecting the terms of the promise, seems not to be within the same principle of deeds, which, from the alteration, may not be the deeds of the parties; while a similar alteration in a written simple contract might leave it complete evidence of the same contract. Thus, in the note, the time of payment expressed to be the 25th day of December, in the — of our Lord 1805, omitting the word *year*; held, that, as the law would have supplied this word, the insertion by the promisee, without consent, did not annul the contract. *Hunt v. Adams*, 6 Mass. R. 519. It is different in respect to a material alteration. *Homer v. Wallis*, 11 Mass. R. 319; *Bank of America v. Woodworth*, 18 J. R. 391; *Marshall v. Gougler*, 18 S. & R. 164.

The assent of the party who executed the instrument, may as well be implied as be expressed. *Parsons, C. J.*, 6 Mass. R. 521. Indeed, the assent of the party signing such contract, that the omission of a word, by clerical mistake, which the law will supply, might be cured by inserting such word, ought to be presumed to protect him from the imputation of intentional fraud. *Id.*

* * Adding such words as the law would imply, or as conform to the indisputable intention of the parties, does not vitiate. 1 Gr. Ev. § 567 and notes. Adding the name of a person not present at the execution, as a subscribing witness, is *prima facie* evidence of fraud and avoids the instrument. *Adams v. Frye*, 3 Metc. R. 103. * *

The question whether there has been any alteration, and when, and with what view, is always for the jury, and not for the court. *Leykrieff v. Ashford*, 12 Moore, 281; *Cumberland Bank v. Hall*, 1 Hals. R. 215. * * See *ante*, note 17. * *

A material alteration in a bill renders it inadmissible in evidence, to enable a plaintiff to recover on a common count in a declaration, or for any available purpose whatever, in favor of the holder. *Jardine v. Payne*, 1 B. & Adol. 671; *Sweeting v. Hale*, 9 B. & C. 365. But the material alteration, as in the case of subsequent usury, does not extinguish the *prior* debt, and between the original parties, the original debt or consideration is recoverable upon adducing *other* evidence in proof thereof, such as proof of reputed payment of a fixed sum, as interest for a named period, may suffice to establish the amount of a debt, the interest of which would be equal to the sums from time to time paid. But unless the payment or other admission enable a jury to ascertain the precise amount of debt, the proof is insufficient, and the plaintiff cannot recover *even* nominal damages. *Chit. on Bills*, 213; *Green v. Davies*, 4 B. & C. 255.

held, that, after a bill is 'due, an alteration cannot be made in it by the drawer, whilst it is still in his hands, though with the assent of the acceptor.(1)

A material alteration of the contract, such as attesting a note by a witness who was not present when it was signed, ten years afterwards, when the note had ceased for four years to be a subsiding contract, which could be enforced at law, the attestation was affixed, by which it could be recoverable at law; held, that the validity of the note was thereby destroyed. *Brackett v. Mountford*, 2 Fairf. R. 115; *Smith v. Dunham*, 8 Pick. 246.

Any words written on an instrument which qualify and restrain its operation, constitute a part of the contract. *Jones v. Fales*, 4 Mass. R. 245. And a late case was very strong. It appeared that two notes were written for defendant to sign; he objecting, plaintiff made a memorandum at the bottom of the paper; which memorandum the plaintiff cut off after the execution of the notes; held, that this was a material alteration; for the memorandum stipulated that payment was to be made in stock in one year, or in money in two years, at the election of the plaintiff; and the notes, after separating the memorandum, read payable on demand. *Wheellock v. Freeman*, 13 Pick. 165.

Though the instrument becomes void as a security, the original loan is not destroyed. *Sutton v. Toomer*, 7 B. & C. 416.

If drawer sues acceptor, upon the bill, and fails in consequence of having altered the bill in a material part, he may still recover upon counts on the original consideration. *Atkinson v. Hawdon*, 2 Adol. & Ell. 628. But where the defendant was the drawer, and the plaintiff, who had altered the bill, was an indorsee, he, by the alteration, lost his remedy for his debt altogether; because he thereby deprived the drawer of his remedy against the acceptor, and could not, therefore, sue the drawer upon the original consideration. *Alderson v. Langdale*, 3 B. & Adol. 660.

(1) *Bowman v. Nichol*, 5 T. R. 537.

NOTE 697.—ALTERATION WITH ASSENT.—A bill of exchange, drawn by A., payable to his own order and accepted by B. generally, was altered, with the consent of B., while it continued in the hands of A., by the addition of a particular place of payment to the acceptance. This alteration does not vitiate the bill so as to prevent the acceptor from being liable on it. *Stevens v. Lloyd*, 1 Mo. & M. 292. See also *Jackson v. Malin*, 15 John. 293; and *Adams v. Leland*, 7 Pick. 62, where it was settled, that even a material alteration of a material part, after execution of a will, did not render it void, where it was done by the direction and assent of the testator. * * And see *Chitty on Bills* (11th Am. ed.) pp. 182 to 192, and notes, as to the effect, generally, of altering notes, &c. Also 1 Gr. Ev. §§ 564 to 568, a; and *Taylor on Ev.* pp. 1182 to 1197. * *

(It rests upon the party basing his right of action upon the altered instrument, to explain the erasure or interlineation (*Abbe v. Rood*, 6 McLean, 106; *Simpson v. Stackhouse*, 9 Barr. 186); and it is for the jury to pass upon the explanation. *Bailey v. Taylor*, 11 Conn. 531. An alteration of a note, by the addition of the signature of a subscribing witness, with a fraudulent design, avoids the note. *Thornton v. Appleton*, 29 Maine, 298.

When the alteration is suspicious and beneficial to the holder of the paper, the presumption is against the party offering it. *Jackson v. Osborn*, 2 Wend. 555; 7 Barb. 568; *Knight v. Clements*, 8 A. & E. 215. Being an alteration of the instrument that makes it a different contract, it *prima facie* vitiates it. *Wilde v. Armsby*, 6 Cush. 314; *Bunce v. Westcott*, 3 Barb. 374. See *Smith v. McGowan*, Id. 404; *Chappell v. Spencer*, 23 Barb. 584; *Paine v. Edsell*, 19 Penn. State 178; *Clark v. Eckstein*, 22 Id. 507. Where an alteration is assented to, as where the drawee of a bill alters the date before he accepts, and the other parties assent to the alteration, the instrument is valid. *Ratcliff v. Planter's Bank*, 2 Sneed (Tenn.) 425.

It is held in some of the states that an alteration apparent on the face of an instrument offered in evidence, will be presumed in the first instance to have been made before execution. *Beaman v. Russell*, 20 Vt. 205; *Printup v. Mitchell*, 17 Geo. 558. An immaterial alteration does not

Bill lost or destroyed.

If the bill or note cannot be produced at the trial, it seems to have been considered in several cases, that the plaintiff might give evidence to prove its destruction;(1) and that he would be allowed to show that the bill or note had been lost, if it was specially indorsed to him, and had no indorsement from him upon it;(2) and that a lost bill might be recovered on, if the loss did not happen till after it was due.(3) But it does not appear to have been doubted, that there could be no remedy upon a lost bill or note at law, if any person besides the plaintiff could have acquired a right to sue thereon;(4) and that it would make no difference, that the bill or note

affect the validity of a note, even as against a surety. *Arnold v. Jones*, 2 R. I. 345; *Reed v. Kemp*, 16 Ill. 445.)

(1) *Pierson v. Hutchinson*, 2 Camp. 211; *Mayer v. Johnson*, 3 Camp. 324.

NOTE 698.—*Blade v. Noland*, 12 Wend. 173, 175. Proof that the plaintiff voluntarily burnt the note, will not authorize the introduction of secondary evidence.

Where the existence, and loss or destruction of promissory notes is shown, and does not appear affirmatively that the notes were negotiable, the plaintiff is entitled to recover on the lost notes. *M'Nair v. Gilbert*, 3 Wend. 344. Although a negotiable note is overdue when lost, in an action against the maker, the plaintiff must prove something more than the mere loss of the note. He is not bound to prove an absolute destruction; but such proof must be given, by evidence of its destruction or otherwise, as shows, that the defendant cannot afterwards be compelled to pay the amount again to a *bona fide* holder. *Swift v. Stevens*, 8 Conn. R. 431. The evidence must be of such nature as tends to prove the fact. Thus, it appeared, that the deponent had the special charge of the note. It was confided to his care; he never delivered it to any one; he has searched for it and cannot find it, and he has no doubt it is destroyed; held, that this was evidence for the jury. Direct and positive evidence upon subjects of this sort is not to be expected; circumstantial or presumptive evidence is the ordinary proof. *Id.* In Connecticut, the practice is for the plaintiff to aver, that defendant made the note; that it is lost or destroyed; that it is unpaid; and each of these facts is to be tried by the jury. *Id.*

(2) *Long and another v. Bailie*, 2 Campb. N. P. C. 214. And see *Rolt*, assignee of *Welsford v. Watson*, 4 Bing. 273.

NOTE 699.—This was an action against the acceptor of a bill, payable to the order of the drawer, and by him specially indorsed to the plaintiff. It was proved that a person took the bill to have it compared with the affidavit to hold to bail, that a copy was then taken, and the bill was afterwards stolen from such person. The correctness of this copy, and the special indorsement were proved, and the plaintiff had a verdict. *Clit. on B. 294, n. q.*

(3) *Glover v. Thompson*, 1 Ry. & Mo. 403, and see *Id.* 404, n.

NOTE 700.—An action at law cannot be sustained on a negotiable promissory note payable to bearer, on his proving that the note was lost, though he show that it was lost after it became due. *Rowley v. Ball*, 3 Cowen, 303. In such a case, although the note was due at the time it was lost, the maker would be exposed to the hazard of showing that fact by legal evidence. * * And see *Chitty on Bills* (11th Am. ed.) pp. 253 to 271, as to the loss of bills. Also, *Id.* p. 625. * *

Ex necessitate a party himself is allowed to prove the loss or destruction of a paper, preliminary to the introduction of secondary evidence. *Blade v. Noland*, 12 Wend. 173; *Chamberlain v. Gorham*, 20 John. R. 144; *Jackson v. Frier*, 16 Id. 193; *Page et al., Ex'rs v. Page*, 15 Pick. 368.

The question whether secondary evidence should be allowed or not, is for the court; the court must decide what is, and what is not competent evidence for the jury. *Page et al., Ex'rs v. Page, supra.*

(4) *Pierson v. Hutchinson*, 2 Campb. N. P. C. 211; *Davis v. Dodd*, 4 Taunt. 602; *Powell v. Roach*, 6 Esp. 76; *Champion v. Terry*, 3 Brod. & Bing. 295.

was of so old a date, that the Statute of Limitations has attached upon it,(1) or that the plaintiff was able to produce half of it.(2) And now it has been recently decided by the Court of Queen's Bench, after much consideration, that the holder of a bill of exchange cannot insist upon payment by the acceptor without producing the bill, and that it makes no difference, though the plaintiff is able to prove that he lost the bill after it became due, or that it has been destroyed, and that he has offered an indemnity to the defendant.(3) If a party, who is liable upon a bill or note,

(1) Bayley on Bills, 299 (4th ed.)

(2) Mayer v. Johnson, 3 Campb. 324. See Bayley on Bills, 299 (4th ed.)

NOTE 701.—*At law*, it is said, a party cannot recover against a party to a negotiable bill or note, indorsed in blank, and even in halves, and lost *before or on the day it is due*, although a bond of indemnity has been tendered to the defendant. Chitty on Bills, 291. *.* And as to the production of foreign bills drawn in sets, see Chitty on Bills (11th Am. ed.) p. 625. * *

The holder of *bank bills* cut in two parts for the purpose of safe transmission by mail, is entitled to recover of the bank the amount of the bills, where it appears that the bills were actually mailed, and that only one set of the halves came safe to hand. Hinsdale v. The Bank of Orange, 6 Wend. 378. And in such case, the plaintiff may recover on the common counts. So, in Patton v. The State Bank, 2 Nott & M'Cord, 464. So in Martin v. Bank of United States, 4 Wash. 253; Bullet v. The Bank of Pennsylvania, 2 Wash. C. C. R. 172. The finder or robber cannot prove that he came fairly to the possession of the evidence of the other half part; and if the lost half note gets fairly into the hands of a third person, he takes it with notice that there may be a better title in the possessor of the other half. The bank knows there cannot be but one owner in such case, and who that one is, must be satisfactorily proved. Though the bank has given notice that she will not pay, the law says she shall pay. *Id.* The case of The Bank of the United States v. Sill, 5 Conn. R. 106, is to the same effect. See also Farmers' Bank v. Reynolds, 4 Saund. 186.

By cutting a bill into two parts, its negotiability is destroyed; there can be no negotiability of a separate half of the bill. Hinsdale v. The Bank of Orange, *supra*. In legal effect, it is a destruction where such a disposition of either half is made as to prevent their constituting again a whole note. Armat v. The Union Bank of Georgetown, 16 Niles' Reg. 360. The *bona fide* owner of a bank note, having transmitted one-half thereof by mail, which has been stolen therefrom, or is lost, cannot demand payment from the bank of any part of its amount, in consequence of *holding the retained half merely*; but he is entitled to demand the whole amount of the note on proof of the verity of the facts, or establishing them by the judgment of a court of equity, and giving, in either case, a satisfactory indemnity, to secure the bank against future loss from the appearance and setting up the other half of such note. The Bank of Virginia v. Ward, 6 Munf. R. 166. In this country, however, the weight of authority is clearly in favor of the holder of a part, owning the whole bill; and that upon proof of the facts, he is entitled to recover at law, without giving indemnity.

(3) Hansard v. Robinson, 7 B. & C. 90. The facts of the case were, that the bill had been lost after it became due, and an indemnity was offered.

NOTE 702.—“Is the holder, then, without a remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and if it be refused, he may enforce payment thereof in a court of equity.” Hansard v. Robinson, 7 B. & C. 90; Ry. & Mo. 90. *.* And see Taylor on Evidence, § 320, and the cases cited in the notes. * *

It seems, however, that if it can be distinctly proved that the bill has been destroyed, the party who was the holder may recover at law. Per Park, J., in Woodford v. Whitely, Mood. & M. 517. *.* See Story on Bills, § 448, n. 1. * *

If the destruction is not shown, it seems necessary for the plaintiff to show, not only the loss, but that it has not been indorsed. Pintard v. Tackington, 10 John. R. 104; 3 J. Cas. 72; Rolfe v. Watson, 4 Bing. 275; 7 B. & C. 93.

wrongfully detains it, he may nevertheless be sued upon it, and parol evidence may be given of its contents, after notice to produce it in court.(1)

Consideration.

In some cases the plaintiff in an action upon a bill of exchange or promissory note, must prove that he or some preceding party took the bill or note *bona fide*, and for value ;(2) as, where bills or notes have been ob-

A plaintiff is not allowed to give evidence of the contents of a note (sworn by him to be lost or destroyed), or to resort to proof of the original consideration of the note in support of the action, without accounting for the loss or destruction of the note, in such a manner as to repel all inference of a fraudulent design in its destruction. *Blade v. Noland*, 12 Wend. 173. The instrument being of a negotiable nature, such proof must be given, where it is not produced, by evidence of its destruction, or otherwise, as shows that the defendant cannot afterwards be compelled to pay the amount again to a *bona fide* holder. 2 Stark. Ev. 142; *Swift v. Stevens*, 8 Conn. R. 431. Thus, evidence of loss, coupled with the lapse of eighteen years, was held sufficient evidence of the non-existence of the note or bill. *Peabody v. Denton*, 2 Gall. 351.

Chancellor Eldon said (6 Ves. 812), "he could never understand by what authority courts of law compelled persons to take the indemnity." It seems quite clear courts of law have no such authority. *Davies v. Dodd*, 4 Price, 176. By statute, 2 R. S. 406, § 75, 76, in New York, a bond of indemnity is necessary only where the note alleged to be lost, is negotiable; and its negotiability will not be presumed, but must be proved. *Blade v. Noland*, 12 Wend. 172.

Where it appeared that the note was in court a day before, and introduced in evidence on a trial in another case, against the maker, but had been mislaid, and upon thorough search could not be found, the court admitted the contents to be proved, without a notarial copy, and without a special count in the declaration upon a lost note. *Renner v. Bank of Columbia*, 9 Wheat. 581. The English practice as to a special count has not been adopted in this country. So, parol evidence was admitted to show that the notes were intrusted to the care of the clerk of the court; and it appeared from his testimony that they were lost, and that he could not find them. The attorney who drew the writ, proved that he drew the writ from the notes or copies of them; and that they were read to the jury on the former trial. *Jones et al v. Fales*, 5 Mass. R. 101.

(1) By Lord Ellenborough, *Smith v. Maclure*, 5 East, 475. And see *Fryer v. Brown*, 1 Ry. & Mo. 145.

NOTE 703.—Proof of loss by a party in interest, is to the court. *Chamberlin v. Gorham*, 20 John. R. 144. The affidavit of the party on the question of loss of a paper, may be admitted, to exclude any presumption that he may have it in his possession or know where it is. *Poignard v. Smith*, 8 Pick. 278. But the defendant's affidavit was held not to be admissible to show that the notes in question had been given up to him by the holder, and that they had been taken out of his possession by *accident*. *Potter v. Titcomb*, 2 Fairf. R. 157.

The courts in New York have decided that a plaintiff cannot recover on the original consideration, unless he shows the note to have been lost, or produces and cancels it at the trial. *Holmes et al v. Camp*, 1 John. R. 34; *Burdick v. Green*, 15 Id. 247. * * If a note be lost, before demand of payment, a tender of a sufficient indemnity must accompany the demand, in order to charge the indorser. *Smith v. Rockwell*, 2 Hill, 482. * *

If a note sued upon as lost, is admitted by the defendant to have existed, and not pretended to have been paid, presumptive evidence of its loss will suffice. *Lewis v. Petavin*, 4 Mart. R. (N. S.) 4. But the plaintiff will be made to give security for the defendant's indemnification. 1a.

(1) NOTE 704.—*Hills v. Barrister*, 8 Cowen. 31.

The indorsement of T. on the promissory note of E., payable to A., as follows: "I hereby guarantee the ultimate payment of the within note," is void for want of consideration; and under the plea of non-assumpsit to a declaration founded upon that guaranty, the objection to the want of consideration may be taken. *Aldridge et al. v. Turner*, 1 Gill & John. 427.

Where it was shown that the consideration for a note was the trouble the promisee might be put to in consequence of being appointed an executor of the maker's will, held, that the promisee dying before the testator, the consideration failed, and the collection of the note could not be enforced. *Solly v. Hinde*, 6 Carr. & Payne, 316.

Some consideration there must be; for a promissory note given without any consideration is *nudum pactum* and void. *Fowler v. Shearer*, 7 Mass. R. 14; *Erwin v. Saunders*, 1 Cowen, 250; *The People v. Howell*, 4 John. R. 26; *Schoonmaker v. Roosa*, 17 Id. 176. There seems to be no difference between a want and a failure of consideration; for as against the original parties or holder, who become such after the note was overdue, or, indeed, any other holder who had knowledge of the circumstances under which the note was originally made, either may be set up as a defence to the note. Chit. on Bills, 79, n. 1, and the cases there cited. So a defence arising from proof of an illegal or fraudulent consideration has been received against an indorsee, who became such after the dishonor of a note, as well as a want or failure of consideration, or payment before the negotiation of the note. *Tucker v. Smith*, 4 Greenl. 415.

A *partial failure* of consideration cannot be given in evidence under the general issue without *special notice*; it is otherwise in a case of *total and entire failure* of consideration. *Lounsbury v. Ball*, 12 Wend. 246. * * And see 16 Maine R. 177; 17 Id. 267; 19 Id. 102; 21 Id. 418; and Chitty on Bills. 11th Am. ed.) pp. 602—605. * * It has even been doubted in a late case in England whether, when a bill or note on the face of it states an adequate consideration, the defendant is not estopped from showing a *different* consideration, in contradiction to his written admission; as that a note expressed to be "for value received by my late husband," was given only as an indemnity, and that the payee had not been damnified, though the defendant is certainly, in all cases, allowed to prove that the contract or consideration was illegal, or that the consideration *subsequently* failed; therefore, it was held, that where a promissory note expressed the consideration for which it was given, evidence could not be given of a consideration inconsistent with its terms. Chit. on Bills, 79, 80 (8th Am. ed.); *Ridout v. Bristow*, 1 Tyrw. 84; S. C., 1 Crompt. & Jerv. 231. The principle of this decision seems to be supported by decisions in New York. *Winchell v. Latham*, 6 Cowen, 690; *Erwin v. Saunders*, 1 Id. 249; 1 John. R. 139; 3 Id. 506; 7 Id. 341. * * And see *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501; and *Grant v. Townsend*, 2 Denio, 336. * *

Where a promissory note was given in consideration of the sale of pews, it was held, that although the vendor refused to convey, that constituted no defence at law; the plaintiff's remedy was in equity by compelling a specific performance. *Freligh v. Platt*, 5 Cowen, 494. *Sed vide* *Boutel et al. v. Cowden*, 9 Mass. R. 254.

It may be shown that an instrument, though it has the form of a promissory note, was never given, or taken and received as such; that it was put into the hands of a third person, to be delivered upon a contingency, which has not taken place; that it was taken from the possession of the maker without his consent; that although it was suffered to go into the hands of the payee, it was to have no validity until after the happening of a certain event. The consideration of a note of hand is open to inquiry as between the original parties. It may be shown that there was either no consideration, or that it had failed. But in a case where there was no want of consideration, but the note in question was given upon a discharge of the old notes, written upon the copies, and the condition was, that the original notes should be sent to the defendant within two weeks; held, that this was a condition subsequent not to be found in the note, but attempted to be attached thereto by parol evidence; and it was not admissible to look to any terms of the contract *abunde* after it was written, executed and delivered. *Goddard v. Cutts et al.*, 2 Fairf. 440.

"But parol evidence may be given to contradict a written simple contract, or to show that the whole of it was not reduced to writing; but that it was made with certain conditions or limitations, expressly agreed upon, but not contained in the written contract, where the action is between the original parties. Thus, it is every day's practice, notwithstanding a promissory note is expressed to be for value received, to admit the promisor, in an action by the promisee, to prove that there was no consideration. There are also several cases in which evidence has been admitted between the parties to the contract, that the same did not contain the whole agreement. 8 Term. R. 379; *Peake's Cas.* 40; Str. 674; Gilb. 154; *Peake's Law of Ev.*, c. 2, § 5. We are therefore satisfied, notwithstanding the terms of the indorsement, that it was regular to prove that

the plaintiff, the indorsee, received the bill, not as assignee, but as an agent to collect it for the payees." *Barker v. Prentiss*, 6 Mass. R. 434, Parsons, C. J.

So, when underwriters sue for the premium on a note, which has reference to the policy, the insured has always been let in to prove any facts which destroy their right to recover; such as that the risk never commenced, or that the insurance was ineffectual for want of seaworthiness of the vessel. *Russell v. De Grand*, 15 Mass. R. 35.

Where the parts of a bill or promissory note are divisible, making an aggregate sum, and as to one liquidated and definite part there was a valuable consideration, and as to the other part there was no consideration, the bill or note, as such, may be apportioned, and a holder may recover for such part as was founded on a good consideration. *Parish v. Stone*, 14 Pick. 198.

There is a difference between a want of consideration and a failure of consideration; as where the note is not given upon any one consideration, which, whether good or not, whether it fails or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract and the other not, there the contract shall be apportioned, and the holder shall not recover to the extent of the valid consideration, and no further. *Id.*

It is a *presumption* of law, that every bill or note, whether expressed or not on the face of it, to have been given for value received, was given for adequate value, and consequently it is not, as in the case of other contracts, necessary for the plaintiff in the first instance, to allege or prove a consideration. *Chit. on Bills*, 79. And although that presumption may, between the original parties, or when a holder has not himself given any value, or only a part, in general be *rebutted* (per Abbott, Ch. J., in *Holliday v. Atkinson*, 5 Barn. & Cres. 503), yet the *onus probandi* lies on the defendant, and the holder is not bound to prove that he gave value, until the defendant has first proved that he received none; upon establishing which, the holder must then prove that he received the bill or note before it was due, and that he, or some person for whose use he sues, gave value for it. *Chit. on Bills*, 79. And it has even been doubted whether, when a bill or note on the face of it states an adequate consideration, the defendant is not estopped from showing a *different* consideration, in contradiction to his written admission; as that a note expressed to be "for value received by my late husband," was given only as an *indemnity*, and that the payee had not been damaged, though the defendant is certainly, in all cases, allowed to prove that the contract or consideration was illegal, or that the consideration *subsequently* failed; therefore, in a late case, it was held, that where a promissory note expressed the consideration for which it was given, evidence could not be given of a consideration inconsistent with its terms. *Ridout v. Bristow*, 1 Tyrw. R. 84, and other cases cited in *Chit. on Bills*, 80, a. Bayley, B., observed: "That in case of a note, as well as any other written instrument, evidence cannot be given of a consideration differing from or inconsistent with the tenor of the written instrument." The note was in these words: "Twelve months after date, I promise to pay Mr. John Ridout (the holder) or order, one hundred pounds, *value received by my late husband*." *Love Ridout*."

However, in general, want of consideration is a defence. *Chit. on Bills*, 81, 82. And also, it seems, where the consideration is inadequate. *Id.*; *Holliday v. Atkinson*, 5 Barn. & Cres. 591; *Chit. on Bills*, 85, n.

Where notice has been given of intention to dispute the consideration of a bill or note, and the plaintiff's counsel is apprised by the cross-examination that the consideration is disputed, he must give his evidence in support of the bill in the first instance. *Spooner v. Gardiner*, Ry. & Mo. 83.

* * "He need not account for his possession of it unless suspicion be raised. Suspicion must be cast upon the title of the holder, by showing that the instrument had got in circulation by force or fraud, before the *onus* is cast upon the holder of showing the consideration he gave for it." 3 Kent's C. (6th ed.) p. 79, and notes. And see *Swift v. Tysen*, 16 Peters R. 1; *Riley v. Anderson*, 2 McLean's R. 589; *Bank of Salina v. Babcock*, 21 Wend. 499; *Bank of Sandusky v. Scoville*, 24 Id. 115; *Mohawk Bank v. Carey*, 1 Hill, 512; *Carlisle v. Wishart*, 11 Ohio R. 162. * *

(Proof showing that the bill sued on was illegal in its inception, casts upon the holder the burden of showing that he gave value for it. *Bailey v. Bidwell*, 13 Mees. & Wels. 73; *Edmunds v. Groves*, 2 Id. 642. While proof that the defendant accepted the bill for the drawer's accom-

tained by fraud, or under duress, or have been stolen or lost.(1) To compel a plaintiff, however, to give such proof, it is, in general, necessary that

modation, does not cast upon the holder, an indorsee; the burden of proving that he gave value for the bill. *Mills v. Barber*, 1 Id. 425; and *James v. Chalmers*, 2 Selden N. Y. Rep. 209; *Ross v. Bedell*, 5 Duer R. 462.)

(1) *Duncan v. Scott*, 1 Camp. N. P. C. 100; *Rees v. Marquis of Headford*, 2 Camp. N. P. C. 574; *Solomons v. The Bank of England*, 13 East, 135, n.

NOTE 705.—“Pay to N. 100 — or bearer, 100 dollars.” J. A. “To the Cashier.” Held, that the plaintiff was bound to prove that he paid for it, or that he came otherwise fairly by it; the mere possession of the paper in such a case, there being no drawee in existence, cannot entitle the possessor to an action in any form. *Ball v. Allen*, 15 Mass. R. 433. (But see *Willets v. The Phoenix Bank*, 2 Duer R. 121.)

It may be laid down as a general rule, that if the note or acceptance were taken under such circumstances that the indorser himself could not recover, the indorsee must prove that he became such for good consideration, though no notice be given him to produce such evidence. Per *Littledale, J.*, in *Heath v. Samson*, 2 Barn. & Adol. 729. And in all cases, where, from defect of original consideration, the original payees could not recover on the note or bill, the indorsee will be holden to show a consideration given by himself or a prior indorsee; and this he must do, though notice has not been given that such proof will be called for. Id.

Where negotiable paper is transferred for a *valuable consideration*, and without notice of any fraud, the right of the holder shall prevail against the true owner. *Coddington v. Bay*, 20 John. R. 637. But that *valuable consideration* must be for a *present consideration paid*; not where they were received in security, or payment for an antecedent debt. Accordingly it has been held, that the holder of a negotiable note, who receives it in payment of a precedent debt, takes it subject to all the equities existing between the original parties. *Rosa v. Brotherson*, 10 Wend. 85.

In New York, therefore, it seems settled by repeated decisions, that an antecedent debt is not considered such a valuable consideration as will support the claim of a *bona fide* holder of a negotiable instrument, to the injury of the right of the original parties. These decisions seem not entirely satisfactory, as appears by a doubt expressed by *Beardsley, Senator*, in *Briggs v. Rockwell* (11 Wend. 509); and by *Tracy, Senator*, in *Morton et al. v. Rogers et al.* (14 Wend. 575). And the doctrine of the New York decisions is expressly repudiated in a late case in Connecticut. *Brush v. Scribner*, 11 Conn. R. 388. The learned chief justice, in delivering the opinion of the court, reviewed all the cases upon the subject; and the result to which he arrived, was, that both the English and American cases (with the exception of New York) were in accordance with the law in Connecticut, viz: that it made no difference in law, whether the debt for which the bill or note is taken, is a pre-existing debt, or money then paid for it.

* * *Swift v. Tysen* (16 Peters' R. 1) was in the Supreme Court of the United States on a certificate of division of the judges of the Circuit Court of the southern district of New York. In the circuit, the defendant had offered to prove, that the consideration for which the bill in suit was given, had failed, and that the plaintiff had received the note in payment of a precedent debt; and the question certified was, whether the defendant was entitled to the same defence to the action, as if the suit were between the original parties to the bill? The Supreme Court answered the question in the negative. The courts of New York hold a contrary doctrine. The New York cases are collected and reviewed in *Stalker v. McDonald* (6 Hill, 93), and they are declared, by *Chancellor Walworth*, to “fully establish the principle, that to protect the holder of a negotiable security, which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, it is not sufficient that it has been received by him merely as a security, or *nominally* in payment of a pre-existing debt, where he has parted with nothing of value, nor relinquished any security upon the faith of the paper thus improperly transferred to him, without any fault on his part.” And the doctrine of *Swift v. Tysen* was denied to be law in New York. A distinction is taken between a *nominal payment* and the *actual extinguishment* of a debt. What renders the receipt of a negotiable note an extinguishment or discharge

of a debt? If a vendor of goods receive from a vendee the note of a third person, in respect of whose solvency no misrepresentation is made, it will be deemed to have been accepted in payment and satisfaction, till the contrary is proved. *Whitlock v. Van Ness*, 11 John. R. 409; *Breed v. Cook*, 15 Id. 241. In *Arnold v. Camp* (12 John. R. 409, it was held, that where a partnership note had been taken up, by substituting the individual note of one of the partners, the latter note was a payment; and that if the payee were afterwards to get back the partnership note, by giving up the other, the other partner might avail himself of such payment as a bar. In *Frisbie v. Larned* (21 Wend. R. 450), it was held, that the acceptance of the note of a third person, from one of the members of a firm, and by him indorsed, together with the balance of the indebtedness in cash, was *prima facie* an accord and satisfaction of the firm debt; and that a judgment confessed by one partner had a like effect. *Cole v. Sackett* (1 Hill, 511) disapproved of the decision in *Arnold v. Camp*, and held, that the individual note of a partner was not a bar to an action against the firm for the demand which it was given to pay; and *Waydell v. Luer* (5 Hill R. 448) went still further, and held, that the note of one of several partners or joint debtors, given for a debt antecedently due from all, did not extinguish the liability of the others, though the creditor expressly agreed to receive it in satisfaction; but the Court of Errors (S. C., 3 Denio, 410), reversed the judgment of the Supreme Court in the last case; thus overruling *Cole v. Sackett*, and re-affirming *Arnold v. Camp*. It seems that taking the bill or note of a third person, for an antecedent debt, will extinguish the debt, if the parties expressly so agree (*Hays v. Stone*, 7 Hill, 128; *Small v. Smith*, 1 Denio, 583); but not if it be received nominally as a payment, without such an agreement. *Id.*; *Artcher v. Zeh*, 5 Hill, 200; *Bank of St. Albans v. Gilliland*, 23 Wend. 311; *Dayton v. Trull*, Id. 345. See *Bank of Salina v. Babcock*, 21 Id. 499; *Bank of Sandusky v. Scoville*, 24 Id. 115. And see 1 Am. Lead. Cases, 191, *et seq.*, for a collection of the American cases on the principal question; also, the American note to *Cumlier v. Wane*, 1 Smith's Leading Cases, 256.

A question of great interest, and of much practical importance, arose in *Swift v. Tysen*. The bill in that case was drawn and negotiated in New York, and it was urged, that the rights of the parties depended upon the local law, which was claimed to be decisive in favor of the defendant. The Supreme Court denied that it was bound by the decisions of the courts of New York, on a question of commercial law, which the court (citing an observation of Lord Mansfield, in *Luke v. Lyde*, 2 Burr. R. 883, 887) declared to be, in a great measure, not the law of a single country only, but of the commercial world. In a similar case, in the Supreme Court of Connecticut, on a promissory note made and negotiated in New York (*Bartsch v. Almater*, 1 Conn. R. 409 (2d ed.), and note 1 to page 416), the court enforced what it (erroneously) supposed to be the law of New York, in opposition to the well settled law of Connecticut. The courts of New York have repeatedly resisted attempts to bend general rules of commercial law to local usages. See *Woodruff v. Merchants' Bank*, 25 Wend. 675; S. C. in error, 6 Hill, 174; *Dyckers v. Alstyne*, 3 Hill, 593; S. C. in error, 7 Hill, 498; and see opinion of Wright, Senator, Id. 504. In a great, and greatly extended commercial country, like the United States, the importance of uniform rules, for the government of commercial transactions, cannot easily be overstated. A conflict of decisions, like that between the Supreme Court of the United States, and the courts of New York, in *Swift v. Tysen*, and *Stalker v. McDonald*, was, probably, in the contemplation of Mr. Duer, when he availed himself of a recent solemn occasion to maintain, with characteristic point and power, the paramount authority of the United States Supreme Court, on questions of public law. "But the practical value of this doctrine" (said that eminent lawyer, who may now, as a judge of the Superior Court of New York, speak with more decisive effect upon the question), "will be greatly diminished, if not wholly lost, if we limit its application to the cases in which the decisions of the state tribunals are liable to be reviewed and reversed by the Supreme Court of the United States. In these cases there is a very slight, if any, hazard of discord, confusion, or collision, since experience has proved, that, whatever may be the reluctance of the state courts, the ultimate decision of the Supreme Court will be enforced, and must be obeyed. But there are several classes of cases in which the judgment of the highest state tribunal may be final in its nature, and yet may have proceeded on rules of law in direct hostility to those that the Supreme Court of the United States, in similar cases, had established or sanctioned; and it is to these cases that the doctrine that imposes it as a duty upon the state tribunals to follow and obey the decisions of our highest national court, must be extended and applied, if we wish to

avoid the discord, confusion, and perilous uncertainty, that a permanent conflict in their decisions must otherwise of necessity produce. It is to these cases that the doctrine must be applied, unless we are to be placed in the unexampled and anomalous condition,—a condition that seems to be inconsistent with the very nature of civil society—of having two opposite systems of law, conflicting rules of human action, prevailing at the same time, in the same community, applicable to the same subjects and transactions, and binding upon the same individuals. Nor is the course to be observed, in order to prevent this dangerous conflict, difficult to be stated. If the questions that the judges of a state tribunal are called to determine, belong to their own local or municipal law, it is their own judgment that it is not merely their right, but their duty, to follow; and the authority of their decisions, in such cases, is justly to be regarded, and we know, will be regarded, as supreme; but if the questions to be decided are national in their character—if they belong to a law that is not municipal and local, but which pervades the Union, such as the law of nations and the general rules of commercial law—the decisions of our highest national court, I am constrained to think, ought to be implicitly followed, as paramount in their authority, as binding on the conscience of judges, although not necessarily controlling their actions.” Duer’s Discourse on the Character of Chancellor Kent, p 66, *et seq.* These weighty observations deserve to be deeply pondered by American jurists and statesmen. * *

In *Bassett v. Dodgin* (10 Bing. 40), Park, J., says: “In order to cast it on a plaintiff to show the consideration of a bill, defendant must show, I will not say felony or fraud only, but he must cast such a shade over the transaction, as to make it imperative on the plaintiff to clear it up by further proof. And in *Heath v. Sampson* (2 Barn. & Adol. 297), three of the judges held, that where a note or acceptance has been given under such circumstances that the original payee cannot recover on it, the indorsee must prove that he became so for a valuable consideration; though Mr. Justice J. Parke confines the rule to cases where the note or bill has been obtained by fraud, felony, or duress.

Where a note has been stolen, the plaintiff must show that he paid full value for it. *De La Chaumette v. The Bank of England*, 9 Barn. & Cressw. 208. A negotiable note indorsed in blank by the payee, if fraudulently or feloniously taken from the true owner; the person into whose hands it comes, must show himself to be an innocent and *bona fide* holder for value. *The Fulton Bank v. The Phoenix Bank*, 1 Hall, 562. So, when the note has been obtained by fraud, the defendant, upon proof of the fraud, may require the plaintiff to show that he received it in the usual course of business, before it was dishonored, and that he paid value for it. *Vallet v. Parker*, 6 Wend. 615; *Holme v. Carpser*, 5 Binn. 469; *Jackson v. Heath*, 1 Bail. R. 355; *Patterson v. Hardacre*, 4 Taunt. 114.

If a note has been stolen, and the plaintiff had notice of the fact before he paid value, he cannot recover. *De La Chaumette v. The Bank of England*, 9 Barn. & Cres. 208.

If a merchant intrust his clerk with blank indorsements; and a note is afterwards written on the face of the paper by the promisor, without the consent of the defendants, but it appeared with the consent of the clerk, from whom it was obtained by false pretences; held, that it was not such a fraud as would discharge the indorser against an innocent indorsee. *Putnam et al. v. Sullivan et al.*, 4 Mass. R. 45. Generally, an indorsement obtained by fraud will hold the indorser according to the terms of it. So, where the payee obtained the note by unfair means, without any consideration, it being taken of defendant for a balance of account due one B., under an expectation that one J. would indorse it as surety for the payment, he refusing so to indorse unless it was made payable at sixty days; when another note was obtained payable at sixty days; but the first note was not given up; it was indorsed to the plaintiff by the payee in Boston, where the plaintiff lived, on the seventh day after it was made: held, that the plaintiff was entitled to recover, although it was on demand. *Thurston v. McKown*, 6 Mass. R. 428. The note was payable on demand, and the promisee was not obliged to demand payment immediately. The note was not overdue, within the true intent of the principle of the law. Of two innocent parties in a case like this, the loss must fall on the maker of the note.

An indorsee, without notice, is not affected by fraud or other transactions between the original parties. *Baker v. Arnold*, 3 Caines’ R. 279; *M’Neil et al. v. Baird*, 6 Munf. R. 316; *Mann v. King*, 6 Id 428; *Clark v. Stackhouse*, 2 Mart. R. 319. The payee’s qualified indorsement cannot impair the indorsee’s right acquired under his transfer. *Russel v. Ball et al.*, 2 John. R. 50. So, where the note was given for the purpose of placing the debt from the maker to the payee,

he should be apprised, before the trial, that such proof will be required of him.

Notice.

And the rule as to the necessity and effect of a previous notice, requiring proof of the consideration, appears to be this: if the title of the plaintiff as holder is brought into suspicion by a witness called on the part of the plaintiff, it seems that he ought to prove the consideration, whether there has, or has not been any notice to that effect;(1) but, if no suspicion arises on the plaintiff's case, he will not be obliged, even after notice, to prove the consideration, until it has been impeached.(2)

out of the reach of the creditors of the latter, who was insolvent; but as knowledge of the fraud was not brought home to the plaintiff, held, that he was entitled to recover; especially as it appeared that the plaintiff was a creditor of the payee. *Warren v. Lynch*, 5 John. R. 239.

(The actual satisfaction of a precedent debt is giving value for a note (*Gould v. Legee*, 5 Duer R. 260; *White v. The Springfield Bank*, 3 Sand. 222); so where a person surrenders and parts with one note for another, this is giving value for the latter so as to constitute him a holder for value. *Youngs v. Lee*, 2 Keruan N. Y. R. 551, and the cases cited there.)

(1) *Green v. Deakin and others*, 2 Stark. N. P. C. 347; *Rees v. Marquis of Headford*, 2 Camp. N. P. C. 574; *Duncan v. Scott*, 1 Campb. N. P. C. 100. In the Common Pleas, it would seem in all cases necessary to give notice. *Patterson v. Hardacre*, 4 Taunt. 114.

(2) In the case of *Delauney v. Mitchell* (1 Stark. N. P. C. 439), Lord Ellenborough is reported to have held, that it was not competent to the plaintiff, to whom such notice has been delivered, to give evidence of the consideration, after having closed his case, in reply to the case of the defendant. But the rule stated in the text is said to have been since declared by the present lord chief justice to be the most correct. See *Chitty on Bills*, 401 (7th ed.) The present practice in the Common Pleas is said to agree with that in the King's Bench. 1 Ry. & Mo. 256, note.

NOTE 706.—In an action by the indorsee against the acceptor of a bill of exchange, the defendant may show that the bill was originally given without consideration, though he has given no notice of disputing the consideration. *Mann v. Lent*, 1 Mood. & Malk. 240.

In an action by a holder against one who had indorsed a bill for the accommodation of the drawer, the drawer proved that he had applied to J., step-father of the plaintiff, to get the bill discounted; that J. went away, and returned with £32 less than the amount of the bill, the discount being £1 19s.; held, not sufficient, without proof that J. was plaintiff's agent, to cast it on plaintiff to prove the consideration he gave for the bill. *Bassett v. Dodgin*, 10 Bing. 40. "In order to cast it on a plaintiff to show the consideration of a bill, the defendant must show, I will not say felony or fraud only, but he must cast such a shade over the transaction as to make it imperative on the plaintiff to clear it up by further proof." Park, J., in *Id.*

An acceptor cannot, by mere notice to the plaintiff, and without throwing suspicion on his title, compel him to prove value. *Reynolds v. Chattle*, 2 Camp 596. The practice of the two courts in England is different: in Bail Court it seems not necessary to give notice; but in Court of Bankruptcy the defendant must give such notice. 2 Stark. Ev. 155.

In *Heath v. Sampson* (2 Barn. & Adol. 291), it seems to be considered necessary in all cases, where, from defect of consideration, the original payee could not recover on the note or bill, that the indorsee must prove a *bona fide* consideration paid by himself or a prior indorser. But later cases repudiate this doctrine. *French v. Archer*, 2 D. & Ry. R. 130; *Stein v. Yglesias*, Id. 252; *Lowe v. Clifton*, 5 M. & Scott, 95; *Branah v. Roberts*, 1 Bing. N. S. R. 465. In an action by indorsee against the acceptor, the defendant offered to prove that there was no consideration for his acceptance, and insisted that the burden of proof was upon the plaintiff of proving the consideration of the indorsement to him; *Patterson J.*; "I am of opinion that the evidence offered by

When the plaintiff has established a *prima facie* case, it then remains for the defendant, if he can, to impeach his title; and until he has first cast some suspicion on the title, by showing that the note was lost, or obtained by force or fraud, he cannot, merely by giving notice(1)

the defendant, will not make it necessary for the plaintiff to prove the consideration which he gave for the bill. Since the decision in *Heath v. Sampson*, the consideration of the judges has been a good deal called to the subject; and the prevalent opinion amongst them is, that the courts have, of late, gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can show something of fraud in the previous steps, or the transfer of the instrument, that throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it." *Whitaker v. Edmunds*, 1 Mood. & Rob. R. 366.

Where, on the settlement of an account, a debtor gave to his creditor a promissory note payable to a *third person*, for a portion of the *assumed balance*, and two drafts for the residue, and after payment of the drafts, an action was commenced upon the note by the assignees of the payee, who had been discharged as an insolvent debtor, it was held, that it was competent to the defendant to show an error in the statement of the account, and that the plaintiffs were entitled to recover only the true balance due at the time of the settlement, deducting the amount of drafts paid by the defendant. *Morton et al. v. Rogers*, 14 Wend. 575; S. C., in 12 Wend. 484.

Assumpsit by indorsee against drawer of a bill of exchange, accepted by B. Plea, that B., being in want of a loan of money, applied to the plaintiff to advance it, which he was unwilling to do, unless B. agreed to accept it in two-thirds money, and one-third wine, and unless the plaintiff had the security of a bill drawn by the defendant and accepted by B.; that B. agreed to the said terms, and thereupon the bill declared on was drawn by the defendant and accepted by B.; and that the defendant never received any consideration or value, nor did any consideration move or pass from either of the said parties to the defendants for his drawing the bill, except as aforesaid; and that the said wine has not been delivered, and that the said contract for the sale and delivery thereof was a gross fraud on the defendant. Held, bad on demurrer. *Connop v. Holmes*, 2 C., M. & R. 719; 1 Tyr. & G. 85; 4 D. P. R. 451.

In an action by an indorsee, defendant may prove fraud in the inception of the note, or that it was fraudulently put in circulation; then the burden of proof will be on the plaintiff, to show that he came by the note fairly, and without knowledge of the fraud. *Munroe v. Cooper et al.*, 5 Pick. 412.

In an action by B., indorsee, against C., acceptor, C. pleads that the acceptance was obtained from him by the fraud of A., the drawer, and the bill was indorsed to B. without consideration, and with notice of the fraud, and of the want of consideration between A. and C.: *semble*, that B. may rely, merely traversing the fraud. *Heydon v. Thompson*, 3 Nev. & M. 319; 1 Adol. & Ell. 1210. However, if B. newly assigns a different bill, accepted generally, and the defendant pleads as before, omitting the statement of the original want of consideration, a replication to such plea merely traversing the fraud is sufficient. *Id.*

There is a distinction between negotiable paper taken for an advance of money, or other value paid, and paper taken for a pre-existing debt. *Coddington v. Bay*, 20 John. R. 637. And a note or bill is not considered as taken in the usual course of trade, unless money or property is given in exchange, or responsibility is incurred. However, Chief Justice Marshall, in *Coolidge v. Payson* (2 Wheat. 73), says: "But the mere circumstance that the bill was taken for a pre-existing debt, has not been thought sufficient to do away the effect of a promise to accept." And see *Brush v. Scribner*, 11 Conn. R. 388, cited in last note, where it was held, that there is no distinction between a note taken for a pre-existing debt, or other value paid. * * And see the later cases cited, *ante*, note 705. * *

(1) NOTE 707.—The consideration of a note of hand is open to inquiry between the original parties. It may be shown that either there was no consideration or that it had failed. A total failure of title is a total failure of consideration. *Rice v. Goddard*, 14 Pick. 292; *Frisbie v. Hoffnagle*, 11 John. R. 50; *M'Allister v. Reab*, 4 Wend. 433; *Steinhauer v. Whitman*, 1 Serg.

& Rawle, 447; Gray v. Hankinson, 1 Bay, 327; Chandler v. Marsh, 3 Verm. R. 162; Tillotson v. Grapes, 4 N. Hamp. R. 448. And a party is not compelled to seek his remedy on the covenants in such case. A conveyance of a patent right with a covenant as to title—the patent right being void—was *nudum pactum*, although the plaintiff might have sold the supposed patent right. Dickinson v. Hall, 14 Pick. 220. The promisor also may show that the promise was gratuitous, and made without any legal consideration. Bliss v. Negus, 8 Mass. R. 46; Hill v. Buckminster, 5 Pick 393; Parish v. Stone, 14 Pick. 194. In this last case, it was settled that a promissory note, as a *donatio causa mortis*, is not good. S. P., Holliday v. Atkinson, 8 Dowl. & Ryl. 163; S. C., 5 Barn. & Cress. 501; Raymond v. Sellick, 10 Conn. R. 480.

Where the parts of a bill are divisible, making an aggregate sum, and as to one liquidated and definite part there was a valuable consideration, and as to the other part there was no consideration; the bill, as such, may be apportioned, and a holder may recover for such part as was founded on a good consideration. Parish v. Stone, 14 Pick. 198.

Where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, there the consideration shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. Per Shaw, Ch. J., in *Id.* The fact, what amount was upon one consideration, and what upon the other, like every other questionable fact, should be settled by the jury upon the evidence.

There is a distinction in this respect between failure of consideration and want of consideration. Lord Ellenborough, in Tye v. Gwynne (2 Campb. 346): "The latter may be given in evidence to reduce the damages, the former cannot, but furnishes a distinct and independent cause of action." It seems, therefore, very clear, that want of consideration, either total or partial, may always be shown by way of defence. Parish v. Stone, *supra*. In this case, the note was made to Stone by the testator, to compensate the promisee for services rendered, and also as a further bounty from the testator's property. The note was delivered by the testator. The jury were charged to inquire whether there was a consideration, and to what amount; and upon their returning a verdict for one hundred and fifteen dollars, the court held, that it was rightly left to the jury to find what part of the note was given in compensation for services, the evidence showing that all beyond that was gratuitous.

Upon this principle is also the distinction between an action for the price of the goods, and an action on the security given for them. In the former, the value only can be recovered; in the latter, the party holding bills given for the price of goods supplied, can recover upon them, unless there has been a total failure of consideration. Obbard et al. v. Betham, 1 Mood. & Malk. 483. If the consideration fails partially, as by the inferiority of the article furnished, to that ordered, the buyer must seek his remedy by a cross action. See further, *post*, of the text. Held, also, that it was no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker, and of a further sum to be paid at a future day; and that the estate had not been conveyed. Spiller et al. v. Westlake, 2 Barn. & Adol. 150. Lord Tenterden observed: "I see no reason why he should have executed a distinct instrument, whereby he promised to pay a part of the purchase money on a particular day, unless it was intended that he should pay the money on that day at all events."

Where the note is taken upon a condition which has not been performed, the failure of consideration may be shown in defence of the action. Thus, where the master of a slave verbally agreed that, if the latter would deliver to him good approved notes for a certain amount, he would deliver to him a deed of manumission; but having obtained the notes, he refused to deliver the deed; held, that the plaintiff was not entitled to recover. Petry v. Christy, 19 John. R. 53.

A total and entire failure of consideration, on the ground of fraud or otherwise, may be given in evidence under the general issue *without notice*; but a *partial failure* cannot be given in evidence without special notice. Lounsbury v. Ball, 12 Wend. 246. A partial failure is only in mitigation of damages; it does not go to the foundation of the action. Spalding v. Vandercook 2 Id. 431; Burton v. Stewart, 3 Id. 238; Reab v. M'Allister, 8 Id. 109.

to prove the consideration, cast the burden of proof upon the plaintiff.(1)

(1) NOTE 708.—Want of consideration is not a good defence to an action upon a promissory note in favor of a *bona fide* indorsee. *Goddard v. Lyman*, 14 Pick. 268. It may be shown that the note was put into the hands of a third person, to be delivered upon a contingency which has not taken place. That it was taken from the possession of the maker without his consent. That although it was suffered to go into the hands of the payee, it was to have no validity, until after the happening of a certain event. Per *Weston, J.*, in 2 Fairf. R. 442. Such a defence is not only admissible, between the original parties, but as against an indorsee with notice of the circumstances under which the note was made. *Boutelle v. Wheaton*, 13 Pick. 499.

In an action on a bill of exchange by a third indorsee against the acceptor, the defendant cannot put the plaintiff to prove consideration, by giving *prima facie* evidence to show the want of it, merely as between the drawer and his indorsee, and each subsequent indorser and indorsee; but he must also show the want of consideration as between himself and the drawer. And for this purpose it is not enough to prove that the drawer, on the day before the maturity of the bill, procured all the indorsements to be made without consideration, in order that the action might be brought by an indorsee, on the understanding that the money, when recovered, should be divided between one of the indorsees and the drawer. *Whitaker v. Edmonds*, 1 Ad. & El. 638. *Denman, C. J.*, "It does not appear but that the defendant actually owed the amount of the bill to the drawer; and if he did, that which passed on the transfer of the bill to the intermediate parties, cannot be a defence."

The indorsee of a negotiable note, indorsed after due, is considered as receiving dishonored paper, and takes it subject to all the infirmities and equities, and some cases say, defences to which it is liable in the hands of the payee. *Church, J.*, in *Robinson v. Lyman* (10 Conn. R. 30): "Payments made, a failure or fraud in the consideration, or any illegality therein, or any agreement between the parties affecting the note, before it was transferred to the plaintiff; these may be shown in defence; it is otherwise as to any claim of mere set-off, on the part of the defendant. *Id.* The indorsee of an overdue bill or note, is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters." *Burrough v. Moss et al.*, 10 Barn. & Cres. 558. The cases have not gone the length of establishing, that such a set-off not arising out of the bill or note transaction, can be made available against an indorsee, even when the bill or note is overdue, at the time of the indorsement. *Holland v. Makepeace*, 8 Mass. Rep. 418.

The practice in New York has been different. There, the principle seems to be assumed, that as between the original parties, a set-off is a defence to the note itself; and, therefore, must be permitted to be made after the transfer. *Hendricks v. Judah*, 1 John. R. 319; *O'Callaghan v. Sawyer*, 5 John. R. 118; *Bank of Niagara v. M'Cracken*, 18 Id. 118; *Ford v. Stuart*, 19 Id. 342. On the contrary, the set-off admits the validity of the note, recognizes it as a subsisting debt, and asks only that the plaintiff shall receive in payment debts due from himself instead of cash. *Church, J.*, in *Robinson v. Lyman*, *supra*; *Stedman v. Jillson et al.*, 10 Conn. R. 55. * * For a collection of the English and American authorities on the point, see 1 Am. Lead. Cas. p. 194. And see *Minon v. Hoyt*, 4 Hill, 193. * *

The following cases establish the principle, that an indorsee who takes a note under circumstances which might reasonably create suspicion, as where it has been negotiated after the time of payment has elapsed, may in an action against the maker, be met with every defence of which the maker could have availed himself in an action by the payee, such as fraud, want of consideration, payment, release, set-off, &c. *Baker v. Arnold*, 3 Caines' R. 279; *Wiggin et al. v. Bush*, 12 John. R. 306; *Batley v. Button*, 13 Id. 187; *Johnson v. Bloodgood*, 1 J. Cas. 51; S. C., 2 Caines' Cas. (in error), 303; *Sebring et al. v. Rathbun*, 1 J. Cas. 331; *Jones v. Caswell*, 3 Id. 29; *Hendricks v. Judah*, 1 John. R. 319; *Lansing v. Gaines et al.*, 2 Id. 300; *O'Callaghan v. Sawyer*, 5 Id. 118; *Lansing v. Lansing*, 8 Id. 454; *Anderson et al. v. Van Alen*, 12 Id. 345; *Gold v. Eddy*, 1 Mass. R. 1; *Ayer v. Hutchins et al.*, 4 Id. 370; *Hemenway v. Stone*, 7 Id. 53; *Brown v. Foster et al.*, 1 Mart. R. 34; *Garrigues v. Vedges*, 2 Brown's R. 262; *Ford v. Stuart*,

19 John. R. 342. * * And see *McNeil v. McDonald*, 1 Hill's S. Car. R. 5; *Potter v. Tyler*, 2 Metc. 58; *Howard v. Ames*, 3 Id. 308; *Mackay v. Holland*, 3 Metc. 69. * * The holder of a note which was payable to bearer, who received it with notice, that there was not so much due as the face of the note; held, that in an action against the maker, he was subject to an examination of the accounts between the original parties. *Olmsted v. Stewart*, 13 John. R. 238. The plaintiff did not stand in the character of an innocent holder of a note, coming into his hands in the regular course of business, before it fell due.

As between the indorsee and the maker, it does not lie in the mouth of the latter to say that the former purchased it at a discount. *Braman v. Hess*, 13 John. R. 52. It is different as respects the immediate indorser of the plaintiff. *Id.* And where suits are brought against the maker and indorser of a promissory note, and the indorser pays the amount, and it is agreed between the holder and indorser, that the suit against the maker shall be prosecuted for the benefit of the indorser, the maker cannot avail himself of the payment of the indorser, as a defence in the suit against him. *Mechanics' Bank v. Hazard*, 13 John. R. 353.

The defendant is not bound to prove that the plaintiffs purchased the note with full and certain knowledge of the want or failure of consideration; if the circumstances attending the transfer were such as to put the plaintiffs upon their guard, they were bound to make inquiry. *Cone v. Baldwin*, 12 Pick. 545. The purchase of the note at their own risk, would not, of itself, be sufficient to justify the jury in finding that the plaintiffs were acquainted with the fact that the note was given without consideration, or that it had been obtained by fraud. *Id.* * * See *Beltzhoover v. Blackstock*, 3 Watts, 20; *Hunt v. Sandford*, 6 Yerger, 387; *Smith v. Strong*, 2 Hill, 241; *Safford v. Wyckoff*, 4 Id. 442; *Andrews v. Pond*, 13 Peters, 66; *Fowler v. Brantley*, 14 Id. 318. * *

Where the note was indorsed to the plaintiff some years after it was payable, held, that the defendant was entitled to the benefit of any set-off which, at the time of the indorsement, existed against the payee. *Barney v. Norton*, 2 Fairf. 350. The court said, however, that the set-off must be filed. But the set-off may be disproved by the plaintiff. In *Peabody v. Peters* (5 Pick. 1), it was doubted whether any set-off could be filed, except between the original parties. But in *Sargent v. Southgate* 5 Pick. 312, it was held, that an account might be filed against the indorsee; and that it must be filed, unless the defendant was able to prove that the subject of the set-off was agreed to be applied in payment of the note.

The maker of a negotiable note cannot set off against a *bona fide* holder, a demand which he may have against an intermediate holder, not the original payee, although the note may have been transferred after it was due. *Perry v. Mays*, 2 Bail. R. 354, S. P.; *Nixon v. English*, 3 M'Cord, 549.

Where a note payable on demand, was negotiated five months after its date, and there was several payments indorsed upon it, the last of which was a few days prior to the transfer, in an action by the indorsee, the maker was not allowed to set up any defence, as against the payee, or to impeach the amount due on the face of the note, at the time of the transfer, after deducting the payments indorsed. *Saford v. Mickles et al.*, 4 John. R. 224. Where a note was given in England, payable on demand, and sued upon here within a year after this date, a set-off by the maker against the payee was rejected. *Hendrick v. Judah*, 1 John. R. 319. Where a note, payable on demand, was negotiated two months and a half after its date, in a suit by the holder against the maker, he was allowed to show payment to the original payee, before the transfer to the plaintiff. And the court say that there is no precise time at which such a note is to be deemed as dishonored; that the demand must be made in reasonable time, and that it will depend upon the circumstances of the case, and the situation of the parties. *Losee v. Dunkin*, 7 John. R. 70. In an action by the indorsee against the maker of a note, dated in Philadelphia, payable on demand, without defalcation, it appeared, that the payee lived in Philadelphia, and the maker about 180 miles from it; the first notice the maker had of the assignment, was fourteen months after the date of the note, previous to which time he had paid more than half the note to the payee; it was held, that the jury were at liberty to presume that the indorser had notice of the payments, and that the maker might set them off. It did not appear in this case when the note was transferred, and the court relied on the delay in demanding payment of the maker. *Cromwell et al. v. Arrott*, 1 Serg. & Rawle, 180. * * See *Sylvester v. Crapo*, 15

But the defendant will be at liberty to produce evidence for the purpose of impeaching the plaintiff's title,(1) without having given him previous notice of such intention ;(2) though he cannot, in that case, object to the

Pick. 92; Knowles v. Parker, 7 Metcalf, 31; Tucker v. Smith, 4 Greenleaf, 415; Wethey v. Andrews, 3 Hill, 582; and 1 Am. Lead. Cas. 193, *et seq.*, and the various cases there cited. * *

Where suits are brought against the maker and indorser of a note and the indorser pays the amount, and it is agreed, between the holder and indorser, that the suit against the maker shall be prosecuted for the benefit of the indorser, the maker cannot avail himself of the payment by the indorser, as a defence in the suit against him. *Mechanics' Bank v. Hazard*, 13 John. 353.

An indorsee of accommodation paper shall only recover the amount paid for the note. *Wiffen v. Roberts*, 1 Esp. R. 261. In general, however, it is no defence, that the plaintiff received the note at a great discount. *Dabson v. Webber*, 9 Pick. 163. The defendant may show the nature of the transaction, and that there was no consideration for the indorsement; and then he may show a failure of consideration. *Grew v. Burditt*, 9 Pick. 265.

Indorsee sued his immediate indorser, plea that before commencement of the action, the plaintiff had transferred the note to another, who since had been and continued the owner; held, upon demurrer, that the plea was a bar to the action. *Waggoner v. Colvin*, 11 Wend. 27. If the suit is brought in the name of the plaintiff for the benefit of the persons in interest, that fact should be replied, and it will be a good answer to the plea.

Evidence that a note was delivered as an escrow, and fraudulently put in circulation, is admissible; and the proof of such facts, will put the holder to prove value fairly paid for the note. *Vallett v. Parker*, 6 Wend. 615. See *Edwards on Bills and Notes*, 316-324, 330-336.

(1) NOTE 709.—*Heath v. Sansom & Evans*, 2 Barn. & Adol. 291.

The practice now is, for the plaintiff to begin by merely proving a *prima facie* case, and then if the defendant should succeed in showing that he lost the bill, or received no value, the plaintiff is allowed, in answer to the defendant's evidence, to go into full proof of the circumstances under which he holds the bill. *Chitty on Bills*, 638, and note c. If the defendant can make out a strong case of fraud or want of consideration against the plaintiff, sufficient to establish a defence, it does not then seem necessary in the Court of King's Bench to give to plaintiff any notice to prove the consideration, though in the Court of Bankruptcy, it seems in all cases necessary. *Id.*

The action on a promissory note must be brought in the name of the holder, or by his privity or consent, or by some person acting for him, or in his behalf. The suit should be authorized by a party having a legal interest in the note. *Bradford v. Bucknam*, 3 Fairf. R. 15. A general owner of the note may sue, though the note has been pledged at the time of the commencement of the action, provided it is redeemed, so that the plaintiff can produce it at the trial. *Fisher v. Bradford*, 7 Greenl. 28. For it is sufficient, if consent be obtained subsequent to the suing of the action. *Marr v. Plummer*, 3 Greenl. 73; *Stone v. Butt*, 2 Dowl. P. C. 335; 2 C. & M. 416; *Dobbs v. Humphrey*, 10 Bing. 446. *Prima facie*, the holder must be taken to be the owner; the defendant must show that he is not. Where there is no suspicion as to the original making of the bill, nor as to the mode in which it is obtained from the original parties, it is not sufficient to show merely a suspicion of usury; the usury itself must be proved. *Bassett v. Dodgin*, 10 Bing. 40.

A suit may be brought in the name of a person who has no interest in it; and the defendant cannot defend himself by showing that the nominal plaintiff has no interest, provided the suit is for the benefit, and by the direction of the owner. *Gage v. Kendall*, 15 Wend. 640; *Waggoner v. Colvin*, 11 Id. 27.

(2) NOTE 710.—(Under the present system of pleadings in this state and in England, it is not necessary to give any special notice, since the pleadings themselves show what the issue is, presented for trial.)

Defendant must, in the first instance, show circumstances of suspicion which require the plaintiff to make out a *bona fide* title. *Conroy v. Warren*, 3 J. Cas. 259. Such as after the note was

want of proof of consideration.(1) And no notice is necessary, where the plaintiff sues as a *bona fide holder* of a note tainted with usury, in which case the onus is upon the plaintiff to show that he comes within the description in the statute.(2) If the plaintiff, in the first instance, attempts

indorsed, the maker delivered it to a third person, to get it discounted at the bank, who, on the contrary, put it into the hands of a broker. *Woodhull v. Holmes*, 10 John. R. 231. Where a note was indorsed overdue in such a year, and the maker has assigned his property to trustees for the benefit of his creditors, on the 16th of January, in that year, it will be presumed that the purchase was after the assignment. *Johnson v. Bloodgood*, 2 Cai. Ca. in Error, 302; S. C., 1 J. Cas. 51; *Anderson v. Van Alen*, 12 John. R. 343.

* * But the payee of the note, though not a party to the transaction in which it is given, is presumed to know the circumstances under which it was given, and takes it subject to the maker's equities. *Nelson v. Cowing*, 6 Hill, 337. * *

It seems that a note, paid on or after the day of payment, ceases to be negotiable; and the maker may avail himself of such payment against a subsequent indorsee. *Hemmenway v. Stone*, 7 Mass. R. 58; *Clark v. Leach*, 10 Id. 51; *Minchin v. Moore*, 11 Id. 90; *Flint v. Clark*, 12 John. R. 374; *White v. Kibbling*, 11 Id. 128. Payment before a *bona fide* indorsement cannot affect the indorsee, though one case seems *contra*. *Webster v. Lee*, 5 Mass. R. 334. But see *Baker v. Wheaton*, 5 Id. 512. It is clear, that a payment subsequent to the indorsement, cannot affect the title of the indorsee. *Nightingale v. Withington*, 15 Mass. R. 272.

(1) NOTE 711.—An indorsement on the back of a promissory note, making its payment depend on a contingency, does not affect its negotiability; its only effect is to give notice of the consideration to subsequent holders. *Tappan v. Ely*, 15 Wend. 362. * * In England, a condition indorsed upon a note, is deemed a part of the note. And see *Barnard v. Cushing*, 4 Metcalf, 230; *Shaw v. Methodist E. Society*, 8 Metcalf, 223. * * In a suit on such note by a subsequent holder, the maker may avail himself of any defence which he could set up against the payee. *Id.*; *Sanders v. Bacon*, 8 John. R. 485. * * A *guaranty of payment*, indorsed upon the back of a note, has been held to be a promissory note, and negotiable. *Kitchell v. Burns*, 24 Wend. 456; *Manrow v. Durham*, 3 Hill, 584; *Prosser v. Luqueer*, in error, Id. 420; *Leggett v. Raymond*, 6 Hill, 639. But a guaranty of the *collection* of a note, is not itself a note, and is void by the Statute of Frauds, if it do not express a consideration. 5 Hill, 145. If the guaranty of payment is made cotemporaneously with the note, a consideration will be presumed; if not, and it is attacked on that ground, a consideration must be proved. * * (But see 4 Selden, 201.)

(2) *Wyatt v. Campbell*, 2 Ry. & Mo. 80.

NOTE 712.—Where a note is declared void by statute when the consideration is usurious, it will be void in the hands of an innocent indorsee. *Bridge v. Hubbard*, 15 Mass. R. 96; *Lowe et al. v. Walker*, Doug. 736; * * *Rockwell v. Charles*, 2 Hill, 499; *Vallett v. Parker*, 6 Wendell, 615. But the payee will be liable upon his indorsement, to a *bona fide* holder, without notice, for his indorsement is a new contract. *McKnight v. Wheeler*, 6 Hill, 492. * * At common law, the promisor cannot give in evidence against an innocent indorsee, who came honestly by the note, without any reason to suspect that it was not good, any illegality in the consideration, or fraud in obtaining it, or a subsequent payment. *Ayer v. Hutchins et al.*, 4 Mass. R. 370; *Churchill v. Suter*, 4 Id. 161. Even a usurious transaction between subsequent parties will not avoid the note (*Munn v. The Commission Co.*, 15 John. R. 44), if not in the first instance employed with a view to a usurious transaction. *Jones v. Hake*, 2 John. Cas. 60; 3 Id. 65, 206; 4 Mass. R. 161; 6 Id. 393; 6 Munf. 433; 1 Virg. R. 42; 10 Mass. R. 121. Where executors executed a note and delivered the same to arbitrators who were to indorse their award thereon; held, that in action on such note, the plaintiff was bound to show affirmatively, that the defendants had assets; for a promise by an executor to pay, is not binding, unless he has assets. *Schoonmaker v. Roosa*, 17 John R. 301. See, also, *Ten Eyck et al. v. Vanderpool*, 8 Id. 120.

If a note is negotiated before due, defendant cannot show illegality of consideration against

to prove the consideration, it seems that he cannot adduce further evidence in reply.(1)

Having premised these general observations respecting the requisite evidence in actions upon bills of exchange and promissory notes, it is now proposed to treat of the evidence in actions by particular parties; and in the first place of the evidence where the liability of the defendant arises from his *direct* undertaking, as where he is the maker of a note, or acceptor of a bill; and herein,

Proof of making or accepting.

1. Of the evidence in actions against the maker of a promissory note, and acceptor of a bill of exchange by the payee.

The plaintiff will have to prove the handwriting of the person whose name appears as the maker of the note or acceptor of the bill, and that this person is the defendant. Some proof of the identity of the person is clearly necessary; and it would not be sufficient merely to prove, that a person calling himself by such a name signed the instrument.(2) If the signature is that of an agent, his authority as well as his handwriting must be proved;(3) and if the authority is created by a power of attorney,

an innocent indorsee, unless in cases where the note is declared void by statute. *Vallett et al. v. Parker*, 6 Wend. 615. * * And see *Nelson v. Cowing*, 6 Hill, 337. * *

Where there is an entire promise, including something void by a statute, the plaintiff cannot separate it, and reject or waive the part of the promise which is within, and recover for that which is without the statute. *Chater v. Becker*, 7 T. R. 200; *Loomis v. Newhall*, 15 Pick. 159. Thus, defendant undertook to pay ten shillings in a pound for the debt of one Harris, who was insolvent, and also certain expenses which the plaintiff had sustained in procuring meeting of creditors, &c., if the plaintiff would not prosecute the commission of bankruptcy; to which he agreed. The suit was for the expenses. But the court held, that, as the promise was entire, and one part of it, viz: the engaging to pay ten shillings in a pound for the debt of H., being void by the Statute of Frauds, the plaintiff could not recover for the other part of it; that it was an indivisible contract, and the plaintiff could not recover on any part of it, as the statute made some part void.

(1) *Browne v. Murray*, 1 Ry. & Mo. 254.

NOTE 713.—* * It rests in the sound discretion of the court, whether a party shall be permitted to produce cumulative evidence in reply; and the exercise of such a discretion is not subject to review. *Bartheleny v. The People*, 2 Hill, 248; *Rapelye v. Prince*, 4 Hill, 119. * *

(2) *Memot v. Bates*, Bull. N. P. 171; *Middleton v. Sandford*, 4 Camp. 34; *Parkins v. Hawkshaw*, 2 Stark. N. P. C. 239. Actions on bond. And see *Nelson v. Whittall*, 1 Barn. & Ald. 19.

(3) *Heys v. Hesselstine*, 2 Campb. 604; *Hemsley v. Loader*, 2 Campb. 450; *Johnson v. Mason*, 1 Esp. C. 89.

NOTE 714.—It is a rule, that the agency itself cannot be proved by the declarations of the agent without oath, and in the absence of the party to be affected by them. *Clark v. Baker*, 2 Whart. R. 340. Statements made by the agent, not in the exercise of his authority, or before it originated, or after it has ceased, are no more than those of a stranger, and are not admissible to affect the principal. *Id.*; 1 New York Dig. pp. 446, 447.

(The appointment to act as agent must be shown, in order to charge the principal; for it is the authority so given that enables the agent to do the act. *Page v. Lathrop*, 20 Mis. (5 Bennett) 589; *May v. Kelly*, 27 Ala. 497.)

the original power ought to be produced as the best evidence of his appointment.(1)

Where there are several signatures, they must be all proved,(2) unless the party are connected in partnership, in which case an acceptance by one of the firm, upon whom a bill is drawn, will bind the rest. In that case, therefore, it will be sufficient to prove the partnership, and that one of the firm accepted.(3)

Attesting witness.

If the signature is attested by a subscribing witness, that witness must be called to prove the signature; or if his attendance can be properly dispensed with, his handwriting must be proved.(4) Proof of the handwrit-

(1) *Johnson v. Mason*, 1 Esp. C. 89. As to declarations made by agents, and the proof of their agency, see Vol. II.

(2) *Gray v. Palmer and another*, 1 Esp. Rep. 135; per Lawrence, J., in *Sheriff v. Wilkes*, 1 East, 52.

(3) *Mason v. Rumsey*, 1 Camp. 384; *Lord Galway v. Matthews*, 1 Campb. 403; *Ridley v. Taylor*, 13 East, 175; *Pinkney v. Hall*, 1 Salk. 126.

NOTE 715.—It is different in New York. The separate creditor who has obtained the partnership paper for the private debt of one of the partners, is *there* required to show the assent of the whole firm to be bound. *Dob v. Halsey*, 16 John. R. 34, 38, 39, and cases cited. The rule prohibiting partnership security from being pledged to third persons, without the consent of all the partners, should be strictly enforced. *Bank of Rochester v. Bowen et al.*, 7 Wend. 158. A joint and subsisting indebtedness in all the defendants must be shown. *Id. Robertson v. Smith*, 18 John. R. 459.

Where a note or other security is given in the name of the firm by *one partner*, for his private debt, or in a transaction unconnected with the partnership business, which is the same thing, and known to be so by the person taking it, the other partners are not bound, unless they have consented. *Gansevoort v. Williams*, 14 Wend. 138, and cases cited. *Prima facie*, the execution of the bill or note in the name of the firm by one partner, binds the whole. The burden, therefore, of proving a presumptive want of authority, and, of course, fraud, for that necessarily follows, lies upon the copartners. *Id.*; 11 John. R. 544.

The fact of the paper of the firm being given out of the partnership business by *one member*, is presumptive evidence of want of authority to bind the *other members* of the firm; and if the person taking it knows the fact at the time, he is chargeable with notice of want of authority, and guilty of concurring in an attempted fraud upon the other partners. *Gansevoort v. Williams, supra*.

Where upon the renewal of an accommodation note, the borrower presents to his indorser for signature a note to which he has affixed the name of a *firm*, of which he has recently become a member, as *makers*, the indorser is chargeable with notice that the note is given for the *individual debt* of the borrower, and in case of the dishonor of the note, cannot enforce payment against the other members of the firm. *Id.* * * As to the burden of proof, where the firm name is used out of the firm business, see 3 Kent (6th ed.), 42 and n.; Chitty on Bills (11th Am. ed.), 47 and notes 1, 2; Colyer on Partn. (Perkin's ed.) § 496. And see the numerous authorities on the point collected, in 1 Am. Lead. Cases, 259—304. * *

(4) NOTE 716.—See Vol. I, and notes, as to the proof of deeds, &c.

The rule has been relaxed as to the proof of instruments not under seal, or at least in regard to negotiable paper. The confession of a party that he gave the note, is as high proof as that derived from a subscribing witness. *Henry v. Bishop*, 2 Wend. 575; *Fox et al. v. Reil*, 3 John. R. 477; 13 Id. 75; *Hall v. Phelps*, 2 Id. 451. It seems, however, that great strictness and certainty will be required in the secondary proof. *Shaver v. Ehle*, 16 John. R. 201. In *Stubby v.*

ing of the attesting witness establishes the fact that some person assuming the name and description which the instrument purports to bear, executed it; but as it does not establish the identity of the person, some further proof seems requisite for that purpose.(1) The practice, however, has been not to require such proof.(2)

Admission.

An admission of the signature(3) dispenses with the proof of it, where the instrument is unattested. Such an admission is receivable in evidence, though made in the course of a treaty for settling the cause and under the faith of a compromise,(4) as it is a fact peculiarly within the defendant's knowledge, and with respect to which he cannot be supposed to have made an unfounded concession; and the admission may be proved by an arbitrator, before whom it is made in the course of a reference.(5) Pay-

Champlin (4 John. R. 461), nothing more was required than proof of the handwriting of the attesting witness. In Heckert v. Haine (6 Binn. 16), held, that if the question be whether a receipt to which there is a subscribing witness was given, the witness must be called.

A joint and several promissory note was signed by S. and afterwards by defendant, as surety for S. There was a subscribing witness to S.'s signature. Defendant being sued (alone) on the note, pleaded the Statute of Limitations; and at the trial it was proved, to take the case out of the statute, that a person named S. had made payments on the note. Evidence, but not that of the subscribing witness, was offered to show that the name of S. was the handwriting of the party who made the payments. Held, that this could not be proved without calling on the subscribing witness, and that without such proof there was no *prima facie* case in answer to the plea. Wyld v. Porter, 1 Adol. & El. 742.

If the party has neglected nothing which afforded a reasonable hope of procuring the testimony of the subscribing witnesses, who are supposed to know the minutest particulars of the act of execution, the confession of the party that he executed the paper, is not deemed secondary to evidence of handwriting. Conrad v. Farrow, 5 Watts' R. 536.

Where an attesting witness could not be found after sufficient inquiry, held, that evidence of his handwriting was admissible, although a letter not disclosing his retreat, had been received from him a few days before the trial. Morgan v. Morgan, 9 Binn. 350. It is proper to observe, that the action was debt on a bond.

(1) See Nelson v. Whittall, 1 Barn. & Ald. 19.

(2) Page v. Mann and another, 2 Ry. & Mo. 79.

(3) NOTE 717.—*Vide* Mauri v. Heffernan, 13 John. R. 58. The defendant, notwithstanding his acknowledgment, may introduce evidence to prove that the signature is not genuine. Hall et al. v. Huse, 10 Mass. Rep. 39; Salem Bank v. Gloucester Bank, 17 Id. 1.

The confession of a party that he gave the note is as high proof as that derived from a subscribing witness. Henry v. Bishop, 2 Wend. 575; Hall v. Phelps, 2 John. R. 451.

(Where the instrument is not required by law to be attested, the attesting witness need not, under a recent English statute, be called; the execution may be proved as though there were no subscribing witness. 17 & 18 Vict. c. 125, § 26.)

(4) Walldridge v. Kennison, 1 Esp. N. P. C. 143; Bay. on Bills, p. 379 (4th ed.).

NOTE 718.—An offer of a specific sum by way of compromise, is admissible unless accompanied with a caution that the offer is confidential; it is sufficient *prima facie* evidence. Wallace v. Small, 1 Mood. & Malk. 446. The admission of a particular fact, must be independent of an offer to pay. Gerrish v. Sweetser, 4 Pick. 374.

(5) Gregory v. Howard, 3 Esp. C. 113. In Holt v. Squire (1 Ry. & Mo. 282), an admission was unintentionally contained in a notice to produce papers, describing a bill as accepted.

ment of money into court generally on the whole declaration is also an admission of the defendant's signature.(1) So, an offer from the defendant to the plaintiff, after a note has become due, to give another note instead of it, is an admission of the plaintiff's title.(2) And a promise to pay, or payment of part of the money due upon a bill, or asking time for payment, will dispense with the necessity of proving the signature to an acceptance.(3)

An admission by one of several acceptors, that he accepted, is evidence against him, not against the others.(4) And where one of the makers of a note admitted his handwriting by pleading a judgment recovered, it was held that the handwriting of the other makers ought nevertheless to be proved.(5) Where, indeed, the defendants are partners, an admission by one of them (though not evidence of the partnership against the others who appear and defend) will be good evidence of his acceptance as against the whole aggregate body.(6)

Date of acceptance.

Where a bill was payable a certain time after sight, and the defendant's signature as acceptor was proved, but the date of the acceptance over his name was in a different handwriting, and an objection was taken, that it did not appear when the bill was accepted, or whether it was due before the commencement of the action, Lord Ellenborough left it to the jury to presume, in the absence of all proof to the contrary, that the date of the acceptance was written, with the privity of the defendant, at the time of accepting the bill.(7)

(1) See Vol. I. Chap. 7, Sect. 10.

(2) *Bosnquet v. Anderson*, 6 Esp. N. P. C. 43.

(3) *Hemsley v. Loader*, 2 Campb. 450; *Jones v. Morgan*, 2 Campb. 474; *Vaughan v. Fuller*, 2 Str. 1246.

(4) See *Gray v. Palmer and Hodgson*, 1 Esp. C. 135.

(5) 1 Esp. 135.

(6) *Hodenpyl v. Vingerhood* and another, MS. case; *Chitty on Bills*, 361. And with respect to the effect of admissions made by partners, see Vol. I, Chap. 7, Sect. 10. As to the effect of an admission by defendant's attorney, see Vol. I, Chap. 7, Sect. 10; and as to an admission by his agent, Vol. I, Chap. 7, Sect. 10.

NOTE 719.—*Parker v. Merrill et al.*, 6 Greenl. 41; *Reimsdyk v. Kane*, 1 Gall. 635.

The admission of one partner, made after the partnership had ceased, is not evidence to charge the other, in any transaction which has occurred since their separation; but the power of partners with respect to the rights created pending the partnership, remains after dissolution. *Wood et al. v. Braddick*, 1 Taunt. 103; *Cady v. Shepherd*, 11 Pick. 407; *Lacy v. McNeale*, 7 Dowl. & Ryl. 7; *Walden v. Shelburne et al.*, 15 John. R. 409, *Spencer, Ch. J., contra.*

(The dissolution revokes the implied authority of each member of the firm to bind the concern. *National Bank v. Norton*, 1 Hill N. Y. R. 572; *Mitchell v. Ostram*, 2 Id. 520. But the dissolution should be made known to customers by notice, and to the public by publishing the fact. 6 Barb. 244; *Davis v. Allen*, 3 Comst. 172.)

(7) *Glossop v. Jacob*, 4 Campb. 227. The witnesses in this case stated, that, when a bill, payable at sight, is to be accepted, it is usual for a clerk to write upon it the word "accepted," with the date, and that then the drawee subscribes his own name.

Collateral acceptance.

In the case of foreign bills, it will be sufficient to give evidence of a parol acceptance, or of promise, by letter, to accept; (1) at least, if the bill is existing at the time, and is made on an executed consideration, or if any person is thereby influenced to take or retain the bill. (2) Where a verbal promise to accept was made by a clerk at a banking-house it was held necessary to give evidence of his authority. (3)

(1) The law is otherwise as to inland bills made since the 1st of August, 1821, by stat. 1 & 2 G. IV, c. 78, § 2.

NOTE 720.—By the Revised Statutes (1 R. S. 768, §§ 6, 7, 8, 9), an acceptance of a bill of exchange is void, unless it be in writing; before the operation of these statutes, a *parol* acceptance was valid of a bill already *drawn*; it was otherwise in respect to a bill to be *drawn in future*, where the parol agreement was made with the drawer of the bill, even in the hands of an indorsee, between whom and the drawer no communication had passed, and who had not taken the bill upon the faith of any such promise. *Ontario Bank v. Worthington*, 12 Wend. 593.

* * An order not payable on its face in money and drawn on a particular fund, is not a bill of exchange within 1 N. Y. R. S. 757, § 6 (2d ed.), requiring a *written* acceptance; so held in respect of an order by a landlord on his tenant to pay the *rents* accruing during a specified period; and this, though it appeared on inquiry *aliunde*, that the rents were payable in money. Such an order, though there be no formal acceptance, written or oral, operates an assignment of the fund, and, after notice, the drawee must pay according to the order, though forbidden to do so by the drawer. *Morton v. Naylor*, 1 Hill, 583. See the reporter's note *a*, Id. p. 585; also *Quin v. Hanford*, Id. 82; 2 Edw. Ch. R. 430. But where an order is for the payment of a specified sum, absolutely and at all events, it is a bill of exchange, and the drawer cannot be charged upon an oral promise to pay, though he have money of the drawee in his hands, and ought in justice to have accepted. Otherwise, if the order had not amounted to a bill of exchange. *Luff v. Pope*, 5 Hill, 413; S. C., in error, 7 Hill, 577. * *

A bill accepted by an infant, may be ratified by him on coming of age; and a letter purporting by its date to have been written after he came of age, will, *prima facie*, be taken to have been written and issued at the time when it bears date; and the bill not being then due, it will support a count on a promise to pay according to the tenor and effect of the bill. *Hunt v. Massey*, 4 Barn. & Ald. 902. It lies on the defendant to show that it was not then written.

* * By the French law an acceptance must be in writing. Story on Bills, § 242. By the English law an acceptance may be verbal on foreign bills, but on inland bills must be in writing on the bill. Id. And see *Chitty on Bills* (11th Am. ed.), p. 289. A drawer of a bill may charge himself as acceptor, by writing his name over the face of the bill. *Spear v. Pratt*, 2 Hill, 582. In New York, if the acceptance is written on a separate paper, it does not bind the acceptor, unless the fact of acceptance is disclosed to the person taking the bill, and he receive it for a valuable consideration. *Bank of Michigan v. Ely*, 17 Wend. 508.

(2) Bayley on Bills, 4to ed. 143, *et seq.*

NOTE 721.—*Grant et al. v. Shaw*, 16 Mass. R. 341. The drawee, after protest for non-payment, promised verbally to pay the indorsees out of the funds in his hands, if they would send and get the bill; it having been returned to Philadelphia. A promise to accept, even after a protest for non-acceptance, is binding; and a promise to accept, made after the bill becomes due according to its tenor, amounts to a promise to pay immediately. Id.

(3) *Sayer v. Kitchen*, 1 Esp. R. 209.

NOTE 722.—*Neal v. Turton*, 4 Bing. 149. If a bill be accepted by a person acting as agent, per procuration, for a supposed principal, the party receiving it must ascertain the extent of the supposed agent's authority, and, if he neglect to do so, he will have no claim on the supposed principal, if it should turn out that the assumed agent had no adequate authority. *Attwood v. Munnings*, 7 Barn. & Cress. 278; *East India Co. v. Tritton*, 3 Id. 280. And it is said, also, that the agent must accept the bill in the name of the principal. *Pontz v. Stanton*, 10 Wend. 271.

An acceptance, what is.

To prove a written acceptance by the drawee, his name need not appear; and any words written by him upon the bill, not putting a direct negative upon its request, as "accepted," "presented," "seen," the day of the month, or a direction to a third person to pay it, is *prima facie* a complete acceptance.(1) In cases not within the statute 1 & 2 Geo. IV, it must depend on the intention of the parties what words shall amount to an acceptance or promise to accept.(2) Thus, it has been held, that a promise that a bill then drawn "shall meet with due honor," or "that the holder might rest satisfied as to payment," was an acceptance;(3) but

A person accepting a bill by procuration, but without authority, is guilty of a fraud in law. *Polhill v. Walter*, 2 Barn. & Adol. 114. Proof of the attorney's handwriting to a notice to produce, in an action on the bill, describing the bill as accepted by the defendant, will be *prima facie* evidence of acceptance. *Holt v. Squire*, 1 Ryl. & Mood. 282.

See *post*, note 742. It should seem, that, where indorsement only stated the initial of the name of the principal, thus: "Per *pro.* H. Pickersgill, John Pickersgill, and the declaration stated that *Hannah* Pickersgill indorsed, not only her authority, but her Christian name must be proved." Per Bailey, in *Jones v. Turnour*, 4 Car. & Payne, 206. And although, in that case, it is supposed that Lord Tenterden thought at Nisi Prius, "that as the defendant's acceptance admitted the authority to *draw* by procuration in that particular form, and that indorsement being in the same form and handwriting, it might be taken to have been made with the same authority;" yet it further appeared that *other bills* had been previously drawn, accepted and indorsed in like manner, and the decision turned upon other particular circumstances, and must not be considered as a precedent for other cases. And where, in an action by indorsee against acceptor, the witness proved that neither the drawing nor indorsement was in the handwriting of the person whose they purported to be, but that the defendant had acknowledged the acceptance to be his; and it was contended, that, as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought, upon inspection of the bill, that the drawing and indorsement were of the same handwriting; yet it was held, by Tindal, Ch. J., that it was necessary that some proof should be given as to whose the handwriting was, and, for want of it, the plaintiff was nonsuited. *Allport v. Meek*, 4 Car. & Payne, 267; *Chit. on Bills*, 630.

(1) *Bayley on Bills*, 141 (4th ed.); *Chitty on Bills* (7th ed.) 174.

(2) *Rees and another v. Warwick*, 2 Stark. N. P. C. 411; 2 Barn. & Ald. 113. Whether an acceptance is conditional or absolute, is a matter of law. *Sproat v. Matthews*, 1 Term. Rep. 182.

(3) *Clark v. Cock*, 4 East's R. 57; *Pierson v. Dunlop*, Cowp. 571; *Wilkinson v. Lutwidge*, 1 Str. 649; *Wynne v. Raikes*, 5 East, 514. And see *Fairlie and others v. Herring and others*, 3 Bing. R. 625.

NOTE 723.—"Does a promise to accept a bill amount to an acceptance, to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?" The chief justice's answer is thus: "It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time, *before* or *after* the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." *Coolidge v. Payson*, 2 Wheat. R. 66, Marshall, C. J. This decision is considered as settling the law in this country. *Ogden et al. v. Gillingham et al.*, 1 Bald. C. C. R. 38. In this case, the agent who drew the bill held in his possession a full and unquestioned power of attorney, and had acted under it for two years. He was known as the agent of the principal, both by the acceptor of the bill and the person in whose favor it was drawn, to whom it was delivered as so much cash in payment of a *bona fide* debt due to him from the principal. The agent

an answer in reply to a letter of advice from the drawer desiring that a bill may be honored, that the bill "shall have attention," will not in general, amount to an acceptance,(1) unless, by the course of dealing between the parties, these words are considered to have that effect.(2) And, in like manner, an answer by the drawee when a bill was called for, "there is your bill, it is all right," has been held not to amount to an acceptance.(3) But it seems even that an express refusal to accept, when con-

who drew the bill, and the payee, were both resident in the city of New York, where the bill was drawn, and the defendants, on whom it was drawn, resided in Philadelphia, having in their hands the funds belonging to the principal on which the draft was made. At the time it was drawn by the agent and delivered to the plaintiffs, neither of them had any notice of the bankruptcy of the principal, which took place in England before the bill was drawn; held, that the bankruptcy of the principal did not revoke the power of the agent to draw the bill, although defendants gave in evidence, attachments laid on the property of the principal in their hands. *Hopkinson, J.*, said: "It is the unquestionable law of this country, derived both from the Supreme Courts of the United States and the Supreme Court of this state, that the bankrupt law of a foreign country is incapable of operating as a legal transfer of property in the United States; that an assignment by law has no legal operation out of the territory of the law maker; and, in the case decided in Pennsylvania, an American creditor attaching in the United States, the property of a bankrupt debtor, who had become bankrupt in England before the attachment was issued and laid, was preferred to the assignees of the commissioners."

In *Coolidge v. Payson* (*supra*), the chief justice examined the English decisions, beginning with *Pillans v. Van Mierop* (3 Burr. 1663); and it was considered that there was no essential difference between that case and the one before the Supreme Court. Chief Justice Thompson, in delivering the opinion of the court, in *Goodrich v. Gordon* (15 John. R. 12), says: "It may fairly be inferred from the observations of the late chief justice, in *M'Evers v. Mason* (10 John. 214), that the rule, as laid down in *Pierson v. Dunlop* (Cowp. 573), is approved by this court. It is there said, every one will agree, that an acceptance by a collateral paper may be good; and if that paper be shown to a third person, so as to excite credit, and induce him to advance money on the bill, such third person ought not to suffer by the confidence excited. Whether these observations were intended to apply to collateral acceptances of a bill already drawn, or to be afterwards drawn, does not appear. But I cannot see any sound principle upon which the cases can be distinguished." In *Greele v. Parker* (5 Wend. 414; S. C., 2 Id. 545), the doctrine of these cases was recognized; and both the Supreme Court and Court of Errors held, that though the letter containing the promise to accept, was thus, "I have no objections to accepting at three and four months for \$2,500, on the terms you propose," and the bill drawn was for \$2,500, payable four months after date, which A., on being shown the letter, indorsed for the accommodation of the drawer, yet, the indorser was entitled to recover on such acceptance, without showing that the terms proposed, adverted to in the letter, or a compliance with them. A promise to accept is the same as an actual acceptance, where the promise is made to the payee of the bill; or made to the drawer of the bill, if communicated to the payee, and by the circumstances proved, he may be considered as advancing his money upon, relying on that promise. *Storer v. Logan*, 9 Mass. Rep. 55.

* * A promise to accept an existing bill, specifically described, is a good acceptance; but whether a promise to accept a non-existing bill, to be drawn at a future day, is a good acceptance, is a point not universally agreed. 2 Gr. Ev. § 161, note 2. In the American courts it is held good; in England it is not. *Chitty on Bills* (11th Am. ed.) 297; *Story on Bills*, § 249; *Bank of Ireland v. Archer*, 11 M. & W. 383. * * (*Edwards on Bills and Notes*, 407.)

(1) *Rees v. Warwick*, 2 Barn. & Ald. 113.

(2) *Bayley on Bills*, 147 (4th ed.)

(3) *Powell v. Jones*, 1 Esp. C. 17.

veyed in a manner so as to act as a surprise upon a party, and to create a belief that a bill has been accepted, may be deemed a valid acceptance.(1)

In cases to which the statute of the 1 & 2 G. IV. does not apply, the fact of the drawee keeping a bill presented for acceptance, may amount to an acceptance;(2) and the destruction of the instrument by the drawee may, in some cases, be considered as having that effect;(3) but it is doubtful whether, in a case where the holder sends a bill by post to the drawee, and thereby makes him his agent, any neglect by the drawee will have the effect of rendering him liable as acceptor of the bill.(4) By the custom of London, a banker will not render himself responsible by retaining a check drawn on him, provided he return it at any time before five o'clock in the evening of the day on which it is drawn.(5)

An acceptance may be struck out, before a bill left for acceptance is called for, and, in that case, the drawee is not compellable to show in evidence the circumstances which occasioned the cancellation.(6) A person may be liable upon an acceptance which is forged, if his conduct towards the holder amounts to an adoption of it.(7)

(1) Bayley on Bills, 142 (4th ed.)

(2) Bayley on Bills, 149.

(3) See *Jenne v. Ward*, 1 Barn. & Ald. 653.

(4) See *Mason and others v. Barff*, 2 Barn. & Ald. 26; Bayley on Bills, 151 (4th ed.)

(5) *Fernandez v. Glynn*, 1 Campb. N. P. C. 426, u. The transaction was between bankers.

(6) *Cox v. Troy*, 6 B. & Ald. 474. And see *Fernandez v. Glynn*, 1 Campb. 426, u.

(7) *Barber v. Gingell*, 3 Esp. C. 60.

NOTE 724.—*Phillips v. Ford*, 9 Pick. 39. In paying a note of hand, a counterfeit bank bill was passed: held, that the payee might recover the amount against the payor in an action for money had and received. *Young v. Adams*, 6 Mass. R. 182. "The law seems to be well settled, that where a bill of exchange to which the drawer's name is forged, has been paid by the drawee, it is too late to question the handwriting, and the loss must therefore fall upon him. The effect of an acceptance of a forged bill is not quite so clear. Some of the authorities decide that the acceptor is bound, because his acceptance gives a credit to the bill, and as it is very common to negotiate bills after acceptance, and indeed to procure their acceptance for the purpose of negotiating them, the reason of this rule may include the greatest number of cases which occur. But the modern cases certainly notice another reason for the liability which we think has much good sense in it; namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself. *Shippen*, Ch. J., 1 Binn. 36.

Where bank bills are received in payment, and at the time of such payment the bank has stopped payment, although the failure is not known at the time, the loss falls upon the party paying, and not upon the party receiving the bills. *Lightbody v. Ontario Bank*, 11 Weud. 9; * * S. C. in error, 13 Id. 101 * * The case of *Markle v. Hatfield* (2 John. R. 455) arose upon the payment of a forged bank note, upon a purchase of cattle; and it was held, no payment. The court cite *Stedman v. Gooch* (1 Esp. 3), in which notes were taken for goods sold and received in payment, but proved to be of no value; and held, that a suit might be sustained for the original demand. However, cases of this description depend upon the understanding of the parties at the time when the note or bill was delivered. *Whitbeck v. Van Ness*, 11 John. R. 409. It clearly is not payment when delivered upon an antecedent debt. *Lightbody v. Ontario Bank*, *supra*.

Conditional acceptance.

Every condition precedent contained in the acceptance, or a legal excuse for the non-performance of it must be averred and proved.(1) In the case of *Rowe v. Young*, (2) it was decided, that where an acceptance made a bill payable at a particular place, it was strictly a conditional acceptance. To remedy the inconvenience arising from this decision, the statute 1 & 2 G. IV, c. 78, was passed, which enacts that an acceptance made payable at a banker's shall be deemed a general acceptance, unless accompanied with the words "and not elsewhere;" and in the construction of this statute, it has been held that it embraces every bill payable at a banker's or other place; and that there is no distinction between the case where the bill is

* * In *Taylor v. Todd* (6 Hill, 340), it was held, that payment in a counterfeit bank bill was a nullity, though both parties supposed it to be genuine; but the creditor having retained it beyond a reasonable time (viz. from May 5th to July 4th, 1842) before offering to return it, the debt was discharged. And *Bronson, J.* (p. 341) said, the rule is the same where, although the bill is genuine, the bank had broken before the payment was made, but the knowledge of that fact had not reached the place of payment. But see *Bayard v. Shunk*, 1 Watts & Serg. 92; *Scruggs v. Gass*, 8 Yerg. 175; *Camidge v. Allenby*, 6 Barn. & Cress. 373; 1 *Smith's Lead. Cases*, p. 255 to 256, in the *American note to Cumber v. Wane*. * *

(1) See *Swan v. Cox*, 1 Marshall's R. 176; *Bowes v. Howe*, 5 Taunt. 30.

NOTE 725.—*Ante*, note 723; *Washburn v. Cordis*, 15 Pick. 53; *Grant et al. v. Shaw*, 16 Mass. R. 341. A holder who has a right to an absolute acceptance, without which he might have treated the bill as dishonored; but having taken a special and conditional acceptance, he must abide by its terms. *Campbell v. Pettingell*, 7 Greenl. 126.

After a bill has been passed, the drawee gives a conditional acceptance in writing, to the drawer, which is shown to the holder, such holder cannot maintain an action upon the acceptance, not having taken the bill upon the faith of the acceptance. *Ontario Bank v. Worthington*, 12 Wend. 593. * * Where the plaintiff discounts the bill before acceptance, the acceptor may dispute his liability for want of a consideration; but a consideration will be presumed, and it lies upon the acceptor to negative every possible intendment. *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501; *Chitty on Bills* (11th Am. ed.) 35, and notes; *Id.* 80, and notes. * *

A. being arrested by the indorsee of some foreign bills of exchange drawn on him, and which he had previously refused to accept, said that he would have accepted them when presented, but that he had not the funds from France; and that when he had got the funds he would have paid them, but for some expressions of the indorsee, which he thought reflected on his honor; adding that he had told the clerk of the indorsee, that when he got the funds over from France the bills should be paid. Held, that this amounted to an acceptance by the defendant, and the funds having been received by him, that he was bound to pay the bills. *Mendizabel v. Machado*, 6 C. & P. 218.

An indorsement on the back of a note, has been held to be no part of the note; its only effect is to show the consideration, and operate as a notice to any person who might purchase the note. *Sanders v. Bacon*, 8 John. R. 485. Such indorsement making the payment dependent upon a contingency, does not affect its negotiability; but its effect is to enable the maker to avail himself of any defence in an action by an indorsee, which he might have set up, had the suit been in the name of the payee. *Tappan v. Ely*, 15 Wend. 362. In England it is different; there, the indorsement on the back is considered part of the note itself—that the note was conditional, and, therefore, not negotiable. *Id.* * * See *ante*, note 711. * *

(2) 2 *Brod. & Bing.* 165.

rendered so payable by the language of the drawer, and the case where it is rendered so payable by the language of the acceptor.(1)

Presentment.

When a bill within the meaning of the act of 1 & 2 G. IV, is made payable at a particular place, a presentment there must be averred and proved;(2) and the like proof is requisite in the case of a promissory note, where the place of payment is mentioned in the body of the instrument,(3) and not merely by way of memorandum in the margin or at the foot.(4)

(1) *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 533. And see further respecting conditional acceptances, under the head of Presentment.

NOTE 726.—The cases cited in the text have been since overruled in the Exchequer Chamber. Held, where a bill is drawn payable at a particular place, and the drawee accepts it payable at that place, in an action against the drawer, presentment to the acceptor at that place must be proved. *Gibb v. Mather et al.*, 8 Bing. 214. The statute has not in any manner altered the liability of drawers of bills of exchange; but is confined in its operations to acceptors alone. It gives the acceptor the power to protect himself by the use of restrictive words in his acceptance.

(2) See under preceding head, Conditional Acceptance.

(3) *Sanderson v. Bowes*, 14 East, 500; *Dickenson v. Bowes*, 16 East, 110. *Wild v. Rennards* (cited in note in 1 Campb. 425) seems to show that such a presentment is unnecessary; but, in this case, as it has been since explained (see 14 East, 501), and the place of payment appears to have been mentioned in a memorandum at the foot, and not in the body of the note.

(4) *Sanderson v. Judge*, 2 H. Black, 510; *Callaghan v. Aylett*, 3 Taunt. 398; 2 Camp. N. P. C. 551; *Price v. Mitchell*, 4 Campb. N. P. C. 201; *Exon v. Russell*, 4 Maule & Sel. 505.

NOTE 727.—Although a note is made payable at a place certain, it is not necessary for the plaintiff to prove a demand at such place. *Payson v. Whitcomb*, 15 Pick. 212; *Carley v. Vance*, 17 Mass. R. 389; *Wolcott v. Van Santvoord*, 17 John. R. 248; *Caldwell v. Cassidy*, 8 Cowen, 271; *U. States Bank v. Smith*, 11 Wheat. 171. It is incumbent on the defendant to show, by way of defence, that he was ready to pay at the time and place specified in the note. *Wilde, J.*, in *Payson v. Whitcomb*, *supra*.

And where a bill, drawn on a person at one place, and requiring him to pay in another place, has been protested for non-acceptance, and accepted *supra protest*, the presentment for payment should be made to the drawee at his residence, and not at the place where, if accepted, it would have been payable, and should, thereupon, be protested for non-payment by the original drawee, and then to give notice to the acceptor *supra protest*, and demand payment of him. *Mitchell v. Baring*.

NOTE 728.—Vide *post*, note 759.

Baldwin v. Farnsworth, et al., 1 Fairf. 414. Payment of the note in this case was "to be demanded at their (the promisor's) dwelling-houses in D." Payment was demanded of one, personally, in his own yard; and it appeared that a demand was made upon the other defendant also, at the same time and place; that he made no objection to the place or manner of the demand; and that he gave the plaintiff no notice that he was prepared to pay at his own dwelling-house; held, that the demand was sufficient.

If the note is made payable at a particular place, or at more than one place, it will be incumbent on the defendants to show that they had the money ready at such place, or at one of them. *Id.*; *Ruggles v. Patten*, 8 Mass. R. 480; *Foster v. Shark*, 4 John. R. 183; *Wolcott v. Van Santvoord*, 17 Id. 248. Chief Justice Spencer says, in result to *Bowes v. Howe* (5 Taunt. 30, cited in the text), "From such a doctrine I entirely dissent, and must think that the time and place of payment are merely modal, forming no essential part of the contract; that it is incumbent on the defendant, whether the payee was at the place at the time appointed or not, to show in his

But a memorandum as to the place of payment, even at the bottom of the note, may have the effect of a stipulation, if it appear to have been part of the note when the instrument was filled up by the maker; as, where the whole of the note was printed, except the names of the parties, the sum, and the date; and the words at the bottom designating the place of payment also printed.(1) Circumstances which would excuse the pre-

defence, that he was there, ready and willing to pay, and the payee did not come, &c.; that the consequence of the absence of the payee under such circumstances, unless he makes a subsequent special demand, and there be then a refusal, are, merely, that he must be content with receiving the sum originally payable, and if he sue, without having made a special demand, he loses all claim to damages and costs, and will himself be subject to them."

In *Berkshire Bank v. Jones* (6 Mass R. 524), where the note was made payable on a day and place certain; and the place was the Berkshire Bank; held, that as the plaintiffs held the note, which was made payable in their bank, and the indorsees being there ready to receive payment, no further demand on the promisor was necessary to charge the indorser. Parsons, C. J., says: "If the maker does not come to the bank, or direct the payment there, he has broken his promise; and no other notice to him is necessary. The doctrine is, that a demand in fact or in form, need not be made upon a note, which is payable on a day certain, and at a particular place. The rule is, that a demand must be made on the maker of the note, *on the day it falls due*. The exception is, that when the note is payable at a particular place, such demand need not be made, if the holder or any one for him is *at the place*, with the note, so that he may receive the money, and give up the note. *Woodbridge et al. v. Brigham et al.*, 13 Mass. R. 556; *Shaw v. Reed*, 12 Pick. 132; *U. S. Bank v. Smith*, 11 Wheat. R. 171; *Eldred v. Hawes*, 4 Conn. R. 465. In *Carley v. Vance* (17 Mass. R. 389), the plaintiff brought his action on a promissory note, in which the defendant had promised to pay him a sum of money at Mr. E. S.'s counting room, in Cross street, Boston; and omitted to aver a demand at the place of payment. A plea of funds in the hands of E. L., &c., was sustained; a demand was not a condition precedent; and that the defendant, if ready with his money, might plead it as a matter of defence with a *profert in curia*. * * See 3 Kent Com. 97, and note. * *

Although a note is made payable at a particular place, it has been held, that there is no necessity, as against the maker, to present the note at such place. *M'Nairy v. Bell*, 1 Yerg. R. 502; *Wolcott v. Van Santvoord*, 17 John. R. 248. In this case the action was against the acceptor. *Bank of Kentucky v. Hickey*, 4 Litt. 225.

In *Ogden et al. v. Dobbin et al.* (2 Hall, 118), it was held, that a note, payable at a particular place, must be presented for payment at that place, but when the note is in the bank at which it is made payable, at the time it falls due, in the hands of the cashier, who is authorized to receive; no other demand seems necessary. The place does not enter into the essence of the contract, unless the promise is to pay *on demand at that place*, and that, consequently, where the note is made payable at a particular place merely, no demand is necessary to be averred (*Caldwell v. Cassidy*, 8 Cowen, 271, and *Bowie v. Duvall*, 1 Gill & John. 175), that it is matter of defence on the part of the defendant, to show that he was in attendance to pay.

In the case of the *United States Bank v. Smith* (11 Wheat. 171), it is strongly doubted by the court, whether an averment and proof of a presentment at the place were necessary, in a suit against the maker of the note, though it is decided that they are, as against the indorser. *Bartlett v. Wills*, 4 Leigh's R. 114.

* * And see *Wallace v. McConnell*, 13 Peters, 136; *Story on Bills*, § 239; 3 Kent Comm. 97, and note; *Thompson v. Cook*, 2 M'Lean's R. 125. But in Louisiana, the English rule has been adopted, after full discussion. *Mellon v. Croghan*, 15 Martin, 423; 12 Louis. 455; 10 Robinson, 533. And the English rule was followed in Delaware, in *Bank of Washington v. Cooper*, 1 Harrington R. 10. * *

(1) *Tregothick v. Edwin*, 1 Stark. N. P. C. 468.

sentment, cannot be given in evidence under the general allegation of presentment.(1)

When necessary.

In an action by the payee against the maker of a promissory note, or the acceptor of a bill of exchange, it will not be necessary to prove a demand of payment on the part of the plaintiff, the action itself being a sufficient demand (2) If the acceptance is general, or a bill is accepted at a particular place, but not according to the act of 1 & 2 G. IV, a presentment there need not be proved, notwithstanding it may be alleged in the declaration.(3)

What sufficient.

If a note is made payable at a particular town, and the maker has no residence there, it will be sufficient for the plaintiff, in support of the allegation of a due presentment in the declaration, to prove a presentment at the banking-houses in the town.(4) If a note is made payable at two different places, the holder may present it at either place.(5) Where by the terms of a note, or of the acceptance of a bill, payment is to be made at a banker's, notice of dishonor there need not be given.(6)

(The common or money counts formerly inserted in the declaration, in actions of assumpsit, are not now in use; having been superseded in England, and very generally in this country, by a simpler and more direct form of pleading. The decisions, however, under the old forms of action may be advantageously consulted as a means of determining or defining the nature of bills of exchange and promissory notes.)

The common counts are inserted in the declaration for the purpose of obviating some possible defect in the special count, or to prevent a fatal variance between the description of the instrument in the special count, and the real contents of the instrument. Thus, if a bill or note is produced, but cannot be admitted in evidence on account of a defect in the stamp, the plaintiff may proceed on the common counts, and prove the

(1) *Leeson v. Pigot*, Bayley on Bills, 324.

(2) *Rumball v. Ball*, 10 Mod. 38; *Frampton v. Caulson*, 1 Wils. 33. See *Mackintosh v. Haydon*, 1 Ry. & Mo. 363, by Lord Tenterden, C. J.

(3) *Rhodes v. Gent*, 5 B. & Ald. 244; *Freeman v. Kennell*, Chitty on Bills, 402 (7th ed.)

(4) *Hardy v. Woodroffe*, 2 Stark. N. P. C. 319; Bayley on Bills, 324.

NOTE 729.—Where the bill when due was taken to the house where it was made payable, which was found closed, and the acceptor no longer residing there; held, that the bill was dishonored. *Hine v. Alleby*, 1 Nev. & Man. 433; *Putnam v. Sullivan*, 4 Mass. R. 45; *Widgery v. Monroe*, 6 Id. 449; *Stewart v. Eden*, 2 Caiues' R. 121; *Ogden v. Cowley*, 2 John. R. 270; *Williams v. Bank of U. S.*, 2 Peters' R. 100. * * See *post*, note 757, as to proof of presentment and demand. * * (See also 3 Denio R. 145; 2 Hill, 635; 2 Sand. 166; 5 Denio, 329.)

(5) *Beeching v. Gower*, Holt's N. P. C. 313.

(6) *Pearce v. Pembertley et al.*, 3 Campb. 261; *Treacher v. Hunter*, 4 B. & Ald. 413.

consideration for which it was given; (1) and, it has been held that he will be allowed to go into evidence of the consideration, where the bill or note has been destroyed or lost, provided it was not indorsed, or in such a state as to be used against the maker or acceptor. (2) Where the payee and drawer of a bill are the same person, a bill of exchange will be evidence, in an action brought by him against the acceptor, un-

(1) *Wilson v. Kennedy*, 1 Esp. C. 245; *Farr v. Price*, 1 East, 55; *Brown v. Watts*, 1 Taunt. 353; *Alves v. Hodson*, 7 Term R. 241; *Tyt v. Jones*, 1 East, 58, n. a. The consideration should be noticed in the particulars, and in the opening of the plaintiff's counsel. *Wade v. Beasley*, 4 Esp. C. 7; *Paterson v. Zachariah*, 1 Stark. C. 72.

NOTE 730.—Such an instrument cannot be read in evidence as a security; the bill or note not being on a proper stamp, cannot be looked at by the jury for the purpose of ascertaining the money due. *Jardine v. Payne*, 1 Barn. & Adol. 664. It is not evidence of the contract, or any part of it, in respect of which the plaintiff sues.

Though a note, discounted as security for money lent by the members of an association, contrary to the restraining act, be void, yet the contract of loan remains good; on which an action lies by the lender to recover it of the borrower. *Utica Insurance Co. v. Kip*, 8 Cowen, 20; *Utica Insurance Co. v. Scott*, 19 John. R. 1; S. C., 8 Cowen, 709. "The lending money is not declared to be void, and, therefore, wherever money has been lent, it may be recovered, although the security itself be void. *Id.* It seems, that the plaintiff may elect to give the note in evidence, either on the special or the common count. *Burdick v. Green*, 18 John. R. 14.

The plaintiff held certain cash notes against defendant, either as payee or indorsee, and having advanced other money, adding a sum for usurious interest, and received a note for the whole; and then indorsed the note "without recourse" to B., who sued it, but defendant avoided the note for usury; held, that the plaintiff, notwithstanding might recover the amount of the original notes, thus included in the usurious note; the usurious note not operating as a payment of the pre-existing debt. *Ramsdell v. Soule*, 12 Pick. 126. In such case, the indorsement transferred no legal interest in the notes; and consequently the promisee was entitled to maintain an action in his own name, as the legal holder of the original notes; and to recover upon the count for money had and received, the court saying it made no difference whether the notes were held by the plaintiff as a promisee or indorsee; the indorsement established a sufficient privity of contract between indorsee and maker, and constituted sufficient legal proof of money held by the maker to the use of the holder. *Id.* The case of *Mosher v. Allen* (16 Mass. R. 451), is distinguishable. There the legal interest passed by the indorsement, and the promisor expressly repudiated the action brought in his name by the indorsee. In an action by the indorsee, the note itself is evidence under the money counts. *Wilde v. Fisher*, 4 Pick. 421; *Pierce v. Crafts*, 12 John. R. 90.

A note payable to A. or B., cannot be declared on as a promissory note within the statute. If, however, it purports on its face to be *for value received*, the setting forth the note according to its terms, is a sufficient statement of consideration to entitle the plaintiff to recover as on a contract. Such note may be given in evidence under the money counts. *Walrad et al. v. Petrie et al.*, 4 Wend. 575. In *Jerome v. Whitney* (7 John. R. 321), the declaration set out a note payable in neat cattle, and purported on its face to be made for value received. The plaintiff averred a particular consideration, but on the trial did not prove it, and was nonsuited. "Had the plaintiff declared on the note, stating it to have been for value received, and had not set forth a special and particular consideration, the production and proof of the note would have been sufficient to put the defendant upon his defence; but having specified in what the value consisted, he was bound to prove the averment as laid." *Per Cur.* *Id.* The court, however, allowed the plaintiff to strike out the particular averment.

(2) *Rolt v. Watson*, 4 Bing. R. 237; *Champion v. Terry*, 3 Brod. & Bing. 295; *Dangerfield v. Wilby*, 4 Esp. C. 159; *Hadwin v. Mendisabil*, 2 Carr. & P. 20. *Vide ante*, p. 157.

der the count for money had and received,(1) or under the count upon an account stated.(2) But the presumption of evidence which the writing affords, has no application to the assumpsit for money paid by the payee or holder of a bill to the use of the acceptor.(3)

(1) *Thompson v. Morgan*, 3 Campb. 101; *Vere v. Lewis*, 3 Term R. 182.

NOTE 731.—*Smith v. Smith* (2 John. R. 235), *Saxton et al. v. Johnson* (10 Id. 418), where it was settled that a note not negotiable was admissible in evidence under the count for money had and received. So, where a counterfeit bill was paid in taking up a note made payable in foreign bills, held, that the plaintiff was entitled to recover the amount in an action for money had and received; defendant having refused to rectify the mistake, which on the discovery of it he was entitled to do, according to the tenor of the note, by paying a foreign bill. *Young v. Adams*, 6 Mass. R. 182. * * See *ante*, note 724. * *

To maintain assumpsit, there must be a privity between the parties; but it may be a privity in fact or in law. As between each party to a bill of exchange or negotiable promissory note, and every other party, there is a sufficient privity in law; and as such negotiable contract is presumed to be a cash transaction, and as a money consideration is presumed to pass at the making and at each indorsement of the instrument, each party liable to pay is held responsible, as for so much money had and received to the use of the party who is, for the time, the holder, and entitled to recover. Per *Shaw, Ch. J.*, in *Ellsworth v. Brewer*, 11 Pick. 316; *State Bank v. Hurd*, 12 Mass. R. 172.

A bill of exchange is evidence under the money counts when the suit is by the payee against the drawer or maker. *Cruger v. Armstrong et al.*, 3 John. Cas. 5. So the plaintiff may give a note in evidence under the money counts. *Arnold v. Crane*, 8 John. R. 79; *Pierce v. Crafts*, 12 Id. 90. So a promissory note against the defendant and another, is evidence under the money counts in a suit against the defendant alone. *Williams v. Allen*, 7 Cowen, 316. No advantage in such case can be taken, except by a plea in abatement.

A note payable in specific articles is admissible in evidence under the money counts. *Crandal v. Bradley*, 7 Wend. 311. It is immaterial what is the consideration of the note, if it is a valid security for a debt due payable in money. It is sufficient that the defendant has received money's worth, and that at the time the action was commenced, he was indebted to the plaintiff in the sum claimed, which was then due and payable in money. *Payson v. Whitcomb*, 15 Pick. 212, and cases there cited.

(An indorsee of a bill of exchange payable to the order of the drawer, and by him indorsed to the plaintiff, may recover thereon, at common law, under the money counts, in an action against the acceptor. *Purdy v. Vermilyea*, 4 Selden N. Y. Rep. 346. So, an indorsee may recover on a note, against an indorser, under the money counts. *Cayuga Co. Bank v. Warder*, 2 Id. 19; or against a remote indorsee; *Ellsworth v. Brewer*, 11 Pick. 316.)

(2) By Lord Tenterden, Ch. J.; *Rhodes v. Gent*, 5 Barn. & Ald. 245; *Highmore v. Primrose*, 5 Maule & Selw. 65; *Barlow v. Broadhurst*, 4 B. Moore, 471.

(3) By Ch. B. Eyre, *Gibson v. Minet*, 1 H. Blac. 602. See *Israel v. Douglas*, 1 H. Blac. 242. And *vide infra*, "indorsee and acceptor."

NOTE 732.—*King et al. v. Philips*, 1 Pet. R. 350. It has been said, that a bill or note is *prima facie* evidence of money paid by the holder to the use of the drawer of the one, and the maker of the other (*Bayley* (5th ed.), 358); and that a bill, when accepted, is evidence of money paid by the holder to the use of the acceptor, Id.; and if an indorser has taken up a bill, he may, having failed in his first count against the acceptor, on account of a variance, recover under the count for money paid. Id. This, however, is said to be questionable. *Chit. on Bills* (8th Am. ed.), 595. See *Butler v. Wright*, 20 John. R. 367.

Where the plaintiffs acquired possession of the note long after it was due, so that according to the rules of law it was dishonored, and the court held that the defendant might set off a note given to defendant by the payee under the terms *money paid* (*Sargent v. Southgate*, 5 Pick. 312), the defendant having sued such demand, does not deprive him of such defence. *Evans v. Prosser*, 3 T. R. 186.

Promissory note.

A promissory note, as between the original parties, is evidence of money lent, and is admissible, as a paper or writing, to prove the receipt of so much money from the plaintiff.(1) It is also evidence under the count for money had and received,(2) and under the count upon an account stated, especially if it be expressed to be for "value received." (3) It is to be observed, that when a bill or note is offered as evidence of the general duty to pay, it is but evidence; and any of the presumptions which the writing affords, may be contradicted by other evidence; and the jury must draw their conclusion of fact from the whole of the evidence.(4)

In an action on a promissory note, and also for goods sold and delivered, if the plaintiff prove the delivery of the goods before the note was given, and do not show the consideration of the note to have been given distinct from them, the defendant must have a verdict on one of the counts; the plaintiff cannot take a verdict on one, and have the jury discharged from giving a verdict on the other. *Mutrie v. Harris*, 1 Mood. & Malk. 322.

(1) *Bayley on Bills* (4th ed.), 286; *Story v. Atkins*, 2 Str. 725; *Sutton v. Toomer*, 7 Barn. & Cress. 416.

NOTE 733.—The count for *money lent*, it is said, is proper in an action at the suit of the payee of a bill against the drawer, and in an action at the suit of the payee of a note against the maker, they being evidence of money lent by the payee to the drawer of the one, and maker of the other. It is also proper in an action at the suit of an indorsee against his immediate indorser. So a note in this form: "3d December, 1751, then received of Mr. Harris, the sum of nineteen pounds, on behalf of my grandson, which I promise to be accountable for on demand; witness my hand, S. Huntback." The grandson being an infant, was holden to be evidence in support of the count for money lent; and that decision was recently recognized. But an instrument engaging to pay "for value received," if void, because payable on a contingency, affords no evidence of money lent. *Chit. on Bills*, 595.

In all actions on general money counts, for money lent to defendant, or laid out on his account, or received by him for the plaintiff, the technical rule is, that it must be proved according to the allegation. A specific article, or security advanced for another, is not money paid on his account. *Morrison v. Berkey*, 7 Serg. & Rawle, 238.

In assumpsit for money lent, and for money paid, laid out and expended, a note not negotiable, in the following words, was given in evidence: "I, for value received, promise to pay C. S. or order, £40 silver money, to be paid in lands at nine shillings per acre, in the township of F., in the state of N. H.; said S. to have his choice in any lot that I purchased of D. T., and to have a good warrantee deed of said land when requested, the same to be on interest till paid;" held, to be good evidence under the counts in the declaration. *Smith v. Smith*, 2 John. R. 235. It seems, that further evidence of consideration, besides the admissions of value received in the note, were considered necessary; but in *Jerome v. Whitney* (7 John. R. 320), it was held, that the words value received, in a note not within the statute, were *prima facie* evidence of consideration. However, unless such a note has an admission of consideration on the face of it, it requires a consideration to be stated or averred; otherwise the note is not admissible in evidence. *Saxton et al. v. Johnson*, 10 John. R. 418.

On the authority of *Smith v. Smith* (*supra*), and *Pierce v. Crafts* (12 John. R. 90), held, that a note payable in *specific articles*, was admissible in evidence, under the money counts. *Crandall v. Bradley*, 7 Wend. 311.

(2) *Ford v. Hopkins*, 1 Salk. 283; Vin. Ab. tit. Evidence, A, b. 36.

(3) *Clayton v. Gosling*, 5 Barn. & Cress. 360. See *Chitty on Bills* (7th ed.), 366.

(4) By Ch. J. Eyre, in *Gibson v. Minet*, 1 H. Blac. 602.

One of the joint makers of a promissory note is a competent witness on the part of the plaintiff, to prove the signature of the defendant, the other joint maker; for the witness would be liable to the defendant for contribution, if the plaintiff succeeded; and if, on the other hand, the plaintiff failed and resorted to the witness for his whole demand, then the witness would be entitled to contribution from the defendant, so that in either view of the case, the witness is indifferent in point of interest.(1) The drawer of a bill of exchange is a competent witness for the acceptor to prove the bill discharged.(2)

2. Of the evidence in actions against the maker of a promissory note, or the acceptor of a bill of exchange, by the indorsee.

Proof of making or accepting.

The plaintiff will, first, have to prove the making of the note,(3) or the

(1) *York v. Blott*, 5 Maule & Selw. 71. And see Vol. I, Chap. 5, Sects. 4, 5.

(2) *Pool v. Bonsfield*, 1 Campb. N. P. C. 56.

NOTE 734.—It is now well established, that if the witness by his engagement, express or otherwise, is clearly liable, in a particular event, to one of the parties, he is not a competent witness. Thus, in an action for goods sold, a witness cannot be called for the defence to prove that the defendant has paid the amount to him (either as agent for the plaintiff or in his own right), if it appear that he obtained the payment under such circumstances that, in the event of the plaintiff's recovering, the witness would be liable to the defendant not only for the sum so recovered, but also for the costs of the cause as damages resulting from the witness's deceit. *Larbalestier et al. v. Clark*, 1 Barn. & Adol. 899; *Jones v. Brooke*, 4 Taunt. 464; *Edmonds v. Lowe*, 8 Barn. & Cres. 407.

In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him, and it was stated for defendant, that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer, and that it was indorsed and delivered to the acceptor in order that he might get it discounted, and that he delivered it to the plaintiff upon condition that if he procured the money for it, he might retain out of it the amount of the debt due from the acceptor, but that he never did get cash for the bill; it was held that the acceptor could not be examined to prove these facts; for although he was uninterested as to the amount sought to be recovered on the bill, *he was interested as to the costs*, against which he would have to indemnify the defendant if the plaintiff obtained a verdict. *Edmonds v. Lowe*, 8 Barn. & Cres. 407. But this rule does not apply unless the drawer is under an express or implied engagement to indemnify the acceptor against the costs of the action, as well as the principal debt. *Bagnall v. Andrews*, 7 Bing. 217. See also the case of *The Bank of Montgomery v. Walker*, 9 Serg. & Rawle, 229.

A promissory note was allowed to be impeached and reduced in amount by a letter from the payee, stating upon what consideration it was given. *Lewis v. Gray*, 1 Mass. R. 297. *Vide post*, text, pp. 195, 197. * * In an action by the surviving members of a partnership, the defendant claimed to set off a draft which he had transferred to the deceased partner, which he had inclosed in a letter and transferred to the firm, the plaintiffs were allowed to give the letter in evidence, as a part of the *res gestæ*, for the purpose of showing that he claimed the draft as his own, and to follow it with proof that the draft had been passed to his credit on the firm books. *Wakeman v. Bailey*, 2 Hill, 279. But the Court of Errors reversed the decision of the Supreme Court, holding that the letter was no part of the *res gestæ*, and was incompetent evidence. S. C., 2 Denio, 220. * *

(3) NOTE 735.—*Vide ante*, text and notes.

The offer of the maker to pay the note, when called upon after it becomes due, was held suf-

acceptance of the bill. With respect to the proof of this, the rules which have been before laid down, in treating of the action by the payee, equally apply to this action.

Proof of drawing.

An acceptance admits the signature of the drawer, provided it is made after sight of the bill.(1) Such an acceptance makes the acceptor liable as against a third person, although the bill is forged; it is incumbent on him to be satisfied respecting the drawer's signature before he accepts;(2) and if the bill purports to be drawn by an agent, the acceptance will dispense with proof of his authority;(3) or if it purports to be made by several persons as a firm, and, in fact, only a single person constitutes the firm, yet

ficient evidence of his signature, a sufficient admission that he was the maker of the note. So, it is a sufficient admission of the indorsement, and of the plaintiff's right to receive it; and supercedes the necessity of further proof. *Keplinger v. Griffith*, 2 Gill & John. 296. (See also *Shaver v. Ehle*, 16 John. R. 201; 4 Denio R. 131; 5 Id. 51.)

(1) *Bayley on Bills* (4th ed.) 365; *Wilkinson v. Lutwidge*, 1 Str. 648; *Jenys v. Fawler*, 2 Str. 946; *Robinson v. Yarrow*, 7 Taunt. 455.

(2) *Leach v. Buchanan*, 4 Esp. R. 226; *Price v. Neale*, 3 Burr. 1354; *Smith v. Mercer*, 6 Taunt. 76.

NOTE 736.—It does not lie in the mouth of the acceptor to say, that the drawing or indorsing of the bill is irregular. The drawer having subscribed himself Thomas Wilson, when his name was Thomas Wilson Richardson, was not to be esteemed to have committed a forgery, unless it were proved that the omission of his surname was done for the purposes of fraud. *Schultz v. Astley*, 2 Bing N. C. 544. So, the acceptor was held liable to the indorsee of a bill of exchange, he having the bill drawn in the name of a fictitious person, and the bill being indorsed in the same fictitious name, the drawing and indorsing being both proved to be in the same handwriting. *Cooper v. Meyer et al.*, 10 Barn. & Cres. 468. The defendant (acceptor) is estopped from denying the right of the drawer to draw the bill, whoever he may be; so also he is bound by the indorsement made by such drawer, after such indorsement is proved to have been made by such drawer.

Where a set of foreign bills were sent to the drawee, the defendant who accepted two parts, and indorsed one to the plaintiff for value, prior to which the other had been indorsed by the defendant to his father, conditionally, but who had never insisted on payment, but gave it up on the substitution of other securities; held, that the plaintiff was entitled to recover. *Holdsworth v. Hunter*, 10 Barn. & Cres. 449.

An assignee of a note, not negotiable, may maintain an action in his own name against the maker upon a special promise to pay him; or, he may, at his election, sue in the name of the payee. A second assignee of such note may also sue the maker in the name of the payee; he cannot, however, claim any benefit of the special promise to the first assignee. *Hatch v. Spearin*, 2 Fairf. R. 354.

(3) *Porthouse v. Parker*, 1 Campb. 82; *Robinson v. Yarrow*, 7 Taunt. 455.

NOTE 737.—Yet the acceptance does not admit the *indorsement* by the same procuration; and in an action against the acceptor, the indorsement, as well as the authority to make it, must be proved. *Id.*

The acceptance admits the authority to *indorse*, as well as to *draw*. The acceptance also admits the authority to draw in that particular form; and the indorsement being in the same form and handwriting, it may be taken to have been made with the same authority. *Jones v. Tournour*, 4 C. & P. 204.

the defendant is bound by his acceptance.(1) An acceptance also admits the ability of the drawer to make the bill.(2)

Proof of indorsement.

The indorsement is to be proved in the ordinary mode, like other handwriting, of which enough has been already said.(3) It must appear, that the indorsement was made by the person by whom it purports to have been made;(4) and where the indorsement is special, that the indorsee is the person described in it.

(1) Bass v. Clive, 4 Maule & Selw. 13.

(2) Taylor v. Crocker, 4 Esp. R. 187, cited 2 Barn. & Cres. 299; Bayley on Bills, (4th ed.) 365.

(3) An indorsement may be made in pencil. Geary v. Physic, 5 Barn. & Cres. 234.

NOTE 738.—It must appear that the instrument is negotiable, which is a pure question of law. A note payable on a contingency, is not negotiable. 2 Stark. Ev. 151, 152. So, a note for \$45, in grain next January, or \$40 in two years from next January, was held, clearly, not a negotiable note. Matthews v. Houghton, 2 Fairf. R. 377.

A special indorsement does not transfer property in bills of exchange, until delivery. Rex v. Lambton, 5 Price, 428. But an indorsement on the back of a promissory note, making its payment depend on a contingency, does not affect its *negotiability*; its only effect is to give notice of the consideration to subsequent holders. Tappan et al. v. Ely, 15 Wend. 362; Sanders et al. v. Bacon, 8 John. R. 485. If the payee of a bill deliver it, with his name indorsed on it, to another, no proof is required of the handwriting of the indorsement. Glover v. Thompson, R. & M. 403.

And in Cotes v. Davis (1 Campb. 485), although the indorsement was in the name of the wife, Lord Ellenborough presumed that the husband had given his authority; it is true that the presumption arose from a subsequent, but it was admitted that under the husband's authority, the property in the bill would pass. See next note.

An infant may indorse a negotiable promissory note or a bill of exchange, so as to transfer the property to an indorsee. Nightingale v. Withington, 15 Mass. R. 272; Jones v. Darch et al., 4 Price, 300. This last case was against the acceptors of a bill and the payee and first indorser was an infant; the jury having found a verdict for the plaintiffs, on evidence that defendants knew, when they accepted it, that the payee was an infant, who had in fact indorsed the bill before the acceptance, the court refused to disturb the verdict, saying, "It appeared from the evidence to have been their object to get all the money they could by means of such bills; they ought not now to be permitted to avail themselves of the objection, whatever weight it might have had in a case of different circumstances."

An indorsement on the back of a promissory note, making its payment depend on a contingency, does not affect its *negotiability*; its only effect is to give notice of the consideration to subsequent holders. Tappan v. Ely, 15 Wend. 362.

(4) NOTE 739.—The wife, by her husband's authority, signed and indorsed the bill in her own name; held, that it passed the interest in the bill to the indorsee. Prestwick v. Marshall, 7 Bing. 565. So, a *feme covert* may indorse a note given to her before marriage, if the circumstances of the case warrant the presumption that it was made with the husband's assent. Miller v. Delamater, 12 Wend. 433. So, it has been held, that an infant, for a valuable consideration, may indorse a note. Nightingale v. Withington, 15 Mass. R. 273.

An authority to indorse may be by parol. Turnbull v. Trout, 1 Hall's R. 336. And the initials of the name of the holder of a bank check, indorsed on the check, are enough to charge him as indorser. The Merchants' Bank v. Spicer, 6 Wend. 443.

The directors of a banking corporation may authorize one of their number to indorse a note; and such authority need not be by deed. Northampton Bank v. Pepoon, 11 Mass. R. 288. A blank indorsement is a sufficient execution of such authority. In common cases of actions by the indorsee of a promissory note, the possession of the note, with the name of the promisee

But the possession of a bill or note is *prima facie* evidence of ownership (1) It is, however, competent for the defendant to show that the person indorsing the bill or note was not the real payee, though he be of the same name. (2) Where the plaintiff brought an action in the name of A. B. the younger, and the indorsement was made to A. B. generally, it was held that, as he was in possession of the note he was entitled to recover upon it (3)

Indorsement in blank.

When a bill of exchange is drawn and accepted, payable to (blank) or order, a *bona fide* holder of it may insert his own name as payee, and indorse the same, and the proof of these facts will support a declaration at the suit of the indorsee, stating the bill to have been made payable to such holder. (4) If a bill is indorsed to a particular firm, it must be shown that

upon it, as indorser, the handwriting being proved, is *prima facie* evidence of a legal transfer. *Id.* Although transferred and indorsed, yet, if it gets back into his possession again, he is *prima facie* the lawful owner. *Dugan et al. v. The United States*, 3 Wheat. 172; *Clark v. Pigot*, Salk. 126, pl. 4. *Sed vide Welch v. Lindo*, 7 Cranch, 159; *Georgent v. M'Carty*, 1 Yeates' R. 94.

(1) By *Bayley, J.*, in *Bulkeley v. Butler*, 2 Barn. & Cress. 441; *King v. Nilsom*, 2 Campb. 5; 1 Salk. 290; *Paterson v. Hardacre*, 4 Taunt. 115.

NOTE 740.—*Morton v. Rogers*, 14 Wend. 580; *Lovell v. Everston*, 11 John. R. 52; *Cooper v. Kerr*, cited 3 John. Cas. 264; (*James v. Chalmers*, 2 Selden, 209.) And where the defendant has no legal or equitable defence to the bill or note, as against the real owner, he cannot be permitted to show that the nominal plaintiff, in whose name the suit is brought, is not the real party in interest. The defendant, however, in such cases, may show by his own testimony, the want of consideration as between him and the immediate party with whom he contracted, and that the suit is brought for his benefit; or that the plaintiff received the bill or note, with a knowledge of the equitable rights in relation to the same, or under such circumstances that he cannot be considered the *bona fide* holder thereof. *Morton v. Rogers*, *supra*—Chancellor. 1 New York Dig. 159 to 162. See also text, and notes 703–711.

A., the drawer of a bill, gave it to B. unindorsed, to present it for payment. B. did so, and got it noted. Afterwards A. indorsed the bill and gave it to B. to obtain payment; held, that the indorsement was sufficient to enable B. to recover in an action against the acceptor, notwithstanding A. said, upon the trial, that B. was indebted to him, and that he did not give him any authority to bring the action. *Adams v. Oakes*, 6 C. & P. 70.

The right of action upon a bill of exchange accepted for value, may be transferred by indorsement without value, as by way of gift. *Heydon v. Thompson*, 3 Nev. & M. 319; 1 Adol. & Ell. 210.

(2) *Mead v. Young*, 4 T. R. 28.

(3) *Sweeting v. Fowler*, 1 Stark. N. P. C. 106.

(4) *Atwood and others v. Griffin and another*, 1 Ry. & Mo. 425. See *Crutchley v. Mann*, 1 Marsh. 29.

NOTE 741.—As by the law of France, an indorsement in blank does not transfer the property in a bill, the holder of a bill drawn in that country, and indorsed there in blank, cannot recover against the acceptor in the courts of this country. *Trimbey v. Vignier*, 1 Bing. R. 151. The mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought; it is otherwise with the interpretation of the contract. *Id.*; *De la Vega v. Vianna*, 1 Barn. & Adol. 284; *British Linen Co. v. Drummond*, 10 Barn. & Cres. 903. If the indorsement has not operated as a transfer, that goes to the point that there is no contract upon which the plaintiff can sue. *Trimbey v. Vignier*, *supra*. And

the plaintiffs are the persons who compose that firm;(1) but if the bill is indorsed in blank, and there are several plaintiffs, it will not be necessary for them to prove that they are in partnership, or that the bill was delivered to them jointly.(2)

If the plaintiff declare as indorsee upon a note made to payee or bearer, the indorsement need not be mentioned in the declaration; and if it is mentioned, it seems not necessary to be proved; though according to the report of one case, such proof has been required.(3)

Admissions.

A promise to pay, or an offer to renew a bill or note made to the indorsee after it becomes due, is an admission of the holder's title, and will dispense with the proof of the indorsement to him, and of all intermediate indorsements stated in the declaration.(4) But the admission of an indorser, though sufficient evidence of the indorsement against him will not be

our courts must take notice that the plaintiff could have no right to sue in his own name, upon the contract, in the courts of the country where such contract was made, and that such being the case there, our courts must hold that he has no right of suing here.

Every facility is afforded to negotiable paper after indorsement. It may pay from hand to hand, either with or without consideration; or may be sued by one in trust for another. Therefore, it has been held, that although a note had been delivered to one, indorsed in blank, as security for a debt; the payee might nevertheless again transfer the note or sue the note in his own name; subject in either case to be defeated only by the claim of the pledgee. *Fisher v. Bradford*, 7 Greenl. R. 28; *Bowman v. Wood*, 15 Mass. R. 534.

The indorsement of a negotiable promissory note in blank, by the defendant, a stranger to the note, for the benefit of the payee, and not indorsed by the latter, has been held to import, *prima facie*, the same contract as the blank indorsement of a note not negotiable. *Perkins v. Catlin*, 11 Conn. R. 213; *Beckwith v. Angell*, 6 Id. 323, 324. The agreement accompanying the blank indorsement may be proved by parol. *Perkins v. Catlin*, *supra*. Neither a bill of exchange on its face, nor the indorsements, are within the Statute of Frauds. *Id.*; *Ulen v. Kittridge*, 7 Mass. R. 233.

(1) 3 Campb. 240, n.; *Waters v. Paynter*, Chitty on Bills (7th ed.) 389. In that case the note was payable to Messrs. Waters, Jones & Co., and the plaintiffs were Robert and John Waters, and David Jones.

(2) *Ord v. Portal*, 3 Campb. 239; *Rordsanz v. Leach*, 1 Stark. N. P. C. 446. And see *Machell v. Kinnear*, 1 Stark. N. P. C. 499. From which it appears that evidence of a particular transfer will take a case out of the above rule.

(3) See *Waynham v. Bend*, 1 Camp. 175, by Lord Ellenborough.

NOTE 742.—In a declaration on a promissory note, payable to bearer, it seems to be sufficient merely to allege that the plaintiff is the bearer, without stating an express promise to pay the plaintiff. The usual form is to allege notice, whereby the defendant became liable, and in consideration thereof promised, &c. *Dole v. Weeks*, 4 Mass. R. 451; *Wilbour v. Turner*, 5 Pick. 526. So, in assumpsit on a bank note, the declaration alleged the promise to be made by the defendants to J. C., or bearer, and that the plaintiff held the note for a valuable consideration; held sufficient. *Gilbert v. Nantucket Bank*, 5 Id. 97. And so in an action on a note payable to order, and indorsed in blank, fairly and without fraud, held, that the plaintiff might discharge the defendant, although no legal transfer of the note to the plaintiff is proved. *Little v. O'Brien*, 9 Mass. R. 423.

(4) *Sir Jos. Hankey v. Wilson, Sayre*, 223; *Bosanquet v. Anderson*, 6 Esp. N. P. C. 43; *Sidford v. Chambers*, 1 Stark. N. P. C. 326.

evidence of the fact against other parties.(1) An acceptance does not admit the signature of an indorser;(2) even if the bill is payable to the drawer's order, and he indorses it, yet as his handwriting as *indorser*, is not admitted by the acceptance, although his handwriting as *drawer* is admitted.(3) And though the acceptance admits a procuration to draw the bill, yet it will not admit a procuration to indorse.(4) But where a

(1) *Hemmings v. Robinson*, Barnes, 436; *Bayley on Bills* (4th ed.) 379.

(2) *Smith v. Chester*, 1 T. R. 654. The acceptor is bound only to look at the *face* of the bill. 7 Taunt. 458; *Bayley on Bills*, 367 (4th ed.); *Robinson v. Yarrow*, 7 Taunt. 455.

(3) *Bosanquet v. Anderson*, 6 Esp. N. P. C. 43; *Macferson v. Thoytes*, Peake's N. P. C. 20; *Canal Bank v. Bank of Albany*, 1 Hill N. Y. R. 287, 295. And see *Coggill v. Am. Ex. Bank*, 1 Comst. N. Y. R. 113.

(4) *Robinson v. Yarrow*, 7 Taunt. 455.

NOTE 743.—*Ante*, note 722.

And it should seem, that where the indorsement only stated the initial of the name of the principal, thus: "Per *pro*. H. Pickersgill, John Pickersgill," and the declaration stated that Hannah Pickersgill indorsed, not only her authority, but her Christian name must be proved. Per Bayley, J., in *Jones v. Turnour* (4 C. & P. 206); and although in that case it is supposed that Lord Tenterden thought at Nisi Prius, "that as the defendant's acceptance admitted the authority to draw by procuration in that particular form, and that the indorsement being in the same form and handwriting, it might be taken to be made with the same authority;" yet it further appeared that other bills had been previously drawn, accepted and indorsed in like manner, and the decision turned upon other particular circumstances, and must not be considered as a precedent for other cases. *Chit. on Bills* (8th Am. ed.) 629, 930. And in a later case, which was an action by indorsee against acceptor, the witness proved that neither the drawing nor indorsement was in the handwriting of the person whose they purported to be, but that the defendant had acknowledged the acceptance to be his: yet, it was held by Tindal, C. J., that it was necessary that some proof should be given, as to whose the handwriting was, and for want of it the plaintiff was nonsuited. *Alport v. Meek*, 4 C. & P. 267. The case was thus: *assumpsit* on a bill of exchange, drawn by one Williams, on, and accepted by the defendant, and indorsed by Williams to the plaintiff. The witness who was called to prove the handwriting of Williams, said that neither the drawing and indorsement were written by him, and that he did not know by whom they were written. Tindal, C. J. "I think you must call some witness to lay some evidence before the jury, on which they may decide." *Id.* In the case of *Blakely v. Grant* (6 Mass. R. 386), Parsons, C. J., says: "No person can maintain an action as indorsee of a bill of exchange, against the drawer or acceptor, without proving an assignment of the bill by the payee. The plaintiff's title to recover is as assignee of the payee; and it is necessary that he show the assignment, by proving the signature of the assignor, who is the payee, either by evidence of his handwriting, or by other sufficient evidence." The action in that case was by an indorsee of a foreign bill of exchange against the drawer. The signature of the payee was neither proved nor admitted. Parsons, C. J., says: "As the signature of the payee was not admitted nor proved, and as there was no evidence that he had assigned the bill, the verdict must be set aside." See 10 Mass. R. 39; 17 *Id.* 1; and *Morgan v. Bank of the State of N. Y.*, 1 Kernan, 404.

In an action by the assignee of a promissory note, made payable to bearer, and indorsed by the payee, it is not necessary to prove the handwriting of the indorser. *Wilbour v. Turner*, 5 Pick. 526.

If the instrument in question is good without a subscribing witness, it seems not essential to prove the handwriting of the subscribing witness, before resorting to other evidence. *Homer v. Wallis*, 11 Mass. R. 309. The confession of a party is as high proof as that derived from a subscribing witness. *Henry v. Bishop*, 2 Wend. 575; ** *Newhall v. Holt*, 6 M. & W. 662; *Slat-terie v. Pooley*, *Id.* 663; *Earle v. Picken*, 5 C. & P. 542; *Smith v. Maro*, 7 J. J. Marsh. 445; *Howard v. Smith*, 3 Scott N. R. 574. But see *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Hollenback v. Fleming*, 6 Hill, 306. **

bill is drawn payable to the drawer's order, the acceptance admits that the drawer is competent to indorse.(1) And it was held by Lord Ellenborough, in a *Nisi Prius* case, that an acceptance was an admission, that the persons in whose favor a bill was drawn, and one of whom indorsed it previously to the acceptance, in the names of himself and the other payees, were partners, and consequently that proof of the indorsements of the other payees was unnecessary; but the propriety of this decision seems very doubtful on principle as well as on the authorities.(2)

Several indorsements.

If there are several indorsements, the first indorsement ought to be proved,(3) and all the other indorsements which are stated in the declaration, though some of them may have been stated unnecessarily.(4) But if the first indorsement is in blank, it is not necessary to allege or prove the subsequent indorsements.

It is laid down in a book of authority, that a note is evidence of money had and received by the maker to the use of the holder;(5) but in the

(1) *Drayton v. Dale*, 2 Barn. & Cress. 299.

(2) *Jones and another v. Radford*, 1 Camp. 83. See *Carriek v. Vicary*, Doug. 630, 653; *Ante*, p. 192, u. 2.

(3) *Smith v. Chester*, 1 T. R. 654.

(4) *Waynam v. Bend*, 1 Campb. 175; *Bosanquet v. Anderson*, 6 Esp. N. P. C. 43; *Chaters v. Bell*, 4 Esp. N. P. C. 210; *Sidford v. Chambers*, 1 Stark. N. P. C. 326. When a count is inserted omitting all the indorsements except the first, the subsequent names must be struck out of the bill, at or before the time of trial, which may be done notwithstanding a subsequent indorsement is in full. *Chitty on Bills* (7th ed.), 358, 398. And see *Smith v. Clarke*, 1 Esp. N. P. C. 180. As to the effect of an admission in dispensing with the proof of intermediate indorsements, *vide ante*, p. 192.

NOTE 744.—The holder of a note may derive his title through the last indorser, or he may cancel his name and derive his title to himself from the next preceding indorser. *Emerson v. Cutts*, 12 Mass. R. 78. It has been held, also, that an intermediate indorser, who, on actions brought by a subsequent indorsee against himself, and also against the acceptor, pays part of the amount to such indorsee, may recover that sum against the acceptor, as money paid to his use. *Pownall v. Ferrard*, 6 Barn. & Cress. 439. After an indorsement in blank by the payee or any subsequent indorser, the holder may make himself the immediate indorsee, and claim by the blank indorsement. *Tyler v. Binney*, 7 Mass. R. 479.

The indorser of a bill, who comes again into the possession thereof, is to be regarded as the *bona fide* holder, unless the contrary appears, and may sue and recover thereon, although there be other subsequent indorsements, without showing any receipt or indorsement back to him, from any of the indorsees, and without erasing their names from the bill. *Dugan et al. v. The United States*, 3 Wheat. 172.

(5) *Bayley on Bills* (4th ed.), 287; *Grant v. Vaughan*, Burr. 1516; *Dimsdale v. Lanchester*, 4 Esp. R. 201. And see Mr. J. Buller's argument in *Master v. Miller*, 4 T. R. 339; *Hennings v. Rothschild*, 4 Bing. 334.

NOTE 745.—*Young v. Adams*, 6 Mass. R. 189; *Denn v. Flack et al.*, 3 Gill & John. 369. The point was decided, that the indorsee of the payee of a negotiable note, can maintain an action for money had and received, against the maker of the note, upon the proof of the note and indorsement. So *Wilde v. Fisher* (4 Pick. 421), is to the same point. The indorsement of a cash note, of which the maker had notice and undertook to pay, establishes a privity of contract between indorsee and maker, and constitute legal proof of money held by the maker to the use of

case of *Waynam v. Bend*,⁽¹⁾ it was held by Lord Ellenborough that a promissory note is evidence under the money counts only as between the original parties to it; and the same rule has been followed by the present lord chief justice.⁽²⁾ It seems that a bill of exchange will not be evidence under the money counts for the indorsee against the acceptor, though opinions have differed upon this point.⁽³⁾

the holder. *Ramsdell v. Soule*, 12 Id. 126. And this, although the maker signed the note for the accommodation of the payee. *Cole v. Cushing*, 8 Pick. 48. So, it has been held, that money had and received lies by the holder of a note made payable to bearer. *Pierce v. Crafts*, 12 John. R. 90; *Cruger v. Armstrong et al.*, 3 John. Cas. 5; *Grant v. Vaughan*, 3 Burr. 1516. To maintain assumpsit, there must be a privity between the parties, but it may be a privity in fact, or in law. Between each party to a bill or negotiable note, and every other party, there is a sufficient privity in law; and each party liable to pay, is held responsible, as for so much money had and received to the use of the party who is, for the time, the holder and entitled to recover. *State Bank v. Hurd*, 12 Mass. R. 172. An indorser, by taking up the note, is reinstated in his original title; and may sue as indorsee of the note, striking out his own and all subsequent indorsements. *Emerson v. Cutts*, 12 Mass. R. 78. And in such case, may give the note in evidence upon the count for money had and received. *Ellsworth v. Brewer*, 11 Pick. 316. The holder of a negotiable note, whether by delivery or indorsement, is entitled to recover under the money counts. *Olcott v. Rathbone*, 5 Wend. 490. (4 Selden R. 346; 2 Id. 19.)

Grafton & Gore being copartners in trade, Grafton makes a promissory note payable to C. or order, subscribes it with the name of the firm, and writes the name of C. as indorser, without his leave or knowledge, and with intent to defraud any future holder of the note; he delivered it thus indorsed to a broker, who sold it to the plaintiff; held, that the plaintiff, the indorsee, was entitled to recover on the money counts, because Grafton received the money of the plaintiff upon a false pretence, having offered the note as indorsed by C.; and the money so received was instantly, in the eye of the law, received to the use of the plaintiff, on the ground that the money was advanced on the faith of security, which turned out by the fraud of Grafton to be wholly worthless. *Boardman v. Gore et al.*, 15 Mass. R. 331. It seems to be no objection in such case to the liability of the partner not a party to the fraud, that the money was in fact applied to the use of one of the partners only, the person advancing the money having no knowledge that it was to be so appropriated, it being obtained upon a note made payable by the company, both the partners were considered liable. See *Page's Adm'r v. Bank of Alexandria*, 7 Wheat. 35.

* * See *ante*, note 715. * *

If a draft not negotiable, be accepted by the drawee, with an agreement to pay the amount to any person to whom it is assigned; the assignee, after notice, may maintain an action for money had and received against the acceptor. *Weston v. Penniman*, *Mason*, 306. (See *ante*, note 731.)

(1) 1 Camp. 175. See *Chitty on Bills*, 364 (7th ed.) (*Edwards on Bills and Notes*, 665, 666.)

(2) *Bentley and another v. Northhouse*, 2 Ry. & Mo. 66. But neither this case nor *Waynam v. Bend* were determined on this point. *Vide post*, n. 3.

(3) *Vide ante*, 193, n. 5, 194, nn. 1, 2; *Exon v. Russel*, 4 Maule & Sel. 507; *Thompson v. Morgan*, 3 Campb. 101; *Wells v. Girling*, 3 B. Moore, 79; *Barlow v. Bishop*, 1 East, 434; *Taylor v. Higgins*, 3 East, 169; *Bennet v. Whitwell*, 3 Bos. & Pull. 559; *Johnson v. Collings*, 1 East, 98; *Dimsdale v. Lanchester*, 1 Esp. R. 201; *Israel v. Douglas*, 1 H. Bl. 239; *Bayley on Bills* (4th ed.), 287; *Chitty on Bills* (7th ed.), 365, 366.

NOTE 746.—*Eales v. Dicker*, 1 Mood. & Malk. 324; *Littledale, J.*, said: "I am decidedly of opinion that the bill is not evidence of money had and received by the acceptor to the use of the holder. I know that it has been sometimes supposed that it is so; but I think it against principle, and cannot allow it." Nor in an action by the indorsee against the maker. *Bentley v. Northhouse*, *Id.* 66. * * See *Chitty on Bills* (11th Am. ed.), pp. 578 to 583, and notes, as to the cases in which the holder may recover upon the money counts. * *

Defence. Declarations of former holders.

Where a note is indorsed to a party before it is due, and an action is brought by the indorsee against the maker, evidence is not admissible, on the part of the defendant, of declarations made by the payee of the note, even whilst the note was in his possession, at least if the party making the declarations is still alive.⁽¹⁾ It has been held that letters

(1) *Barough v. White*, 4 B. & C. 325. The note in this case was payable on demand. See *Pocock v. Billing*, 2 Bing. 269; 7 B. Moore, 90; *Shaw v. Broom*, 4 D. & R. 730; *Smith v. De Wruitz*, 1 Ry. & Mo. 212.

NOTE 747.—*Dade's Adm'r v. Madison*, 5 Leigh, 401. The holder of a negotiable note, it is said, has nothing to do with the original consideration; he takes it discharged of all equities between the maker and payee. Therefore, it was held, that the declarations of the indorser (payee) made after the indorsement of the note, were not admissible in evidence in an action by the indorsee against the maker. *Camp v. Walker*, 5 Watts, 482. However, where an indorsee takes a negotiable security, with actual or constructive notice, that it was obtained by fraud, or would be subject to any other legal defence in a suit commenced thereon by the payee, he takes it subject to every such defence in any suit brought in his own name. Per *Shaw, C. J.*, in *Sylvester v. Crapo*, 15 Pick. 92. If the security is overdue and dishonored, at the time of the indorsement, this circumstance proves such legal constructive notice, and lets in the promisor to any defence which he could make against the promisee. *Id.* In Massachusetts, it is held that a promissory note payable on demand, is payable within a reasonable time; that after the lapse of such reasonable time, it is to be deemed overdue and dishonored; and what is reasonable time is a question of law upon the facts proved. *Id.* and cases cited.

Where a note payable on demand, was negotiated eleven months after the date, held, that the defendant was entitled to give the declarations of the payee, made when he held the note, to show fraud in obtaining the note, on the principle that they were admissions in relation to the title to property which he then held. *Id.* The case of *Barough v. White* (4 Barn. & Cress. 325), proceeded on the ground that, in England a promissory note payable on demand, is not overdue or deemed dishonored, by lapse of time, nor till an actual demand made. Such a security is regarded there as a continuing security until the holder shall see fit to render it due by a demand. *Id.*

Barough v. White, cited in the text, turned upon the question whether the note was overdue when it was indorsed. The note was payable on demand; and it was considered that such a note could not be treated as overdue without evidence of payment having been demanded and refused. The declarations, therefore, of the payee were rejected; the plaintiff not being identified with the payee. But when the indorsee is identified in interest with the payee; when he takes the instrument being *overdue*, the declarations of the payee, while he held the instrument, adverse to his own interest, have been held to be clearly admissible in favor of the maker. *Hatch v. Dennis*, 1 Fairf. R. 244. The cases were ably reviewed in that case; and Mr. Justice Parris, who delivered the judgment of the court, says: "An indorsee without notice, and for a valuable consideration, is, in general, not affected by the transactions between the original parties. But when he takes a note under circumstances which might reasonably create suspicion, as when it is negotiated after the time of payment has elapsed, he is considered as identified in interest with the payee, and may, in an action against the maker, be met with every defence of which the maker could have availed himself in an action by the payee." "He may prove the same facts in defence against the indorsee that he might have proved if the action had been in the name of the payee. In the latter case the proof could not come from the testimony of the payee, for being a party to the suit, the defendant could not avail himself of that evidence. But when the action is brought in the name of the indorsee, the payee not being a party to the record, and not interested for the defendant, is a competent witness to prove certain facts necessary for the maker's defence, not, however, relating to the original validity of the instrument. If he be a party to the record, and a party in interest, his admissions are evidence." *Id.* It is a general

principle that the sayings and declarations of one who is a competent witness in a cause, are not to be admitted as evidence to charge another, upon the general ground that they are but hearsay evidence, and not the best which the nature of the case affords. But there are exceptions to this rule. *Id.* Such was the case of *Pocock v. Billings* (2 Bing. 269), where the admissions were received, and the verdict set aside and a new trial ordered, because it did not appear that the note was overdue when indorsed. At the second trial that fact appeared, and the question of the admissibility of the payee's declarations, made while he held the note, was again raised, and upon argument they were held to be admissible. The same doctrine is recognized in *Shaw v. Broom* (4 Dowl. & Ry. 730), in *Beauchamp v. Perry* (1 Barn. & Adol. 89), and in *Smith v. De Wruitz* (Ry. & Mood. 212); *Graves v. Key* (3 Barn. & Adol. 313).

Whitaker v. Brown (8 Wend. 490) seems different. But the report of that case is very short; it does not appear from the facts stated, whether the note was overdue when indorsed. It seems, however, to have been decided on the authority of *Dickham v. Wallis* (5 Esp. N. P. 253), "a case (said the judge) precisely like the one at bar." After citing *Pocock v. Billings* (2 Bing. 269), the court, Sutherland, J., says: "I should nevertheless adhere to the decisions of our own court, and the opinion of Lord Ellenborough, in 5 Esp., founded, as they appear to me to be, upon a fundamental principle of the law of evidence." Held, accordingly, that the declarations of the payee of a note, were not admissible in an action on such note by the assignee thereof, although it seems, the note was transferred after it became due. The same principle has been recognized in Connecticut. In ejectment, held, that the declarations of one through whom plaintiffs claimed title, were not admissible; he being alive, and could be a witness. *Fitch v. Chapman*, 10 Conn. R. 8. *Williams, J.*: "It is said, that the plaintiff is identified with J. C., because he claims through him. The indorsee of a promissory note, claims through the indorser; but it does not, therefore, follow, that the declarations of that indorsee can be given in evidence; as was observed in *Barough v. White* (*supra*), I should think the identity spoken of in the books, referred rather to those cases where the nominal plaintiff was suing, in fact, for the benefit of a third person; and this identified their interests." Persons whose declarations were admitted, though not dead, were so situated that they could not be witnesses, or could not be compelled to testify. *Beers v. Hawley et al.*, 2 Conn. R. 467; *Norton v. Pettibone*, 7 Id. 319, 323. In the subsequent case of *Rogers v. Moore* (10 Id. 13), which was also ejectment, the plaintiff claimed title under B. B., deceased; and his declarations while he owned the land, were admitted, as to facts claimed to be inconsistent with his claims of title; the court, Church, J., saying: "The principle, that the declarations of a person deceased, while in possession of the premises, against his title, has been too recently settled, in 7 Conn. R. 319, and before that, in 2 Conn. R. 467, to be considered now open for discussion."

In Pennsylvania, however, it seems to be settled by repeated decisions, that the declarations of a person holding the legal title to an estate under whom the plaintiff claims title, made during the time he owned the land, are evidence. *Weidman v. Kohr*, 4 Serg. & Rawle, 174. It is not stated in the report whether the grantor in that case was living; from the antiquity of the transaction, it is very apparent that he was not. So, indeed, it was considered in *Strickler v. Todd* (10 Serg. & Rawle, 63). In a later case (*Gibblehouse v. Strong*, 3 Rawle, 437), it was decided, that the declarations of a person while holding the legal title, that he was but the trustee for another, who paid the purchase money, were admissible in evidence against those claiming under him, although he was, at the time when the declarations were offered in evidence, within the reach of the process of the court, and might have been called as a witness.

The applicability of this principle to personal, as well as real actions, is recognized in *Hatch v. Dennis* (*supra*), and in *Snelgrove v. Martin* (2 M'Cord, 241), and in *Pocock v. Billings* (*supra*). *Best, C. J.*: "In receiving the declarations of a former holder of a bill, made during his possession, likened the case to that of declarations made by the owner of an estate during his possession." See also *Jackson v. Bard*, 4 John. R. 230.

The declarations of a person formerly interested in an estate, are admissible in evidence, when the party himself might have been called. Thus, declarations respecting the subject matter of a cause, by a person who, at the time of making them, had the same interest in such matter as one of the parties now has, is evidence as showing an assertion of ownership, though it be not proved that any person was present on behalf of the plaintiff, or knew of it, and though the maker is alive, and might be called as a witness. *Woolway v. Rowe*, 1 Adol. & Ell. 114.

from the payee to the maker, are admissible to prove the illegality of the consideration of a note, if they are shown to be cotemporaneous with the making of the note, as they are evidence of an act done by the payee, through whom the plaintiff claims;(1) but this appears to be a strong decision.

In an action on a bill of exchange, the drawer is a competent witness for the plaintiff, to prove the handwriting of the acceptor, although the forgery of the defendant's name is imputed to the witness.(2) A drawer

Statements of third persons are inadmissible. *Healy v. Jacobs*, 2 C. & P. 616. But if it be shown that the plaintiff was suing for the benefit of a third person, what that person has said will be admissible in evidence. *Welstead v. Levy*, 2 Mood. & Malk. 138. In general, however, evidence of what a third person said when he was holder of a bill, is not admissible against the plaintiff; except it appear that the plaintiff is merely an agent for, or tool of the third party. *Id.* But where a bill of exchange had been given by the acceptor for the accommodation of the drawer, and *whilst it was in the hands of the latter*, he made a declaration that it was an accommodation bill, and that the acceptor had received no value; long after the bill was due, the drawer indorsed the bill to the plaintiff, all accounts between the drawer and acceptor being then closed, it was held, the declaration of the drawer was inadmissible to affect the plaintiff's title, on the ground that what would be a good defence against the drawer, would be equally a good defence against the indorsee in this case. *Benson v. Marshal*, cited in 4 Dowling & Ryland, 732.

If the instrument be not negotiable, then the declarations of the payee made previous to the assignment, are admissible in an action brought in the name of the payee; because he was then admitting against his own interest, and being a party to the record, the defendant cannot make use of him as a witness. *Hatch v. Dennis*, *supra*; *Hacket v. Martin*, 8 Greenl. 77. His declarations, subsequent to the assignment, are not admissible.

The holder of a negotiable note has nothing to do with the original consideration; he takes it discharged of all equities between the maker and payee. It is scarcely necessary, after the repeated decisions which have been made, to add, that the declarations of the payee, after parting with his interest in the note, are not admissible in evidence. *Camp v. Walker*, 5 Watts' R. 428; *Atkinson v. Graham*, *Id.* 411. The promisor may show as against the promisee, that the note was illegal or without consideration; and after showing that the note was indorsed when overdue, he will be let into the same defence. *Grew v. Burditt*, 9 Pick. 265.

(1) *Kent v. Lowen*, 1 Campb. 177. And see *Langdon v. Hulls*, 5 Esp. 158.

NOTE 748.—See last note. Statements, when part of the illegal transaction itself, and made at the same time by the parties to it, may perhaps be admissible in evidence against a subsequent holder as part of the *res gestæ*. *Chit. on Bills*, 650. But a very learned judge refused to receive evidence of what a prior holder had said against the validity of a bill whilst he was the holder, because such holder was living, and might be called as a witness. *Gazelee, J.*, in *Hedger v. Horton*, 3 Carr. & Payne, 179. In an action by the indorsee against the maker of a promissory note, the declarations of the payee (not uttered at the time of making the note) are not evidence to prove that the consideration for the note was money lost at play, unless it be previously shown that the indorsee is identified in interest with the payee, as by having taken the note after it was due, or without any consideration. *Beauchamp v. Parry*, 1 Barn & Adol. 89. * * See *ante*, of the text, and the notes. * *

A promissory note was allowed to be impeached and reduced in amount by a letter from the payee, stating upon what consideration it was given. *Lewis v. Gray*, 1 Mass R. 297. * * But see *Bailey v. Wakeman*, 2 Denio, 220, overruling the same case in 2 Hill, 279, and denying the competency of such proof as part of the *res gestæ*. * *

(2) *Dickinson v. Prentice*, 4 Esp. R. 52; *Bayley on Bills*, 419 (4th ed.) On the subject of the competency of witness, *vide ante*, p. 187, and *infra*, p. 227.

is also a competent witness for the defendant, to prove that the plaintiff discounted the bill on an usurious consideration,(1) or that the bill was given on a gaming consideration,(2) or has been paid;(3) and it is no objection, that he is a prisoner on a charge of having forged the bill.(4) Where a bill has been drawn by one partner in fraud of the rest, to pay a separate creditor, a copartner is competent to prove the drawer's want of authority.(5) But the drawer of a bill is not a competent witness for the acceptor of an accommodation bill, to prove that the holder received the bill on usurious consideration;(6) because he is liable to the acceptor not only for the principal sum, but also for all damages sustained by the acceptor in the suit. The drawer will, however, be an admissible witness for this purpose, if he has become bankrupt and obtained his certificate.(7)

In an action on a promissory note or bill of exchange, the indorser is in general a competent witness, either for the plaintiff or defendant.(8) Thus he may be called by the plaintiff to prove his own indorsement.(9) And in an action against the maker of a promissory note, he is a competent witness for the defendant, to prove payment of the money for which he

(1) *Rich v. Topping*, Peake's N. P. C. 224; *Brand v. Ackerman*, 5 Esp. 119.

(2) *Hubner v. Richardson*, Manning's Index, 327.

(3) *Humphrey v. Moxon*, Peake's N. P. C. 52.

(4) *Barber v. Gingell*, 3 Esp. C. 62.

(5) By Lord Ellenborough, in *Ridley v. Taylor*, 13 East, 176.

(6) *Jones v. Brooke*, 4 Taunt. 464. And see *Bottomley v. Wilson*, 3 Stark. N. P. C. 148; *Harman v. Lashbrey*, Holt's C. 390. See Vol I, Chap. 5, Sects. 4 and 5. But the drawer will be rendered competent by a release. *Hardwick v. Blanchard*, 1 Gow N. P. C. 113.

NOTE 749.—*Hubbly v. Brown*, 16 John. R. 70. Persons liable to the costs of an action, have an immediate interest in the event, and are, therefore, not competent.

One who admits he is liable in respect to a claim on which an action is brought, is nevertheless incompetent to be a witness in the action; for though contribution in respect to the claim advanced, be ultimately against his interest, he has a stronger interest to defeat the action or lessen the damages. *Hall v. Rix*, 6 Bing. 181.

(7) *Ashton v. Longes*, 2 Ry. & Mo. N. P. C. 127. See *Brind v. Bacon*, 5 Taunt. 183; 6 Geo. IV, c. 16, § 52.

(8) *Bayley on Bills* (4th ed.) 422. *Vide post*, Indorsee against drawer.

NOTE 750.—In *Knights v. Putnam* (3 Pick. 184), the action was by the indorsee of a negotiable note against the maker; the indorser was introduced as a witness to prove usury, as between himself and the indorsee, in the transfer of the note; and also that it was pledged to the indorsee for a debt less than the amount of it; the testimony was rejected as irrelevant. But the judge in delivering the opinion of the court, says, that the indorsement being unqualified, the indorser could not be received as a witness to qualify it, by establishing an interest in himself.

The indorser is admissible to prove the time of the indorsement and other facts not affecting the original validity of the note. *Adams et al. v. Carver et al.*, 6 Greenl. 390; *Spring v. Lovett*, 11 Pick. 417. A note payable on demand is, strictly speaking, overdue from the time it is made; and if indorsed long after due, it is subject to all the equities to which it was liable in the hands of the person from whom he took it. *Sargent v. Southgate*, 5 Id. 317. If a party to a note stands disinterested, he is competent to testify as to facts subsequently arising. *Skelding v. Warren*, 15 John. R. 270.

(9) *Richardson v. Allan*, 2 Stark. N. P. C. 334.

indorsed the note.(1) So, in an action by an indorsee against the acceptor of a bill of exchange, he may prove that the bill was made in London, although dated in a foreign country, and, therefore, void for want of an English stamp.(2) And if a witness is discharged by his bankruptcy and certificate, of his liability on a bill which he has guaranteed, his evidence is admissible, because he is thereby also relieved from liability to the costs.(3) It has been held, in one case, that an indorser cannot be called to prove a title in himself; as, by proving that he delivered the bill to the plaintiff as his agent only, to enable him to obtain payment; and that a release from the defendant would not render him a competent witness; but the principle of this decision is very questionable.(4)

II. In the next place, it is proposed to treat of the evidence in cases

(1) *Charrington v. Milner*, Peake's N. P. C. 6.

NOTE 751.—It is a general rule, that although a party to a negotiable instrument is inadmissible as a witness to impeach its original validity (*Mann v. Swann*, 14 John. R. 270; *Churchill v. Suter*, 4 Mass. R. 156; yet he is competent to prove a discharge, payment, or any other matter *ex post facto* to defeat the action. *Woodhull v. Holmes*, 10 Johns. R. 231; *White v. Kibling*, 11 Id. 128; *Warren v. Merry*, 3 Mass. R. 27. Where the indorser of a note was admitted as a witness to show that he indorsed it after it fell due, the plaintiff was allowed to impeach his testimony by producing letters of the witness in relation to the transfer. *Baker et al. v. Arnold*, 3 Caines' R. 279. It was decided early in Pennsylvania, that an indorser could not be a witness to invalidate an instrument to which he was a party. *Stiles v. Lynch*, 2 Dall. 194. This rule, with certain restrictions and qualifications, has since been repeatedly recognized. *Id.*; 4 Serg. & Rawle, 115; 6 Id. 115; 1 Rawle, 197; 2 Watts, 265. The rule is confined to negotiable paper; and the instrument must not only be negotiable, but must have been actually negotiated. *Gest v. Espy*, 2 Watts, 265. Having given the note or bill the sanction of his name, and thereby added to its value, by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration, or under any other circumstances which would destroy its validity. *Bank of U. S. v. Dunn*, 6 Peters' R. 51; *Deering v. Sawtel*, 4 Greenl. R. 191. This rule applies not only to actions directly upon the note, but to all others, where its validity comes collaterally in question. *Id.* The reasons of policy for this rule are lucidly exhibited by Chief Justice Parsons, in *Churchill v. Suter*, *supra*. The rule, however, has been held not to apply to what occurs *after* indorsement. *Shamburgh v. Commogere*, 10 Mart. R. 18. * * The rule excluding the party from impeaching the original validity of the instrument, prevails in the Supreme Court of the United States, and in the following states, viz: Maine, Massachusetts, Pennsylvania, Ohio, and Louisiana. The contrary rule prevails in New York (*Stafford v. Rice*, 5 Cowen, 23; *Bank of Utica v. Hillard*, Id. 153; *Williams v. Walbridge*, 3 Wend. 415), Virginia, Connecticut, Kentucky, North and South Carolina, Georgia, Alabama, Tennessee, New Hampshire, Vermont (but see *Chandler v. Mason*, 2 Vern. 198), and Missouri. See the cases collected in *Chitty on Bills* (11th Am. ed.), p. 669, and notes. * *

(The competency of parties depends upon the same general rules which apply to other witnesses. Greenl. on Ev. §§ 203—207. At common law they were held incompetent, when directly interested in the event of the suit, on the ground of such interest; and since the recent statutes declaring that interest shall not disqualify, they are unquestionably competent.)

(2) *Jordaine v. Lashbrooke*, 7 T. R. 601.

(3) *Brind v. Bacon*, 5 Taunt. 183. And see *Bottomley v. Wilson*, 3 Stark. N. P. C. 148; *Moody v. King*, 2 B. & C. 558. And *vide ante*, p. 198. See further respecting the competency of an indorser, *post*, Indorsee against Drawer.

(4) *Buckland v. Tankard*, 5 T. R. 578; *Bull. N. P. 288*. See Vol. I, Chap. 5, Sects. 4, 5.

where the liability of the defendant arises in consequence of the default of another party; and herein,—

Of the evidence in actions by the indorsee of a promissory note against the indorser, and by the payee or indorsee of a bill of exchange against the drawer or indorser.(1)

In these actions the plaintiff must prove, at the trial, the defendant's liability upon the note or bill,(2) and his own interest in it, and a presentment to the maker or acceptor, and notice to the defendant of non payment or non-acceptance.

Admissions of indorser.

As to the first point, enough has been said in treating of the preceding actions upon notes and bills; and, upon the second, it is only necessary to add to what has been there noticed, that in an action against an indorser,

(1) NOTE 752.—In Connecticut, a blank indorsement of a note not negotiable, *prima facie* implies a contract on the part of the indorser, that the note is due, that the maker shall be of ability to pay it when it comes to maturity, and that it is collectable by the use of due diligence. Perkins v. Catlin, 11 Conn. R. 213, and cases cited.

The indorsement of a negotiable note by a stranger, is subject to the same construction, and imposes upon the payee the same diligence as in the case of a note not negotiable. Id. But as between the payee of a negotiable note and a third person, who has indorsed it in blank, as a further security to the payee, it is competent for the payee to prove, by parol, the agreement which was in fact made at the time of the indorsement, and the performance of which the indorsement was intended to secure. Id. (Not so in New York. Edwards on Bills and Notes, 229, 273, 650.

Where the guaranty or promise relied upon was in these words: "I acknowledge myself to be holden as surety for the payment of the above note;" the note having previously been signed by C.; held, that defendant was answerable as an original promisor, and not merely on the contingency of C.'s failing to pay. Hunt v. Adams, 6 Mass. R. 519. This decision was recognized in Cobb et al. v. Little (2 Greenl. R. 261), where defendant's engagement was absolute, that the note should be paid in six months; and held, that it was the duty of the defendant to see the note paid at the time; and if it was not, to take notice of his neglect and pay the amount of the note himself.

Parties make this species of contract like all others, on such terms as they choose. Sometimes a guaranty is conditional, as in the case of Tyler v. Binney (7 Mass. R. 479), where the payee of a negotiable note made a special indorsement thus: "I guarantee the payment of the within note in eighteen months, if it cannot be collected of the promissor before that time;" held, in such case, the plaintiff was bound to prove a title to the note; there being no name inserted in the indorsement; the court saying, "The guaranty, taken independently of the note, is a promise not negotiable, being conditional, and not absolute; and connected with it, the supposition is altogether unreasonable and improbable, of an unlimited currency intended for the note itself at the risk of the indorser."

(2) NOTE 753.—"No person can maintain an action as indorsee of a bill of exchange, without proving an assignment of the bill by the payee. The plaintiff's title to recover is as assignee of the payee; and it is necessary that he show the assignment, by proving the signature of the assignor, who is the payee, either by evidence of his handwriting, or by other sufficient evidence." Parsons, Ch. J., in Blakely v. Grant, 6 Mass. R. 386. A blank indorsement, as between the immediate parties, is *prima facie* evidence only of the contract which they have, and like all other such legal presumptions, may be explained by parol evidence. Perkins v. Catlin, 11 Conn. Rep. 229.

the proof of the defendant's indorsement will dispense with evidence of the handwriting of the maker or drawer; and the indorser is liable, though the bill be forged.(1) The defendant's indorsement admits also the ability and signature of every antecedent party.(2) But indorsements which are subsequent to that of the defendant must be proved, if they are averred in the declaration.(3) However, an admission by the defendant, of his liability to the plaintiff through any intermediate indorsement, will dispense with proof of that indorsement.(4) When the indorsement is attested, as it must be where the note is for the payment of less than five pounds, otherwise the note is absolutely void,(5) the indorsement must be regularly proved by the subscribing witness.

Admission by drawer.

In an action by the indorsee against the drawer, the indorsement of the payee must be proved, although the bill, so indorsed, was shown to the defendant after it became due, at which time the defendant did not object to the title of the holder: as, where he objected to pay, on the ground of having drawn without consideration, but said nothing respecting the indorsement, Lord Ellenborough held, that this could not be considered as an admission of the handwriting of the indorser.(6)

Presentment when necessary.

It is in all cases necessary for the plaintiff to prove a presentment for payment, and he must show a demand(7) on the person who is primarily

(1) *Lambert v. Oakes*, 1 *Ld. Raym.* 443; *S. C.*, 1 *Salk.* 127; *Free v. Hawkins*, *Holt's C.* 550.

NOTE 754.—*Harris v. Bradley*, 7 *Yerger*, 310. The holder of a bill or note has nothing to do with the preceding indorsements, and, whether genuine or not, his immediate indorser is liable to him. The last indorsement is, in fact, a guaranty of the preceding indorsements, and admits the handwriting of the drawer and prior indorser, although the bill be forged. *Chit on Bills*, 197, 198; 3 *Kent's Com.* 60. The note, therefore, with its indorsements, was admitted to be read to the jury upon proof having been made of the indorsement by the defendant. *Harris v. Bradley*, *supra*.

The general issue of non-assumpsit has been held not to apply to a denial of the making of the note or its indorsement, unless sworn to as required by statute; the act declaring that no indorser shall plead any plea denying directly or indirectly such indorsement, unless the plea is accompanied with an affidavit of the truth thereof. *Smith v. M'Manus*, 7 *Yerger*, 477.

(2) *Bayley on Bills* (4th ed.), 366; *Critchlow v. Perry*, 2 *Campb.* 182; *Chaters v. Bell*, 4 *Esp. C.* 210; *Lambert v. Pack*, 1 *Salk.* 127.

(3) *Vide ante*, p. 193.

(4) *Sidford v. Chambers*, 1 *Stark. N. P. C.* 326.

(5) By st. 17 *G. III.*, c. 30, § 1.

(6) *Duncan v. Scott*, 1 *Campb.* 101.

(7) NOTE 755.—The demand may be made by an agent who had the note for collection, although he has not the note with him at the time. Thus, where the note was discounted at the bank, and the cashier made the demand, held, that it was sufficient; it appearing that the indorser knew it was discounted at the bank. *Gallagher v. Roberts*, 2 *Fairf. R.* 489. But a demand made on the maker of the note in W., by an agent of the plaintiffs then living in B., and having the note there in their possession, while M., the agent, had only a copy of the note when he made the demand, was held insufficient. *Freeman v. Boynton*, 7 *Mass. R.* 483.

liable, or that he has used due diligence to get the money from him.(1) An allegation of due presentment will not be satisfied, by proof that the maker or acceptor could not be found;(2) and it will not be a sufficient excuse for omitting to present a bill of exchange, that the acceptor has become bankrupt,(3) or insolvent,(4) or that he is dead; for in that case the presentment may be made to his executors, or if there be none, at the house of the deceased.(5) But if the drawee of a bill has never lived at the place of address, or has absconded, and not simply removed to another

The custom of merchants is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. Per Lord Tenterden, in *Hansard v. Robinson*, 7 Barn. & Cres. 90; Chit. on Bills, 385, *et seq.*: 1 New York Dig. 171-175.

An acceptance for honor is not absolutely such, but in the nature of a conditional acceptance; and in such case it is necessary that presentment to the drawee for payment should be averred in the declaration; and, for want of such averment, judgment was arrested. *Williams v. Germaine*, 7 Barn. & Cres. 468. The same rule as to proof which prevails in the case of an acceptor for honor, in suing a party for whose honor he accepts, must also be observed when the holder of a bill sues the person so accepting. *Id.*

Any person who, by accident or otherwise, happens to be the holder at the time a bill or note becomes due, may and ought to demand payment, and give notice of the non-payment, although not beneficially interested, and though liable to pay over the proceeds on demand to the person legally entitled. *Jones v. Fort*, 9 B. & C. 764; *Tennant v. Stratchan*, Mood. & Malk. 377. A demand of payment by an agent having any parol authority, or the mere possession of the paper, is sufficient. *Bank of Utica v. Smith*, 18 John. R. 230; 7 Mass. R. 486; 9 Id. 423, 427. A person in possession of a note fairly and without fraud, may give a good and valid discharge. Though the law does not require the intervention of a notary to demand payment, yet these officers are in the practice of doing so; and their doings are available for that purpose as well as to give notice. *Bank of Utica v. Smith*, *supra*.

The holder of a note receiving and indorsing it for the purpose of collection, and being, therefore, merely an agent, is nevertheless to be considered as the real holder to demand payment and give notice. *Ogden et al. v. Dobbin et al.*, 2 Hall, 112; *Mead v. Engs*, 5 Cowen, 303.

In an action against the indorser of a bill, it is not necessary to prove any presentment to, or demand upon, the drawer, because the indorser, by the act of indorsement, engages that the bill shall be paid, which contract being broken by the dishonor of the bill, the holder is entitled to sue without reference to the drawer's breach of contract. Chitt. on Bills, p. 640 (8th Am. ed.).

(1) 2 Burr. 677; by Lord Mansfield, C. J., in *Heylin v. Adamson*.

(2) *Leeson v. Pigott*, cited Bayley on Bills, p. 324.

(3) *Russell v. Langstaffe*, Doug. 515.

(4) *Esdaile v. Sowerby*, 11 East, 117; *Rohde v. Proctor*, 4 B. & C. 523.

NOTE 756.—*May v. Coffin*, 4 Mass. R. 341; *Bond v. Farnham*, 5 Id. 171; *Clair v. Barr*, 2 Marsh. 256. But if the indorser guaranty the solvency of the drawer, it seems not necessary to prove a demand on the maker in order to maintain an action upon the guaranty; the guaranty being absolute upon proof of the insolvency. *Bell v. Johnson et al.*, 4 Yerger, 194. The actual insolvency of the maker when the note is due, never dispenses with the necessity of notice to defendant, who is sued as indorser. *Groton v. Dalheim*, 6 Greenl. R. 476. Even though the fact of the insolvency of the maker at the time of such indorsement was known to the indorser, who indorsed it to give it currency. *Nickolson v. Gouthit*, 2 H. Black. 609; *Jackson v. Richards*, 2 Caines, 343; *Buck v. Cotton*, 2 Conn. R. 126; *Crossen v. Hutchins*, 9 Mass. R. 205; *Sandford v. Dillaway*, 10 Id. 52; 13 Id. 559.

The insolvency of the acceptor does not excuse from giving notice to the drawer. *Whitfield v. Savage*, 2 Bos. & Pull. 277; *May v. Coffin*, 4 Mass. R. 341.

(5) Chitty on Bills (7th ed.), 261.

place, the holder will be excused from making further inquiries after him.(1)

(1) Bayley on Bills, 173 (4th ed.); Anon., *Ld. Ray.* 743; *Collins v. Butler*, 2 Str. 1087; *Bate-man v. Joseph*, 2 Camp. 461; 12 East, 433.

NOTE 757.—*Gillespie v. Hannahan*, 4 M'Cord, 503; *Putnam v. Sullivan*, 4 Mass. R. 53.

* * *Spies v. Gilmore* (1 Barb. Sup. C. R. 158; S. C., in Error, 1 Comstock's N. Y. R. 321), was a suit upon a note as follows:

\$530.07.

New York, Sept. 16, 1835.

Six months after date, I promise to pay to the order of Mr. Adam W. Spies five hundred thirty, 07-100 dollars, value received.

JOHN FURLONG.

The defendant Gilmore was the first and only indorser. Furlong was indebted to plaintiff, and proposed to give Gilmore as an indorser, on an extension of the credit, in pursuance whereof the note was made and indorsed in the city of New York; the maker and indorser then, and at the maturity of the note, residing at Matamoros in Mexico, which the plaintiff knew. Payment was never demanded of the maker, and notice of non-payment was given to the indorser. The Superior Court (where the suit was commenced), decided that a demand was unnecessary, and held Gilmore as a guarantor of the note. The Supreme Court, on error, reversed the judgment of the Superior Court; holding, first, that the defendant was to be charged as indorser, and not as guarantor (*Hall v. Newcomb*, 3 Hill, 233; and 7 Id. 416; S. C., in error, and note, p. 426; *Seabury v. Hungerford*, 2 Id. 80; *Manrow v. Dunham*, 3 Id. 587, per Bronson, J.); and second, that, as indorser, Gilmore was discharged for want of due demand of the maker. The Supreme Court had previously held (*Taylor v. Snyder*, 3 Denio, 145), that where the maker of a note, who resided at Florida, made and dated it at Troy, a demand in Florida (where the holder knew the maker to reside), was necessary to charge the indorser. See the elaborate opinion of Beardsley, J., Id. pp. 147, 157. * *

(When the bill is drawn payable at a place named, or is addressed to the drawee at a particular place and accepted in general terms, it is sufficient to present for payment at the place designated. *Seneca Co. Bank v. Neass*, 5 Denio R. 329; 8 Bing. 214; *De Wolf v. Murray*, 2 Sand. R. 166. In the case of the removal of the maker of a note or the acceptor of a bill from the state, after the making of the note or acceptance of the bill, the holder is not bound to follow him in order to demand payment, and thus charge the drawer or indorser. *Edwards on Bills and Notes*, 159, 160, 236, 237.)

If the drawer of a note remains in the state, and has only changed his residence, the holder must find him out and make his demand, to charge the indorser upon non-payment; but if he has removed to a foreign country, the holder is excused from making a demand. Any other state of the United States, is considered as a foreign state. *Gillespie v. Hannahan*, *supra*; *Halls et al. v. Howell*, Harp. R. 426.

May v. Coffin, 4 Mass. R. 341. The condition on which the indorser of a note is holden, is that the indorsee shall present the note to the promisor when due, and demand payment of it, if it can be done by using due diligence. But where this cannot be done by reason that the promisor has absconded, the indorsers are holden, notwithstanding there was no demand on the promisor. *Putnam et al. v. Sullivan et al.*, *supra*. Where a demand must be fruitless, the indorser has no right to insist on a demand upon the maker. *Bond et al. v. Farnham*, 5 Mass. R. 170. Thus, where the indorser had received an assignment of all the maker's property, for security against his indorsements; held, that this was a waiver of the condition of his liability; and the nature or terms of the engagement cannot be varied by an eventual deficiency of the property. *Bond et al. v. Farnham*, 5 Mass. R. 170. It is not to be understood, however, that where an indorser receives security to meet particular indorsements, it is to be concluded that he waives a demand or notice as to any other indorsements. Id. Although in such a case, a demand be averred in the declaration, it is mere surplusage. Id.

It is analogous to the case of a drawer of a bill, who had no effects in the drawee's hands. He cannot insist upon a demand upon the drawee, for he could not expect an acceptance, and he suffers no injury by the want of it. Id.; *Warder et al. v. Tucker*, 7 Id. 449; *Stanton et al. v.*

A presentment for acceptance is not necessary, except in the case of bills payable within a limited time after sight; (1) and if an acceptance be

Blossom et al., 14 Id. 116. But if at the time of drawing, the drawer had effects in the hands of the drawees, and had a reasonable expectation that it would be paid, he will be entitled to notice, notwithstanding the effects were attached after the bill was drawn, and before it was presented for acceptance. *Stanton v. Blossom et al.*, 14 Mass. R. 116.

Some latitude in the mode of proof is allowed, where a presentment and demand are averred in the declaration; it being usual to aver a presentment and demand, even where proof of matter in excuse is relied upon. Thus, in all cases where a note is given in evidence upon the money counts, any proof which establishes the plaintiff's right to recover the note, supports the count. Per Shaw, C. J., in *North Bank v. Abbot*, 13 Pick. 469, 470. By force of law, by special agreement, or by usage, some particular mode of presentment is valid. As where a note is payable at a particular bank: if the maker is not at the place to receive the demand, leaving the note at the place, with authority to receive the contents, is held to be a demand. So where it is the custom of banks, instead of presenting the note to the promisor, to send a notice to him to come to the bank and pay it, and this is known to the promisor, he shall be held to assent to it, and such notice is held to be equivalent to actual presentment. *Id.*; *Jones v. Fales*, 4 Mass. R. 245. So, where it is agreed between the holder and promisor, that notice may be left at a particular place, not his own place of business or residence, leaving the usual notice at such place, is a sufficient presentment. *Whitwell v. Johnson*, 17 Mass. R. 449; *State Bank v. Hurd*, 12 Id. 172. It is no concern of the indorser, whether the legal forms have been complied, or waived by the promisor.

It seems, that where there is an impossibility to present the bill on the day it falls due, owing to unavoidable accidents, and the holder is not in fault for the delay, a subsequent presentment will be good. *Schofield et al. v. Bayard et al.*, 3 Wend. 488. A bill drawn on Leghorn, due the 10th September, 1800, was not demanded till the 31st December; Leghorn being then occupied by the enemy, or in some such critical situation, it was impossible to present it in season. Lord Ellenborough said: "Duly presented, is presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within the regular time." *Patience v. Townley*, 2 Smith, 223.

In assumpsit on a bill of exchange drawn upon "P. P., No. 6 Budge Row," and accepted by him, an averment that the bill, when due, was presented and shown to P. P. for payment, is supported by proof that the holder went to 6 Budge Row, to present it, but found the house shut up, and no one there. And notice may be given to the drawers on the day of such dishonor, as in the case of an actual refusal to pay. *Hine v. Alley*, 4 Barn. & Adol. 624.

The indorser informed the holder that the maker had absconded, and negotiated for further time of payment; held, that a demand of the maker, and notice to the indorser, were unnecessary. *Leffingwell v. White*, 1 John. Cas. 99. The protest of a notary deceased, and a register of protest kept by him, in which were notes and memoranda in his handwriting, proved by a witness, stated that the notary had made diligent search and inquiry after the maker of a note in the city of New York (where the note was dated), in order to demand payment of him, and that he could not be found; held, that this was sufficient evidence of due diligence, as to the demand of payment of the note. *Halliday v. Martinet*, 20 John. 163. "What a man has actually done, and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury." *Spencer, C. J.*, in *Id.* In *Welsh v. Barrett* (15 Mass. R. 380), the court admitted the book of a messenger of a bank, who was dead, to prove a demand on the maker, and notice to the indorser.

(1) Bayley on Bills, (4th ed.) 182.

NOTE 758.—*Bachelior v. Priest et al.*, 12 Pick. 399. A bill payable in four months from date, and presented long before it was payable, was considered as being presented for acceptance in due season. "If the bill had been payable at a certain period after sight, the objection would be deserving of more consideration." Per Wilde, J., in *Id.*

Plaintiff purchased in the market, a bill drawn by defendant on G. at Rio Janeiro, and payable

unnecessarily stated, it need not be proved; (1) and it seems, that there is no occasion to present a bill which is upon a wrong stamp. (2)

Presentments within that time.

The time when a bill or note ought to be presented for payment, frequently depends on the instrument itself; (3) and when no time of pay-

at sixty days' sight; the exchange falling after the purchase, plaintiff kept the bill nearly five months, and then sold it again. The drawer having failed before presentment, plaintiff, after paying his indorsee the amount of the bill, sued the defendant, the drawer; held, that the jury were correctly directed to consider whether, looking at the situation and interests of both drawer and holder, there had been unreasonable delay on the part of the plaintiff in forwarding the bill for acceptance, or putting it in circulation; and the jury having found for the plaintiff, the court refused to disturb the verdict. *Mellis v. Rawdon*, 9 Bing. 416. "Whether the bill is locked up by the first purchaser, waiting for the turn of the market in his favor, or whether it is circulating through a distant part of Europe for an equal space of time, really seems to make little, if any, difference with respect to the drawer's risk. When the bill is circulating, the immediate motive for forwarding to its destination will be a rise in the exchange; and the same motive will equally operate and produce the same effect, if the bill still remains in the hands of the original purchaser." *Id.*

A bill payable at sight, must be presented for payment to the drawee as soon as conveniently can be done, taking into consideration all the circumstances of the holder and the drawee. *Parker, C. J.*, in *Field v. Nickerson*, 13 Mass. R. 137. And a promissory note payable on demand, is like a bill payable at sight; so that, as in the latter case, the holder must present his bill within a reasonable time, in order to charge the drawer, so in the former, the indorsee must make demand of payment on the promisor within a reasonable time, in order to charge the indorser. *Id.* so the holder of a check must use due diligence, and demand payment in order to recover of the drawer. *Cruger v. Armstrong et al.*, 3 John. Cas. 5. However, in a subsequent case, a delay of six months in presenting a check was held not to preclude the plaintiff from recovering; it appearing that defendant had not sustained any damages by the delay. *Conroy v. Warren*, 3 John. Cas. 259. What is reasonable time was said to be a question of law according to the circumstances of each case. 3 John. Cas. 262. Checks and bills are substantially alike. *Id.* 7, 8, 9, 264. *Vide Joliffe v. Wiggins*, 6 Munf. R. 3.

(1) *Tanner v. Bean*, 4 Barn. & Cress. 312.

(2) *Wilson v. Vysar*, 4 Taunt. 288.

(3) As to the allowance of days of grace, particularly in the case of bills payable after sight, see *Chitty on Bills* (7th ed.), 268.

NOTE 159.—The demand of payment must be made on the day the note becomes due; unless the day of grace falls upon Sunday, in which case the demand must be made on the preceding Saturday. *Jones v. Fales*, 4 Mass. R. 245; *Griffin v. Goff*, 12 John. R. 423; *Jackson v. Richards*, 2 Caines, 343; *Johnson v. Haight et al.*, 13 John. 470; 13 Mass. R. 558; *Henry v. Jones*, 8 Id. 453; *Bussard v. Levering*, 6 Wheat. R. 102. A note made payable at the Mechanics' Bank in the city of New York, was presented by the notary to the first teller of the bank, fifteen minutes after three o'clock, on the day on which it was payable, and payment demanded; it was held that this presentment was sufficient, although the bank closed at three o'clock, it appearing to be the usual course of business in the bank, to allow that time after banking hours, for the presentment and payment of notes. *Bank of Utica v. Smith*, 18 John. R. 230. The law requires a demand and notice; but the time and manner may be modified by usage. *Lincoln & Kennebec Bank v. Page*, 9 Mass. R. 155. *Pierce v. Butler*, 14 Id. 303. A note of hand is not, by the laws of Massachusetts, entitled to grace, unless it be expressly made payable *with grace*. *Jones v. Fales*, 4 Mass. R. 245.

The bill or note must be presented for payment on the last day of grace (*Platt v. Eads*, 1 Black. R. 31), unless that day be Sunday; in such case it must be on the second. *Id.* But if the cus-

ment is expressed, as on bills payable at a certain time after sight, or at sight, the presentment must be made within a reasonable time. The question as to what is a reasonable time for the presentment of a bill in such cases, is a mixed question of law and fact;(1) and it has been usual, at least in later cases, to leave to the consideration of the jury what is a reasonable time for presentment, subject to the observations of the court,(2) though it is difficult to lay down any precise rule on the subject.(3) But the question must depend very much on the course of dealing and situation of the parties. Thus, where a bill is drawn by bankers in the country on their correspondents in London, it does not seem unreasonable to treat the bills as not requiring immediate payment.(4) And although, in general, if a bill or note payable after sight is not put into circulation, it ought to be presented without delay;(5) yet it has been held, that a delay to present such a bill in London, which was given within twenty miles thereof, until the fourth day, was not unreasonable, though the bill had not been circulated.(6) A check payable on demand may be presented

tom of the bank where the note is discounted, is to make the demand on the fourth, the parties are bound by the custom. *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. U. S. Bank*, 11 Id. 431.

(1) By Lord Tenterden, Ch. J., *Shute v. Robins*, 2 Ry. & Mo. 136.

(2) 2 Ry. & Mo. 136; *Fry v. Hill*, 7 Taunt. 397; *Muilman v. D'Eguino*, 2 H. Blac. 565. The cases in which this question is considered as in the province of the court are cited in *Chitty on Bills* (7th ed.), 262.

(3) Per Eyre, Ch. J., *Muilman v. D'Eguino*, 2 H. Blac. 565. And per Heath, J., and Gibbs, Ch. J., *Goupy v. Hardén*, 7 Taunt. 159.

(4) 2 Ry. & Mo. 136.

(5) By Buller, J., in *Muilman v. D'Eguino*, 2 H. Blac. 565; by Gibbs, Ch. J., *Goupy v. Harden*, 7 Taunt. 161.

(6) *Fry v. Hill*, 7 Taunt. 597.

NOTE 760.—See note, *supra*.

There seems to be no fixed rule for the presentation of such a bill; but the holder is bound to use due diligence, and put the bill into circulation. Where a bill of exchange was drawn in Antigua on London, dated July 18th, 1817, but was not presented for acceptance until January 16, 1818; but it had been put into circulation, and had passed into several hands before it was indorsed to the plaintiff; held, that there was no laches in the holders in presenting the bill. *Robinson v. Ames*, 20 John. R. 146. Spencer, C. J., observes: "We perceive how extremely cautious the judges were, in the case cited (*Muilman v. D'Eguino*, 2 H. Bl. R. 565), in laying down any rule. The evident inclination of their minds was, that when the payee put the bill in circulation, the subsequent holder was not bound to any strict presentment. The drawers of the bill evidently did not mean to limit the time of presentment, by making the bill at sixty days after sight. They meant to give a latitude, as to time, to the holder; and my conclusion is, that there is not such *laches* as will discharge the drawers." (*Mellish v. Rawdon*, 9 Bing. 416.)

The question, what is reasonable time, is partly a question of fact, and partly of law; the facts being ascertained, the question of due diligence in making presentment or giving notice, is a question for the court. *Furnan v. Haskin*, 2 *Caines' Rep.* 369; *Vreeland v. Hyde*, 2 Hall, 431; (*Edwards on Bills and Notes*, 386 to 396.)

Where the plaintiff paid for goods in country bank notes on the 23d, and on the 28th, passed the same, but was informed on the next day, that the bank had stopped; and on the 30th he informed the defendant of that fact; held, that the plaintiff, as the holder of the notes, was bound

on the day after that on which it is given,(1) and it may be sent for presentment by the next day's post.(2)

to present them to the bank for payment, or else to have returned them without delay, to defendant. *Rogers v. Langford*, 1 C. & M. 637; and 3 Tyrw. 634.

(1) NOTE 761.—*Vide ante*, note 728.

When a *check or bill* or banker's note is expressed to be payable *on demand*, or when *no time of payment is expressed*, it is payable instantly on presentment, without any allowance of days of grace. *Moyser v. Whitall*, 9 Barn. & Cres. 409; *Sutton v. Toomer*, 7 Id. 416; *Chit. on Bills*, 410; *Field v. Nickerson*, 13 Mass. R. 131; *Herrick v. Bennett*, Id. 374. And the presentment for payment of such a check or bill must be made within a *reasonable time*, usually the next day. *Chit. on Bills*, 410, (8th Am. ed.) No particular time for a demand is fixed. *Murray v. Judah*, 6 Cowen, 484. A note payable on demand must be presented for payment within a reasonable time, and notice given to the indorser, and that when facts are ascertained, what is a reasonable time, is a question of law. *Vreeland v. Hyde*, 2 Hall, 431; 1 Cowen, 408; 2 Caines, 369. The rule as to *reasonable time* was intended for, and is applicable to negotiable instruments *made for commercial purposes only*. *Vreeland v. Hyde*, *supra*.

An action on a bank note payable on demand without specifying any place of payment, will be sustained without a demand at the bank. *The Bank of Niagara v. McCracken*, 18 John. R. 493, *Woodworth, J.* Though in a subsequent case, this was said not to have been the opinion of the court. *Jefferson County Bank v. Chapman*, 19 John. R. 322. But in a still later case, it seems to have been the opinion of the court, that a demand was not necessary. *Haxtum v. Bishop*, 3 Wend. 13. But if the bank is solvent, a defence will be made out, which will subject the plaintiff to costs. So, too, upon a bank note payable generally on demand, the commencement of the suit is a demand; and no other demand seems necessary to sustain an action upon it against the promisor. Id.

A note overdue, is to be considered as a note payable on demand; but where the demand was made within a few weeks, and notice given within two or three months, it was held to be sufficient to charge the indorser. *Lewis v. Lozee*, 3 Wend. 75.

Before a suit can be instituted on a bank check, it seems that a demand of payment of the bank, is a condition precedent. *Brown v. Lusk*, 4 Yerg. R. 210; 3 Kent C. 58. Checks are not due until demand, and are payable on presentment. Therefore, an order to the cashier of a bank to pay a certain sum on the next day after it bears date, is a bill of exchange, and not a bank check. Id.

* * It is essential to a check *eo nomine*, or a bank draft, that it be payable to *bearer*, and on demand. *Harker v. Anderson*, 21 Wend. 372; *Woodruff v. Merchants' Bank*, 25 Wend. 675; S. C. in error, 6 Hill, 174. In the case last cited, it was held (successively by the New York Superior Court, the Supreme Court, and the Court of Errors), that an instrument in the form of a bill of exchange, drawn upon and accepted by the cashier of a bank, and payable to *order* at a specified period *after date*, in the city of New York, is entitled to *days of grace*, and that evidence of a local usage to the contrary was incompetent for the purpose of varying such its legal effect. * * (A *post-dated* check is a bill of exchange. *Brown v. Newall*, 4 Selden R. 190.)

(2) *Williams v. Smith*, 2 Barn. & Ald. 497; 7 Taunt. 398; *Rickford v. Ridge*, 2 Campb. 537; *Robson v. Bennet*, 2 Taunt. 388; *Chitty on Bills* (7th ed.), 272. In the case of acceptances for honor, the presentment for payment may be made to the drawee, at the time of the presentment to the acceptor for honor. *Williams v. Germaine*, 7 Barn. & Cres. 468.

NOTE 762.—When a *check or bill*, or banker's note, is expressed to be payable *on demand*, or when *no time of payment is expressed*, it is payable instantly on presentment, without any allowance of days of grace (*Moyser v. Whitall*, 9 Barn. & Cres. 409); and the presentment for payment of such a check or bill, must be made *within a reasonable time* after the receipt of it, usually the *next day*. And where a country banker's deposit note was given in this peculiar form: "Payable with interest to the day of acceptance," it was held to be payable immediately on presentment, without any days of grace. *Sutton v. Toomer*, 7 Barn. & Cres. 416.

As a general rule, a check is not due from the drawer until payment has been demanded from

Within what hours.

A presentment at a banker's must be made within banking hours;(1) but a presentment at the house of a tradesman, need not be made within any particular time; and it has been held, that a presentment at eight

the drawee, and refused by him. 1 Hall, 78; 4 Yerg. 210; 6 Wend. 369, 443. As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time. But as between the holder and maker or drawer, a demand at any time before suit brought is sufficient, unless it appear that the drawer has failed, or the drawee has in some other manner sustained injury by the delay. *Murray v. Judah*, 6 Cowen, 490. A check on a bank for the payment of money, to charge an indorser, must be presented with all diligence consistent with the transaction of other commercial concerns. *Mohawk Bank v. Broderick et al.*, 6 Wend. 304. The rule appears to be settled that no laches can be imputed to the holder, if the check is presented at any time during the day after that on which it was given. *Id.*; *Cornell v. Lovett*, 1 Hall, 68.

Where an injunction from chancery, under the act to prevent bankruptcies by incorporated companies, was served upon a bank half an hour after it opened for business, by which its operations were suspended, it was held, that the holder of a check received after banking hours on the preceding day, was not bound to show a presentment of a check for payment, to entitle him to recover upon the original consideration, although it appeared that the drawer had sufficient funds in the bank to pay the check, and that it would have been paid, had it been presented before the service of the injunction. *Lovett v. Cornwell et al.*, 6 Wend. 369. Upon the same principle, it has been decided that no demand of payment upon the personal representatives of a deceased promisor, or notice of non-payment was necessary, under the laws of that state, to charge the indorsers, because an administrator is not by law obliged to pay the debt until the lapse of a year from his appointment. *Hale v. Burr*, 12 Mass. R. 86.

The delivery of a bank check by one bank to the porter of another bank, upon which the check is drawn, and the return of the same as *not good*, accompanied by evidence of the invariable practice of the porter to present checks thus received, and to return them, if dishonored, on the same day that they are delivered to him, is sufficient proof of presentment to authorize the submission of the case to the jury. *Merchants' Bank v. Spicer*, 6 Wend. 443.

A bank check is to be considered as an inland bill of exchange; therefore, if the drawer, at the time of drawing, has no funds in the hands of the drawee, the holder is not bound to present the check at the bank for payment (*Franklin et al. v. Vanderpool*, 1 Hall, 78); unless, indeed, the drawer, at the time of drawing, had a right to expect that it would be paid. *French v. The Bank of Columbia*, 4 Cranch, 141; *Robinson v. Ames*, 20 John. R. 150. But where the bill or check is drawn for the accommodation of another, and no fraud can be imputed on account of the reasonable expectations the drawer entertained that the bill would be paid, the reason of the rule ceases, and in such case the drawer ought to have notice of the dishonor of the bill. *Brown v. Leesk*, 4 Yerg. 210.

If the holder of a bill or note neglect to present it for payment at the time mentioned, he will lose his remedy on the bill as well as upon the consideration or debt. *Camidge v. Allenby*, 6 Barn. & Cressw. 373. The holder is bound to present promptly, or within a reasonable time. But the rule, requiring a presentment within a reasonable time, was intended for and is applicable to negotiable paper made for commercial purposes only. It was not intended for cases of suretyship. *Vreeland v. Hyde*, 2 Hall, 429.

The rule is, that the demand of payment should be made on the last day of grace (Bank of Alexandria v. Swann, 9 Peters, 33; *Lenox v. Roberts*, 2 Wheat, 373); unless the day falls on Sunday; and a demand made before is not sufficient. *Jackson v. Richards*, 2 Caines' R. 343; *Mitchell v. Degrand*, Mason, 176; *Bussing v. Lenering*, 6 Wheat. R. 102, 104; *Leavitt v. Simes*, 3 N. H. R. 14. If payable in a given number of days, generally, in reckoning the day of payment, the day of the date is excluded. *Henry v. Jones*, 8 Mass. R. 453.

(1) *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 Maule & Selw. 28; *Jameson v. Swinton*, 2 Taunt. 224; 3 Campb. 374.

o'clock in the evening was not unreasonable;(1) and a presentment of a bill, even at a banker's, may be made at any time, provided an authorized person, stationed there, refuses to pay.(2) But no inference can be drawn in favor of a presentment within banking hours, from the circumstance of a bill having been presented by a notary in the evening.(3)

At what place.

It has been before considered in what cases a presentment for payment must be made at a particular place;(4) and although, since the statute 1 & 2 G. IV, presentment at a particular place is in many cases rendered unnecessary, yet it appears that a presentment at the place mentioned in the bill of acceptance, and refusal there, will be sufficient to charge the drawer or indorser.(5) Where no particular place for payment is specified,

(1) *Barclay v. Bailey*, 2 Camp. 527; *Jameson v. Swinton*, 2 Taunt. 224; *Bancroft v. Hall*, Holt's C. 476; *Morgan v. Davison*, 1 Stark. N. P. C. 114.

(2) *Garnett v. Woodcock*, 1 Stark. N. P. C. 475; 6 Maule & Selw. 44.

(3) *Elford v. Teed*, 1 Maule & Selw. 28.

(4) *Vide ante*, pp. 180, 181.

NOTE 763.—*Wilkins v. Jadis* (2 Barn. & Adol. 188) decides that, a presentment at eight o'clock in the evening of the day when a bill becomes due, is sufficient to charge the drawer, although at that hour the house be shut up, and no person there to pay the bill; though Lord Tenterden observed, that a presentment at twelve at night, when a person has retired to rest, would be unreasonable.

(5) See *Mackintosh v. Haydon*, 1 Ry. & Mo. 363; *Ambrose v. Hopwood*, 2 Taunt. 61; *Garnett v. Woodcock*, 1 Stark. N. P. 475.

NOTE 764.—*Ante*, note 727. *Mitchel v. Barin*, 4 Car. & Payne, 33.

If a bill be drawn in body, payable at a particular place, it must be presented there to charge the drawer. *Gibb v. Mather*, 8 Bing. 214. *Tindal*, Ch. J.: "Where a bill is drawn payable at a particular place, and the drawee accepts it payable at that place, in an action against the drawer, presentment to the acceptor at that place must be proved, and consequently must be alleged; nor will the fact that the special acceptance payable at the bankers (but not complying with the requisites of 1 and 2 Geo. II, c. 78) was made before the bill passed out of the hands of the drawer, dispense with the necessity of such proof or vary his liability." The cases of *Selby v. Eden* and *Fayle v. Bird*, cited in p. 181 of the text, are by this decision overruled.

A. draws on B., in the country, making it payable at the house of C., in London, without authority from C., and B. accepts the bill in this form without giving notice to C., or providing for the payment of the bill at C.'s house. A. negotiates the bill, which, upon becoming due, is presented by the holder to C., who paid it under a supposition that the bill so presented was another bill, of a different amount and date, drawn by B. on and accepted by himself, and did not discover his mistake until a fortnight afterwards; when the other bill was presented, B. becomes bankrupt; held, that C. could not recover against A. in an action for money had and received. *Davis v. Watson*, 2 Nev. & Malk. 709. It seems, that if A. himself had received payment as holder of the bill, for his misconduct in making the bill payable at C.'s house, he would have been liable. *Id.*

Where a note is made payable at a particular bank, or other place certain, it has long been held, and is now well settled, not only that the holder is not bound to present it to the promisor, at any other place, but that a presentment at any other place would be unavailing; a promisor would be under no obligation to pay it at another place, and of course a refusal to pay upon such presentment would be no dishonor, upon which the indorser could be charged. Per *Shaw*, Ch. J., in *North Bank v. Abbot*, 13 Pick. 468; *Berkshire Bank v. Jones*, 6 Mass. R. 524; *Woodbridge v. Brigham*, 12 Id. 405; S. C., 13 Id. 556.

the demand may be made at the house of the drawee or maker of a note.(1) But it is not sufficient to leave a bill, unless the money is called for.(2) If the drawee or maker have left the country, the plaintiff may prove a presentment to his wife or agent at the place where he formerly resided.(3) If a note is proved to have been presented to a banker's clerk at the clearing-house, it is equivalent to a presentment to the banker.(4) A refusal to accept, given at the residence of the drawee of a bill of exchange, must be proved to have been made by an authorized agent.(5)

A note made payable at either of the banks in a large city, the holder may select the bank; but he must, it seems, give notice to the promisor, where his note is, unless he has notice that his note is in a particular bank. *North Bank v. Abbot, supra*. Proof of such facts and of failure of promisor to appear at such bank or to provide funds there, is a dishonor, without presentment of the note at any other place. *Id.*

Where a bank with branches issues bills payable at a branch certain, but subsequently discontinues such branch and withdraws its funds; held, that a demand upon the mother bank was sufficient to support an action against the bank for non-payment of its notes. *Nashville Bank v. Henderson*, 5 Yerger, 104; *Erwin v. Adams*, 3 Miller's R. 318.

Where a promissory note is made payable, or a bill of exchange is accepted, payable at a particular place, it is not necessary to aver and prove a presentment at that place. *Wolcott v. Van Santvoord*, 17 John. R. 248; 4 Id. 183; *United States Bank v. Smith*, 11 Wheat. 171. This last case, however, held that such averment and proof, as against the indorser, were necessary.

Where the maker of a note, after the same had been indorsed, and without the knowledge of the indorser, wrote on the margin of the note "payable at the Bank of America, J. K.," at which place payment was demanded; held, that such alteration discharged the indorser from liability. Held, also, that demand of payment in such case should have been *personal*, or at the maker's residence, and not at the place in the margin. *Woodworth v. The Bank of America*, 19 John. R. 391; S. C., 18 Id. 315.

If a note is made *negotiable* at a bank certain, it is nevertheless payable at large, there being no necessary connection between the bank where a note is made *negotiable*, and the place where it is made payable. *Barret v. Wills*, 4 Leigh, 114; *Mandeville v. Union Bank*, 9 Cranch, 11. In such case, the averment of presentation at the bank is immaterial, and need not be proved.

Notes made payable at a branch bank may, nevertheless, be demanded at the mother bank, if the funds of the branch have been called in. *Nashville Bank v. Henderson*, 5 Yerger, 104.

(1) *Sanderson v. Judge*, 2 H. Bl. 511; *Giles v. Bourn*, 2 Chitty C. 300; *Brown v. M'Dermot*, 5 Esp. C. 265; *Cromwell v. Hynson*, 2 Esp. 512.

(2) *Hayward v. Bank of England*, 1 Str. 350.

(3) *Governor and Company of the Bank of England v. Newman*, 1 Lord Ray. 442; 12 Mod. 241; *Cromwell v. Hynson*, 2 Esp. C. 511; *Phillips v. Astling*, 2 Taunt. 206.

NOTE 765.—Where a note is not payable at any particular place, and the maker after executing it, removes to another known and permanent residence, payment must be demanded of him there; but it is different if he removes out of the state or country. *Anderson v. Drake*, 14 John. R. 114. See *Dumford v. Johnson*, 2 Mart. R. 183. * * See *ante*, note 757. * *

(4) *Reynolds v. Chattle*, 2 Campb. 596.

NOTE 766.—Where a note is payable at a particular place, a personal demand on the drawer cannot always be made, and is not required. It is sufficient if the demand is made of any persons at the place designated. *Gale v. Kemper's Heirs*, 10 Lou. R. 205.

(5) *Cheek v. Roper*, 5 Esp. 175. And see further as to the presentment of bills, *ante*, p. 206.

Notice of dishonor.

It has already been observed that a presentment for acceptance is not necessary, except where a bill is made payable within a certain period after sight. But if a presentment for acceptance has in any case been made, and has been refused, or a conditional or partial acceptance alone is offered, it becomes necessary that notice should be given to the persons to whom the holder intends to resort for payment.(1) The like notice is, in general, required wherever payment of a bill or note has been refused. There is no precise form of words necessary to be used in giving notice of the dishonor of a bill of exchange; but the language must be such as to convey notice to the party what the bill or note is, and that payment of it has been refused by the party primarily liable; and a claim of the amount due is not sufficient notice of dishonor.(2)

(1) Bayley on Bills (4th ed.) 205, 206; Blesard v. Hirst, Burr. 2670; Goodall v. Dolley, 1 T. R. 713. That a subsequent indorsee may not be affected by the neglect, see O'Keefe v. Dunn, 6 Taunt. 305.

NOTE 767.—Craig v. Brown, Peters' R. 171; Berry v. Robinson, 9 John. R. 121; Munroe et al. v. Easton, 2 John. Cas. 75; Colt et al. v. Noble, 5 Mass. 167; May v. Coffin, 4 Id. 341; Jackson v. Richards, 2 Caines' R. 343; (Walker v. The Bank, &c., of N. Y., 13 Barb. 636.)

(2) By Lord Tenterden, Ch. J., Hartley v. Case, 4 Barn. & Cress. 339.

NOTE 768.—Solarte et al. v. Palmer et al., 7 Bing. 530. The law has prescribed no particular form for such notice. The object is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof. Per Thompson, J., in Bank of Alexandria v. Swann, 9 Pet. R. 33. Every variance in the description, however immaterial, is not fatal to the notice. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. Id.; Mills v. Bank of the U. States, 11 Wheat. 376. The notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonored. It has been decided, however, that if the notice was sufficient to put the defendant upon inquiry, although the amount of the note is erroneously stated in the notice, and its date is not given, and if from the facts appearing on the trial, the jury are satisfied that the indorser was not misled by the notice, they are authorized to find a verdict against him. Bank of Rochester v. Gould, 9 Wend. 279. See also Smith v. Whiting, 12 Mass. R. 6; Reid v. Seixas, 2 John. Cas. 337.

It is not sufficient to say that the holder looks to the indorser for payment, without stating that it has been dishonored; nor is a notice stating the bill to have been *drawn* by the party, when, in fact, he was not the drawer, but only an indorser, sufficient, as it misstated the facts. Beauchamp v. Cash, Dow. & Ry. R. 3. In Smith v. Whiting (12 Mass. R. 6), the notice of dishonor mistook the name of the promisor, calling the note Jotham Cushing's note, instead of Jotham Cushman's, and describing it as due January 6th, when it was due on the 3d of January; it was left to the jury to decide, whether the defendant must not have known that the notice referred to the only note, which, it seems, laid in the bank, on which he was liable as promisor or indorser; and the jury having determined that he must have had such knowledge; there being proof that the indorser was liable on no other note payable on the bank.

* * A notice of protest need not, in terms, state that a demand has been made upon the maker. That it had been "protested for non-payment, and the holders look to you for the payment thereof," was held sufficient. Cayuga County Bank v. Warren, 1 Comstock N. Y. R. 414. The note in question was for \$600, payable at the plaintiff's bank, and the notices of protest had "600" in the margin, but the body described the note as for *three hundred dollars*. On proof that there was no other note in the bank, made by the same maker and indorsed by the defendants, the notice was held sufficient. Id. And see Remer v. Downer, 23 Wend. 620; Shelton v. Braithwaite, 7 M. & W. 436; Stockham v. Parr, 11 Id. 809; Story on Pr. Notes, §§ 349, 354.

By whom, and to whom given.

It seems to be settled by recent decisions, that the notice need not come from the holder of the bill or note, but that any party to the instrument may give it.(1) And it will be sufficient, if the drawer has notice of the dishonor of a bill from the acceptor;(2) but notice from a stranger, without authority, will have no effect.(3) Notice to one of several partners is

And see *Kilgore v. Bulkley*, 14 Conn. 362; *Crocker v. Getchell*, 10 Shep. 392. Where there are several *individual* indorsers, the notice must be to each, but need not refer to the several indorsements. 1 Comstock, 414; *Sayre v. Frick*, 7 Watts & Serg. 383; *Willis v. Green*, 5 Hill, 232. And see 1 Am. Leading Cases, p. 229 to 237. * *

(1) *Jameson v. Swinton*, 2 Campb. 373; *Wilson v. Swabey*, 1 Stark. N. P. C. 34; *Bray v. Hadwen*, 5 Maule & Selw. 71; *Rosher v. Keernan*, 4 Campb. 87. And see *Gunson v. Metz*, 1 Barn. & Cress. 193. It was formerly thought that the notice must come from the holder. *Tindal v. Brown*, 1 T. R. 167.

NOTE 769.—*Stanton et al. v. Blossom et al.*, 14 Mass. R. 116; *Stafford v. Bates*, 18 John. R. 327.

Any person who happens, whether by accident (as by the failure of an agent), to be the holder, at the time a bill or note becomes due, and although he has no right to require payment for his own benefit, may and ought to demand payment, and give notice of the non-payment so as to prevent loss. *Jones v. Fort*, 9 Barn. & Cress. 764; *Tennant v. Stratchan*, Mood. & Malk. 377. In *Stanton et al. v. Blossom et al.* (12 Mass. 116), held, that notice from the drawee who refused to accept, was not sufficient; he is not a party to the bill, and notice from him is in no degree better than from any other stranger.

Where a note was discounted at the Phoenix Bank, in Connecticut, and indorsed for collection merely to a bank in New York; held, that the former bank was to be considered the real holders, and the notary making the protest at New York as their agent; and that consequently the notary did right in transmitting to them the evidence of the non-payment, and that it was for them to determine, whom, among the numerous indorsers, they would look to for payment, and to notify them accordingly; and they, having seasonably transmitted the notice to the defendant after they received it, he thereby became liable. *Church v. Barlow*, 9 Pick. 547. It seems also, that the bank at New York might be considered as the holder for the purpose of giving notice. See *Butler v. Duval*, 4 Yerg. 265.

The notice may also be given by a notary public. *Bank of Utica v. Smith*, 18 John. R. 230; *Hartford Bank v. Stedman*, 3 Conn. R. 409. And it may as well be made by an agent, as by the principal, and there is no need of a power of attorney or any written instrument to constitute an agent for this purpose. Having possession of the note, is authority to receive the money and deliver up the note. *Shed v. Brett*, 1 Pick. 401.

Where a bill or note has been transmitted by the holder to an agent for collection, and it is presented by the agent and dishonored, if the protest or other evidence of dishonor is transmitted by the agent to his principal, and by him seasonably sent to the indorser, it is sufficient, although the indorser does not in fact receive it so soon as if it had been transmitted by the agent directly to the indorser. *Colt v. Noble*, 5 Mass. R. 167.

Every indorser in fact, and every holder in fact, must be treated as a party to commercial paper. It makes no difference, therefore, whether banks to whom such paper has been indorsed, act as owners or agents. *Butler v. Duval*, 4 Yerg. 265; *Colt v. Noble*, 5 Mass. R. 167; *Bank v. Goddard*, 5 Mason, 366. And each indorser is entitled to notice from his indorsee; and notice from any one party to the preceding parties, is sufficient. *Id.* See also *Mead v. Engs*, 5 Cowen, 303; *Ogden et al. v. Dobbin et al.*, 2 Hall, 112.

(2) *Jameson v. Swinton*, 2 Campb. 373.

(3) *Stewart v. Kennett*, 2 Campb. 177.

NOTE 770.—*Chanoine v. Fowler*, 3 Wend. 173; *Stanton et al. v. Blossom et al.*, 14 Mass. Rep. 116.

Hartford Bank v. Perry, 17 Id. 95. Held, that an indorsement of the cashier of a bank was

a good notice to all.(1) In the case of the death of a party, notice should be given to his personal representative.(2) It has been held that notice given to a bankrupt drawer, before the appointment of his assignees, was good;(3) and it seems, that where a drawer has become bankrupt, and assignees are appointed, notice should be given to them;(4) and notice was decided to be necessary where the bankrupt had absconded, but his house continued open, and an agent of the assignees was to be found there.(5)

Within what time.

The notice of refusal must be given within a reasonable time; and the question what time is reasonable, is a question of law to be determined by the court, upon the facts ascertained by the jury.(6) The result of the

sufficient authority for the purpose of a demand of payment, and it seems, also, to give notice to the indorser.

(1) *Perthouse v. Parker*, 1 Camp. 82, by *Ld. Ellenborough*, Ch. J.; and therefore, where a bill is drawn upon one of the firm, no notice need be given. *Id.*

NOTE 771.—*Gowan v. Jackson*, 20 John. R. 176. Where the drawer of the bill was a partner of the firm on which it was drawn, held, that it was not necessary for the holder to prove notice of the dishonor given to the drawee. *Vide Dwight et al. v. Suvill*, 2 Conn. R. 654; *Magee et al. v. Dunbar et al.*, 10 Lou. R. 546.

Where information of the dishonor of a bill of exchange is sent to an agent who is no party to the bill, either actually or nominally, for the purpose of collection, with a request to give notice to the drawers, and he omits to give such notice until the next day after receiving such information, the drawers are discharged; being a mere agent, he should have given immediate notice. *Sewell v. Russel*, 3 Wend. 276; *United States v. Barker*, 12 Wheat. 559, 560, 561. If sent to an agent to procure acceptance or payment, it is not necessary that he should give notice of its dishonor; the rule is complied with, if he return the bill to his principal within reasonable time, of which the criterion must be the same as if a notice from the payee or holder to the drawer or indorser. *Tunno et al. v. Lague*, 2 John. Cas. 1; *Colt et al. v. Noble*, 5 Mass. R. 167. If the agent himself undertakes to give notice to the drawer, it will be sufficient if it be given as soon, as, under the circumstances of the case, it could have been received from the holder. *Tunno et al. v. Lague*, *supra*; *Duncan v. Young*, 1 Mart. R. 32.

(2) *Chitty on Bills*, 228 (7th ed.).

NOTE 772.—*Toby v. Maurian*, 7 Lou. R. 493, and the cases cited. Where the maker of the note died on the last day of grace, the notary, on calling at his domicile, being informed of his death, protested the note for non-payment, and notified the indorser thereof: held, that there was no demand of payment sufficient to bind the indorser. If there are no personal representatives at the time, a notice sent to the residence of the deceased party's family, is sufficient, and it is not necessary to give notice afterwards to the executor or administrator, who subsequently become such. *Merchants' Bank v. Birch*, 17 John. R. 25.

(3) *Ex parte Moline*, 19 Ves. 216.

(4) *Ex parte Moline*, 19 Ves. 216; by *Bailey, J.*, 4 Barn. & Cress. 521; *Chitty on Bills* (7th ed.), 228.

(5) *Rhode v. Proctor*, 4 Barn. & Cress. 521.

NOTE 773.—The drawer having been absent from the state several years, a written notification of the refusal to accept was left at his last dwelling-house, none of his family then residing there; but this notice was in fact received by his wife; this was held sufficient. *Blakely v. Grant*, 6 Mass. R. 386.

(6) *Chitty on Bills* (7th ed.), 224.

NOTE 774.—*Bryden v. Bryden*, 11 John. R. 187; *Hussey v. Freeman*, 10 Mass. R. 86; *Bank*

several decisions upon the subject seems to be, that in the case of inland bills, where the parties reside in the same town, notice must be given before the expiration of the day after intelligence of the dishonor is received; (1) and where the parties do not live in the same place, notice must be given on the departure of the post on the day following that in which the party is acquainted with the dishonor. (2) It has been held to

of North America v. McKnight, 1 Yeates' R. 145; Warder v. Bell, Id. 531. Where the parties concerned were all in one neighborhood, and the means of communication between them constant through the day, and every day; held, that a neglect of eight days to notify the indorser of the maker's non-payment, discharged the indorser, although there was no mail established between the places; it appearing that the distance was but four miles; and persons were constantly passing from one town to the other. Hussey v. Freeman, *supra*.

(1) Smith v. Mullett, 2 Camp. 208; Hilton v. Fairclough, 2 Campb. 633; Jameson v. Swinton, 2 Taunt. 224, in which case the defendant received notice by the two-penny post at nine o'clock in the evening.

NOTE 775.—Chitty on Bills (8th ed.), 513. But in Woodright v. Brigham (12 Mass. R. 403), and Widgery v. Munroe (6 Mass. R. 449), where the parties live in the same town; held, that notice must be sent on the same day.

The holder and indorser resided in the same city, proof of notice to the indorser within three days after advice of the dishonor of the bill, was held to be insufficient. Bryden v. Bryden, 11 John. R. 187.

The principle is, that notice may be immediately given after a refusal to pay on demand, made on the day when the money is due, according to the contract. Burbridge v. Manners, 3 Camp. 193; Miller v. Hackley, 5 John. R. 375; Lindenberger v. Beall, 6 Wheat. 104. Though it is not necessary it should be given until the day after. Shod v. Brett, 1 Pick. 405. Notice of dishonor *before* demand of payment on the maker, is bad. Griffin v. Goff, 12 John. Rep. 423.

Where it can be done, notice ought to be given previously to the bringing of the action. Therefore, where all the parties lived in the same town, held, that notice should have been given the indorser before commencing a suit against him; he should have an opportunity to pay without the expenses of a lawsuit. New England Bank v. Lewis et al., 2 Pick. 125. Though the notice was in the hands of the notary before the delivery of the writ to the officer, the court considered that it would make no difference. Id.

If the parties reside in the same place, notice sent by the post is not sufficient. Ireland v. Kip, 11 John. R. 231. (But is so now by statute of 1857.)

A bill was drawn and dated at New York, on persons residing there, who accepted it. The drawers, in fact, resided in Virginia. The bill being protested for non-payment, on the same or next day, two letters were put into the post-office, giving notice to the drawers, one directed to New York and the other to Norfolk, the supposed place of their residence. The notice was held to be sufficient. Chapman v. Lipscombe, 1 John. R. 294. But due inquiry should be made for the residence; otherwise the notice will be bad. Bank of Utica v. De Mott, 13 Id. 432; Reid v. Payne, 16 Id. 218. The fact of putting the letter into the post-office, is sufficient evidence, without proof that it reached the party. Hartford Bank v. Hart, 3 Day, 497; Shed v. Brett, 1 Pick. 401.

An agreement made with the maker, will dispense with a formal demand. State Bank v. Hurd, 12 Mass. R. 172; Union Bank v. Hyde, 6 Wheat. 572.

* * See *post*, note 787, as to waiver of demand, notice, &c.* *

(2) Williams v. Smith, 2 Barn. & Ald. 500; Darbyshire v. Parker, 6 East, 3. And see Langdale v. Trimmer, 15 East, 291.

NOTE 776.—President, &c., of the Bank of Alexandria v. Swann, 9 Pet. R. 33; Flack v. Green, 3 Gill & John. 474.

Where the indorser lives in a different town from the holder, the law considers putting a letter

be no exception to this general rule, that there is no post on the following day.(1) But if the parties reside in the same town, it will not be sufficient to put a letter in the two-penny post on the day after intelligence of the dishonor, if it is put in too late for delivery on that day.(2) Where a party receives notice on a Sunday, Good Friday, or Christmas day, or some day upon which he is prohibited by his religion from attending to secular affairs, he will be in the same situation as if the notice did not reach him till the next day.(3) It seems that if the holder of a bill or note place it in the hands of his banker, the banker need not give notice to his customer till the day after the dishonor, and the customer will be in time if he communicates that notice on the day after it reaches him, especially if the bill or note be payable at a banker's.(4)

It seems to be now established, that notice may be given on the day on which a bill or note becomes due, especially if an unqualified refusal(5)

seasonably into the post-office, as using due diligence, or as a constructive notice. In such case, the indorser cannot always have an opportunity to pay before action commenced; the officer, it is said, may go with a notice in one hand and a writ in the other. *Parker, C. J., in New England Bank v. Lewis*, 2 Pick. 128. Putting a notice into the post-office, is sufficient, in such case, although it cannot reach the indorser before the action is brought. *Id.* And in *Stanton v. Blossom* (14 Mass. R. 116), it was not considered as an objection to the action that it was commenced before the notice was put into the post-office; but the case did not turn on that point.

If notice of protest is shown to have been sent to the indorser at a post-office in the parish where he resides, it lies with him to show that there is another post-office nearer to his residence. *Yeatman v. Erwin et al.*, 5 Lou. R. 264.

(In New York, notice of dishonor may in all cases be served by mail. Statute of 1857. But at common law the notice must be served upon the drawer or indorser living in the city or town where the note or bill is dishonored, personally or by leaving it at his place of residence or business. *Sheldon v. Benham*, 4 Hill N. Y. Rep. 129; *Cayuga County Bank v. Bennett*, 5 Id. 236; *Patrick v. Beazley*, 6 How. Miss. 609. As to service by mail, see *Ransom v. Mack*, 2 Hill N. Y. 587; and *Montgomery County Bank v. Marsh*, 3 Selden N. Y. 481; and *Edwards on Bills and Notes*, 601-614.)

(1) *Geil v. Jeremy*, 2 Ry. & Mo. 62.

(2) 2 Camp. 209, 633.

(3) *Bray v. Hadwen*, 5 Maule & Selw. 68; *Wright v. Shawcross*, 2 Barn. & Ald. 501, n.; *Haynes v. Berks*, 3 Bos. & Pull. 599; *Tassell v. Lewis*, 1 Ld. Raym. 743; *Lindo v. Unsworth*, 2 Campb. 602; 39 & 40 G. III. c. 42.

(4) *Bayley on Bills* (4th ed.), 222; *Haynes v. Berks*, 3 Bos. & Pull. 599; *Robson v. Bennett*, 2 Taunt. 388; *Scott v. Liford*, 9 East, 347; *Longdale v. Trimmer*, 15 East, 291.

(5) *Burridge v. Mannes*, 3 Campb. 193. See *Leftley v. Mills*, 4 T. R. 170; by Lord Kenyon, Ch. J., and Buller, J., and *Haynes v. Berks*, 3 Bos. & Pull. 602; by Lord Alvanley, C. J.

NOTE 777.—After demand and notice, the indorser may be forthwith sued, without waiting until the expiration of the day on which the note falls due. *Shed v. Brett*, 1 Pick. 401; *City Bank v. Cutter et al.*, 3 Id. 414. It lies also against the maker after reasonable demand on the day it falls due. *Greeley et al. v. Thurston*, 4 Greenl. R. 479. *See* Chitt. on Bills, 513.

(If a note or draft is not paid on due presentment, on the third day of grace, it may be treated as dishonored; but no action can be brought upon it until the third day has expired. *Osborne v. Moncure*, 3 Wend. 170; *Thomas v. Shoemaker*, 6 Watts & Serg. 179; *Bevan v. Eldridge*, 2 Miles, 353; *Wiggles v. Thompson*, 11 S. & M. 452. The general rule gives to the maker or acceptor the whole of third day, on which to make payment, if he chooses to seek the holder after demand and refusal. *Edwards on Bills and Notes*, 525-527.)

to pay it be made; though payment may still be made within the day.(1) Where there are several intervening parties between him who gives a notice and the defendant, it is not sufficient for the plaintiff to prove, where notice has not been given by each indorsee after receiving it, that if the notice had been passed through the intervening parties, and each had taken the time the law allows, the defendant would not have had the notice sooner.(2)

In the case of foreign bills, it has been said that notice should be given on the day of the refusal to accept or pay, if any post or ordinary conveyance sets out on that day, and if not, by the earliest ordinary conveyance.(3) The holder is not bound to send such notice by an accidental, though earlier, conveyance.(4)

Notice how proved.

The fact of notice may be proved by evidence of putting a letter containing it into the general or two-penny post.(5) But where the notice is put into the general post, it should be taken to Lombard street, or at least to a receiving-house, and a delivery to a bellman in the street is not sufficient.(6) It is not sufficient that the letter be directed to a person at a large town, as at Bristol, without specifying in what part of it he resides, unless where the person to whom the letter is directed, has dated the instrument in an equally general manner.(7) The postmarks in town or county, proved to be such, are evidence, that the letters on which they are, were in the office to which those marks belong at the time of the dates of such marks.(8) It is not necessary to give the defendant notice to produce the original letter, in order to prove its contents by a duplicate original, or by an examined copy.(9) Nor is it necessary to give such

(1) See *Hartley v. Case*, 1 Carr. & P. 556; 4 Barn. & Cres. 339.

(2) *Marsh v. Maxwell*, 2 Campb. 210, n., by Lord Ellenborough; *Turner v. Leach*, 4 Barn. & Ald. 451.

(3) *Chitty on Bills*, (7th edit.) 225, 312. And see *Muilman v. D'Eguino*, 2 H. Blac. 565. The occasions upon which the rules respecting notice have been laid down with the greatest precision, have occurred in the instance of actions upon inland bills.

(4) 2 H. Blac. 565.

(5) *Sanderson v. Judge*, 2 H. Blac. 509; *Scott v. Lifford*, 9 East, 347; *Walter v. Haynes*, 1 Ry. & Mo. 149; *Keith v. Weston*, 3 Esp. C. 54. There is no difference in this respect between foreign and inland bills. Id.

(6) See *ante* 5; *Hawkins v. Rutt*, Peake's N. P. C. 186; *Parke v. Gordon*, 7 East, 385.

(7) *Walter v. Haynes*, 1 Ry. & Mo. 149; *Mann v. Moore*, 1 Ry. & Mo. 250.

(8) *Kent v. Lowen*, 1 Campb. 177; *Fletcher v. Braddyl*, 3 Stark. N. P. C. 64; *Rex v. Plummer*, Russ. & Ry. Crown Cases, 264; *Rex v. Watson*, 1 Campb. 215; *Langdon v. Hulls*, 5 Esp. 156; *Rex v. Johnson*, 7 East, 65. At the general post-office in London there is a new stamp for every day, which is destroyed the next morning.

(9) *Ackland v. Pearce*, 2 Campb. 601, by Le Blanc, J.; *Roberts v. Bradshaw*, 1 Stark. N. P. C. 28, by Lord Ellenborough. See *Kine v. Beaumont*, 3 Br. & B. 288; S. C., 7 B. Moore, 112; *Lanauze v. Palmer*, 2 Ry. & Mo. 31.

NOTE 778.—*Johnson v. Haight et al.*, 13 John. R. 470; *Lindenberger v. Beall*, 6 Wheat. 104.

An entry of dishonor of a bill of exchange, made in the usual course of business, at the time of the dishonor, in the book of a notary, by his clerk, who presented the bill, may be given in

notice in order to prove the contents of the letter by parol evidence, in case a copy has not been taken, or if taken, has been lost.(1) After notice to produce the original, the identity of a letter sent to the defendant, and that of which an examined copy is taken, may, in some cases, be inferred from circumstances.(2)

Putting a letter in the post is only one mode of giving notice. Proof that a letter, containing the proper notice, has been left at the defendant's house, will be sufficient.(3) Notice may be sent by a private hand, al-

evidence in an action on the bill, upon proof of the death of the clerk who made the entry. *Poole v. Dicas*, 1 Bing. N. C. 649. A notary testified that it was usual for him, where the indorsees lived at a distance, to send a written notice of dishonor, by post, on the evening of the same day, and that he believed he had sent such notice to the indorsers in the present case; this was held to be sufficient evidence, in the first instance, to support the averment of due notice. *Miller v. Hackley*, 5 John. R. 375. If the register of a deceased notary, proved by a witness to be in the handwriting of the notary, state that on a certain day the notary put a letter in the post-office directed to the indorser, at the place of his residence, containing notice of the dishonor of the note; or, that after diligent inquiry, the indorser could not be found, it seems, this would be sufficient evidence of notice. *Martinet v. Halliday*, 20 John. R. 168; *Syndics of Portas v. Primbor*, 1 Mart. Rep. 267; *Auth. N. P. 1* (*Sheldon v. Benham*, 4 Hill N. Y. R. 129.)

(1) *Ackland v. Pearce*, 2 Camp. 601.

(2) See *Roberts v. Bradshaw*, 1 Stark. N. P. C. 28; *Hetherington v. Kemp*, 4 Campb. 193; *Hagerdern v. Reed*, 3 Campb. 379; *Toosey v. Williams*, 2 Ry. & Mo. 131. Where a notice is given, the particular letter should be pointed out in the notice. See *Franck v. Lucy*, 1 Ry. & Mo. 341.

(3) *Stedman v. Gouch*, 1 Esp. C. 5.

NOTE 779.—In New York, it is provided (Sess. Laws 1833, pp. 395, 396, § 8), that "In all actions at law, the certificate of a notary under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to whom the same was given, and the post-office nearest thereto, shall be presumptive evidence of the facts contained in such certificate; but this section shall not apply to any case in which the defendant shall annex to his plea an affidavit, denying the fact of having received notice of non-acceptance or of non-payment of such a note or bill."

Under a statute in Tennessee, which enacts that the protest of the notary for non-acceptance or non-payment of negotiable paper, and his certificate that he had given notice to the indorsers, should be *prima facie* evidence of the fact of notice, as well as of demand; it has been held, that the protest, with a copy of the note attached, together with a certificate that notice had been given, were sufficient evidence as against an indorser under the general issue. *Smith v. M'Manus*, 7 Yerg. R. 477.

In cases of this nature, the law does not require the highest and strictest degree of diligence in giving notice: but such a degree of reasonable diligence as will ordinarily bring home notice to the party. It is a rule founded upon public convenience, and the general course of business; and only requires that, in common intendment and presumption, the notice is by such means as will be effectual. Per Story, J., in *Bank of United States v. Hatch*, 6 Pet. R. 257. Held, that a notice left at defendant's boarding-house, where he lodged, was sufficient; although the notice was left with a fellow boarder, requesting him to deliver it to the defendant. *Id.* This is not like the case of a public inn, and a delivery to a mere stranger who happens to be there *in transitu*, and cannot be presumed to have any knowledge or intercourse with the party. Boarders at the

though such notice should thereby be received later in the day than if sent by the post;(1) and it is sufficient to send a verbal notice either to the counting-house, or place of abode of the party, without leaving a notice in writing.(2)

Notice when excused.

Notice of non-acceptance, or non-payment, is not necessary to be given to the drawer of a bill of exchange, where from the state of his dealings with the drawees of the bill, he could have no reasonable expectation, that the bill would be paid by them;(3) and although the drawer may have

same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform punctually such common duties of civility as this. *Id.*

* * The facts being undisputed, what is a sufficient demand is a question of law, upon the special circumstances of each case for the court. *Davis v. Herrick*, 6 Ohio, 55; *Wheeler v. Field*, 6 Metc. 290; 1 Am. Leading Cases, pp. 242 to 249. * *

(1) *Bancroft v. Hall*, Holt's C. 467.

(2) *Cross v. Smith*, 1 Maule & Selw. 545. In this case, admission at the counting-house was not obtained; and the parties lived at a small distance. *Goldsmith v. Bland*, Bayley on Bills, (4th ed.) 224; *Stedman v. Gouch*, 1 Esp. 5.

NOTE 780.—Though it is settled that the memorandums made at the time by a person in the ordinary course of his business, of acts and matters which his duty in such business required him to do for others, are admissible evidence of the acts and matters so done after his death (*Nicholas v. Webb*, 8 Wheat. 326; 15 Mass. R. 381); yet if he is living, he must be called, and may make use of these entries to refresh his memory; and if he then undertakes to swear to those facts from memory refreshed by, and depending on the entries, he is competent to prove the fact; but the book of memorandum is not so, as evidence to the jury. The witness uses it to refresh his memory as to times, names, and quantities. *Smith v. Lane*, 12 Serg. & Rawle, 87. And in *The Phila. Bank v. Officer's Ex.* (12 Serg. & Rawle, 49), if the party is dead, or beyond the reach of the court, where there cannot be a personal examination on oath, then, and not before, the question arises, whether such memorandums and entries, to prevent a total failure of justice, are admissible. But an affidavit of a notary's clerk, taken without rule of court, and without notice to the party, was held, not admissible to prove notice of non-payment, although the clerk was dead. *Farmers' Bank v. Whitehill*, 16 Serg. & Rawle, 89, 91.

(3) *Franck v. Lucy*, 1 Ry. & Mo. 342; *Claridge v. Dalton*, 4 Maule & Sel. 229; *Bickerdike v. Bollman*, 1 T. R. 405; *Legge v. Thorpe*, 12 East, 171.

NOTE 781.—*Sharp v. Bailey*, 9 Barn. & Cress. 44. If the bill is made payable at the drawer's own house, the presumption is, that it was accepted for his accommodation, and that he was to provide for the payment of it when due. *Chit. on Bills*, 470. Where, also, the transaction between the drawer and drawee has been illegal, the indorser, who was the original payee, was held liable, without notice; the indorser, in such case, had no demand which he could lawfully assign in the hands of the promisor, and suffers no prejudice or loss by any delay in giving notice. *Copp v. M'Dugall*, 9 Mass. R. 1.

But if the drawer might reasonably have expected that his bill would be honored, he is entitled to notice. *French v. Bank of Columbia*, 4 Cranch, 141. *Marshall, C. J.*, after adverting to the general rule that notice must be given to the drawer, says: "A drawer who has no effects in the hands of the drawee, is said to be without the reason of the rule, and, therefore, to form an exception to it. This has been laid down in the books as a positive qualification of the rule, but has been seldom so laid down, except in cases where, in point of fact, the drawer had no right to expect that his bill would be honored, and could sustain no injury by the neglect of the holder to give notice of its being dishonored. In reason it would seem, that in such cases only can the exception be admitted, and that the necessity of notice ought to be dispensed with only in those cases where notice must be unnecessary, or immaterial to the drawer." After examin-

goods in the hands of the drawee, yet, if they have been sold upon credit, which will not expire till long after the bill becomes due, he will not be entitled to notice.(1) The principle on which the rule is founded, is, that the facts show that the drawer must have known, that the bill, when presented, would not be paid, and that, if notice had been given, there would still have been no person to be found, to whom the party to whom notice was omitted to be given, might call for money.(2) The rule has also been considered as proceeding on the ground of a supposed fraud.(3) But it is not to be understood with such latitude as to excuse the want of notice, on proving that the omission of notice could not, in point of fact, have prejudiced the drawer;(4) a sort of inquiry, which would often lead to most indefinite and complicated investigations. Nor is the rule, laid down in *Bickerdike v. Bollman*, to be carried to such an extent as to dispense with notice where the bill is drawn in fair and reasonable expectation, that in the ordinary course of mercantile transactions, it would be accepted or paid when due;(5) or where the drawer can show that the want of notice may produce any detriment to him; as where, in case of his paying the bill, he has any remedy over against a third person.(6) Notice will be required, if the drawer has had effects in the hands of the drawee to

ing *Bickerdike v. Bollman*, and *Rogers v. Stephens*, cited in the text, he proceeds, "It would seem to be the fair construction of these cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and, therefore, as not coming within the exception to the general rule. The transaction cannot be denominated a fraud, for in such case, it is a fair commercial transaction. Neither can it truly be said that he had no right to expect his bill would be paid, for a person authorized to draw must expect his draft will be honored. Neither can it be said that he has virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true, when at the time of drawing the drawer has no reason to expect that his bill will be paid. A person having a right to draw, and a fair right to expect that his bill will be honored, would not come within the reason of the exception, and, therefore, it may well be contended, ought not to be brought within the exception itself." The principle of these observations is supported by Chief Justice Spencer, in *Robinson v. Ames*, 20 John. R. 146. See also *Campbell v. Pettengill*, 7 Greenl. R. 126.

(1) 4 Maule & Sel. 229.

(2) By Lord Tenterden, Ch. J., in *Corry v. Scott*, 3 B. & Ald. 622.

(3) By Heath, J., in *Clegg v. Colton*, 3 Bos. & Pull. 242.

NOTE 782.—*Brown v. Lusk*, 4 Yerg. R. 210, 217. The rule is founded in principle, and ought not to be changed. But where the bill is drawn for the accommodation of another, and no fraud can be imputed on account of the reasonable expectations the drawer entertained that the bill would be paid, the reason of the rule ceases, and in such case the drawer ought to have notice of the dishonor of the bill. *Id.* In *Lafitte v. Slatler* (6 Bing. R. 623), who was indebted to the drawer, was to have paid the bill, and the drawer had reason to expect he would do so; held, that he was entitled to notice, although he knew that the acceptor would not pay it.

(4) *Dennis v. Morrice*, 3 Esp. C. 158. See *Rogers v. Stephens*, 2 T. R. 718.

(5) *Claridge v. Dalton*. 4 Maule & Sel. 231; *Campbell v. Pettengill et al.*, 7 Greenl. R. 126; *Brown v. Lusk*, and *Lafitte v. Slatler*, *supra*; *Grosvenor v. Stone*, 8 Pick. 79.

(6) *Corry v. Scott*, 3 B. & Ald. 625, by Bayley, J. See *Rogers v. Stevens*, 2 T. R. 718.

any amount, at any time between the drawing of the bill and its becoming due;(1) or if the drawer had effects on the way to the drawee,(2) or if there is a running account and fluctuating balance between them.(3)

An indorser of a bill is entitled to notice, notwithstanding the want of effects in the hands of the drawee;(4) and the indorser and payee of a note has a right to insist upon notice,(5) although he has given no

(1) *Orr v. Magennis*, 7 East, 359; *Hammond v. Dufeme*, 3 Campb. 145; *Thackray v. Blackett* 3 Campb. 164.

(2) *Rucker v. Hiller*, 3 Campb. 217; 16 East, 43; by Eyre, Ch. J., 1 Bos. & Pul. 652.

(3) By Lord Ellenborough, *Brown v. Maffey*, 15 East, 221. And see *Spooner v. Gardiner*, 1 Ry. & Mo. 84; *Blackan v. Donen*, 2 Camp. 503.

(4) *Brown v. Maffey*, 15 East, 216; *Wilks v. Jacks*, Peake's C. 202, 267; *Leach v. Hewitt*, 4 Taunt. 731; *Esdaile v. Sowerby*, 11 East, 114.

NOTE 783.—*Vide* 13 Mass. R. 559.

An indorser, for the accommodation of the drawer, is entitled to notice, although there were no effects in the hands of the drawee belonging to the drawer. *Warder v. Tucker*, 7 Mass. R. 449; *May v. Coffin*, 4 Id. 341; *Hussey v. Freeman*, 10 Id. 86. In *Farmers' Bank v. Vanmeter* (4 Rand. 553), it was held, that in the case of an accommodation bill, drawn and indorsed under the expectation and knowledge that it would not be paid by the drawee, notice need not be given to the indorser.

(5) *Free v. Hawkins*, 1 Holt's C. 550. And see *Nicholson v. Genthit*, 2 H. Blac. 609; *Smith v. Beckett*, 13 East, 187; 1 Esp. 302; *Leach v. Hewitt*, 4 Taunt. 731, where the acceptor was a fictitious person.

NOTE 784.—*French v. Bank of Columbia*, 4 Cranch, 141; *Brown v. Mott*, 7 John. R. 361.

In a suit by the indorsee against his immediate indorser, the original consideration of the contract may be inquired into. *Herrick v. Carman*, 10 John. R. 224. So, where the indorsee has purchased the note from his indorser, he can only recover from the latter the consideration which he actually paid. *Braman v. Hess*, 13 John. R. 52; *Munn v. The Commission Company*, 15 Id. 44. But the indorser of a note for the accommodation of the maker is liable for the amount to the indorsee after due notice of non-payment, although the plaintiff knew at the time that the indorser had received no value (*Brown v. Mott*, 7 John. R. 361); for, the consideration from the person discounting the note, extends both to the maker and indorser, and it is never essential that a consideration should be beneficial to the party making the promise. *Yeaton v. Bank of Alexandria*, 5 Cranch, 49; *Violett v. Patten*, Id. 142; *Cushing v. Gore et al.*, 15 Mass. R. 69. There is, however, this limitation to the liability of an accommodation indorser (besides his right to avail himself of a defence of usury (*Munn v. The Commission Company*, *supra*), that as regards the immediate indorsee, he may avail himself of the same defence to defeat or diminish the plaintiff's recovery, that the maker himself could have employed. Thus, in an action brought by insurers against the indorsers of a promissory note given to secure the payment of the premium on a policy of insurance, the insurers, before the commencement of the suit, having become liable to pay the insured, who was the maker of the note, a return of premium on the same policy, it was held that the defendant was entitled to have the amount of such return of premium deducted from the amount of the note, notwithstanding the maker was at the same time indebted to the insurers for other notes given for premiums or other policies of insurance, and had become insolvent. *Phoenix Ins. Co. v. Fiquet*, 7 John. R. 383. Hence, it appears that a partial failure of consideration is a defence.

It may be regarded as a general rule, that when an indorser cannot recover against a subsequent indorser, no person acquiring a title under such prior indorser, and acquainted with all the facts, shall be allowed to recover. *Herrick v. Carman*, 15 John. R. 169; *Campbell v. Butler*, 14 Id. 349; *Bradley v. Flowers*, 4 Yeates' R. 436.

Though a promissory note be void by statute, an action may be supported in favor of the indorsee against the indorser; the indorsement being a new contract between the parties to it.

consideration to the maker, unless he knew the maker to be insolvent.(1)

A declaration by the drawee, made at the time when the bill is presented, as to the want of effects of the drawer in his hands, is admissible as evidence of the fact.(2) It seems that under the general allegation of notice, proof may be given that the party knew the bill would be dishonored.(3)

There are various other circumstances, besides the want of effects, which will dispense with the giving of notice.(4) The holder of a bill or note may show that he was ignorant of the place of residence of the party whom he sues, and, in that case, he must produce evidence to satisfy the jury, that he has used due diligence to discover the party, as for instance, by making inquiry of some of the other parties to the bill or note, or of persons of the same name.(5) An acknowledgment by the drawer of a

6 Cranch, 224. Thus, the indorser for valuable consideration, and without notice, may recover against the indorser upon a negotiable note given for a gaming or usurious consideration. *Hussey v. Jacob*, Salk. 344, pl. 2; S. C., 5 Mod. 175; *Bowyer v. Bampton*, Str. 1155; *Copp v. M'Dugall*, 9 Mass. R. 1. So, if the maker's name is forged. *Codwise et al. v. Gleason et al.*, 3 Day's R. 12; *Edwards v. Dick*, 1 Barn. & Ald. 212; (*McKnight v. Wheeler*, 6 Hill N. Y. R. 492.)

(1) *De Berdt v. Atkinson*, 2 H. Bl. 336.

NOTE 785.—The drawer of a dishonored bill is entitled to notice of dishonor, although he knows the bill will not be paid by the acceptor, provided he has reason to expect it will be paid by any other person, or has a remedy over against such person. *Lafitte v. Slatter*, 6 Bing. 523. Knowledge that a bill will not be paid by the acceptor, is no excuse for want of notice. *Brown v. Lush*, 4 Yerger, 217. If the drawer of an accommodation bill has reasonable ground to believe that another person (not the acceptor) would pay the bill, he must have notice of the dishonor of the bill. *Id.*

(2) *Prideaux v. Collier*, 2 Stark. N. P. C. 57.

(3) See by *Bayley, J.*, and *Holroyd, J.*, *Corry v. Scott*, 3 B. & Ald. 624; *Greenaway v. Headley*, 4 Campb. 52.

(4) *Chitty on Bills*, 212 (7th ed.); *Bayley on Bills*, 243 (4th ed.).

(5) *Bateman v. Joseph*, 12 East, 433; *Baldwin v. Richardson*, 1 B. & C. 245; *Beveridge v. Burgis*, 3 Campb. 262; *Browning v. Kinnear*, Gow's C. 81; *Bayley on Bills*, 229 (4th ed.). It seems not sufficient to make inquiries for the residence of an indorser at the place where the bill is payable. 3 Campb. 262.

NOTE 786.—*Preston v. Daysson et al.*, 7 Lou. R. 7; *Halliday v. Martinet*, 20 John. R. 168.

The holder is bound to apply to all the parties to the bill for information, if practicable; and also send notice to the place where the party may be supposed to reside; and if he has employed an attorney, who at length discovers the residence, it will suffice if the attorney, on the next day, consults with his client, and the latter, on the third day, forwards the notice to the discovered indorser; though in general, notice ought to be given on the next day. *Firth v. Thrush*, 8 Barn. & Cres. 387. Though due diligence ought to be used by the holder to discover the residence of the party to whom notice should be given; yet, if he, before the bill become due, be applied to by one of the parties to ascertain the residence of the indorser, and he declines giving any information, the holder need not, after the bill becomes due, renew his inquiries of that party. *Id.* A letter from the holder, giving notice of the dishonor, containing this passage: "I do not know where, till within these few days, you were to be found," is not to be taken as proving that the notice was not given on the next day after the residence of the party was discovered. *Kerby v. England*, 2 Car. & Payne, 300.

Where the notes were protested by a notary, who had since deceased, and the protest stated,

that he went with the original notes, and made inquiry for the maker, but he could not find him in the city of New York, where the note was dated; and that notice of the non-payment was put into the post-office for the indorser; held, that this was evidence of diligence as to the demand of payment; what a man has actually done, and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, is admissible. *Halliday v. Martinet*, 20 John. R. 172. The notary, if living and testifying to the facts contained in the protest, it would have been *prima facie* sufficient proof of reasonable diligence to demand payment of the maker. *Id.*; *Stewart v. Eden*, 2 Caines' R. 121. In *Welsh v. Barrett* (15 Mass. R. 380), the book of the messenger of a bank, who was dead, in which, in the course of his duty, he entered memoranda of demands and notices, was admitted to prove a demand on the maker, and notice to the indorser. But where the register of the notary did not state where the indorser resided, or to what place the notice was sent; held, that the evidence was not sufficient; the notice in the post-office was a nullity, unless it appeared that he resided at some place other than New York; and if he did, then it should appear that the notice was directed to him at such place. *Halliday v. Martinet*, *supra*. In *Chapman v. Lipscombe* (1 John. R. 294), the bill was drawn and dated at New York; there was no evidence that the plaintiff knew that the defendants resided at *Petersburgh*. He inquired at the banks and elsewhere, and being informed that the drawers resided at Norfolk, he sent a notice by post to them, and another addressed to them at New York. This was held sufficient. But though a distinction has been taken as to a drawer, who himself dated his bill so generally, as "Manchester," it was considered that a notice directed to him equally general, sufficed. *Mann v. Ross*, Ryl. & Mood. 249. Every prudent holder should, in all cases, make active inquiries, and write the fullest description on a letter giving notice. It has been suggested, that if it be proved that there was a directory for the place where it is supposed the indorser or drawer resides, then that the adoption of the address given in such directory might, perhaps, be held sufficient. Bayley (5th ed.), 231. It is not usual to advertise the dishonor of a bill in the public papers, but where the sum is considerable, and all other inquiries after an indorser have failed, it might be expedient to adopt that means of giving notice. *Chit. on Bills*, 505 (5th Am. ed.)

Defendant, who was a single man, and an Englishman, whose business was at sea; but when he became indorser he resided in Boston. Some time before the notes were due, he wrote to the holder that he was about to leave for Liverpool; but did not; held, that the holder, notwithstanding this information, should have directed a note to him at Boston, or if he received defendant's letter and knew where he was going, he should have sent a notice to Liverpool; but he made no effort to give any notice, and was therefore nonsuited. *Hodges v. Galt*, 8 Pick. 251. In *Bank of Utica v. Davidson* (5 Wend. 587), the notice was sent by mail to defendant, at B., in Chenango county, at which place the agent who procured the note discounted, informed the cashier of the bank that the defendant lived; held, that the notice was sufficient, although it appeared that defendant had removed to M., in Delaware county. So, in *Catskill Bank v. Stall et al.* (15 Wend. 364), where a notice of protest was sent per mail to a town designated by the agent who procured a discount of the note at the bank, in answer to an inquiry made by the cashier at the time, such notice was held sufficient, although there were four post-offices in the town, and the post-office of the name of the town where the notice was sent was nine miles distant from the residence of the indorser, while another post-office was at the very place where he resided.

It is not indispensable that notice should be sent to the office nearest to the residence of the party, nor even to the town in which he resides; it is sufficient if it be sent to the post-office to which he usually resorts for his letters. *Bank of Geneva v. Howlett*, 4 Wend. 328; *Reid v. Payne*, 16 John. R. 218.

If defendant had made P. his place of residence for five years before, and after due inquiry made by the notary for his place of residence, he may be governed by the information he receives, although it turns out he was misinformed; or though defendant may have changed his residence a few days before the note falls due. *Dunlap v. Thompson et al.*, 5 Yerger, 67.

If the drawee of a bill cannot be found at the place where the bill states him to reside, and it appears that he never resided there, or has absconded, the bill is considered as dishonored. *Wolfe et al. v. Jewett*, 10 Lou. R. 383. (Diligence is equivalent to actual notice. 2 Hill N. Y. R. 578; 3 Id. 520; 2 Sand. R. 171, 178; 3 Comst. 272.)

* * As to communicating notice of dishonor, see 1 Am. Leading Cases, pp. 253 to 259. * *

bill to the holder, that the bill would come back to him, or that it would not be paid by him,(1) or a promise by the drawer or indorser of a bill to pay it, knowing of the failure at the time,(2) will dispense with the proof

(1) *Brett v. Levett*, 13 East, 213.

(2) *Rogers v. Stephens*, 2 T. R. 714, 719; *Lundie v. Robertson*, 7 East, 231; *Hopes v. Alder*, 6 East, 16; *Anson v. Bailey*, Bull. N. P. 276; *Gibson v. Coggar*, 2 Campb. 188; *Roscow v. Hardy*, 12 East, 434; *Gunson v. Metz*, 1 B. & C. 193; S. C., 2 Dow. & Ry. 334; *Stevens v. Lynch*, 12 East, 38; *Wood v. Brown*, 1 Stark. N. P. C. 217; *Blesard v. Hirst*, 5 Burr. 267. In *Potter v. Rayworth* (13 East, 418), the promise was not made to the plaintiffs, but to the holder at the time.

NOTE 787.—*Crain v. Colwell*, 8 John. R. 384; *Donaldson v. Means*, 4 Dal. 109; *Duryee v. Dennison*, 5 John. R. 248; *Miller v. Hackley*, Id. 375; *Pierson v. Hooker*, 3 Id. 68. So a qualified promise. *Fletcher v. Floggatt*, 2 Car. & Payne, 569. But a qualified promise of payment, though an admission of the receipt of due notice, must nevertheless be taken as a qualified promise, and acted upon accordingly. Id. So, a mere unaccepted offer of a composition with other creditors, made by the person insisting on the want of notice (after he was aware of the laches) to the holder of the bill, amounts to a waiver of the consequences of the laches of the holder, and admits his right of action. See also Chit. on Bills (8th Am. ed.), 535, note, and p. 870, tit. Waiver. A promise to take up the bill, made before the fact of its dishonor was known, was held not to be binding; it appearing that the promise was not an absolute and unconditional one. *Pickin v. Graham*, 1 Cramp. & Mee. 725; 3 Tyr. 923. But an offer to secure 10 shillings in the pound, was held to amount to a waiver of notice of the dishonor. *Dixon v. Elliott*, 5 Carrington & Payne, 437.

A subsequent promise to pay, is a waiver of the want of notice in cases only where the promise was made with full knowledge of the fact that due notice had not been given; and that knowledge is not to be inferred from the promise itself, but it must affirmatively appear that the party knew he had not received regular notice; otherwise the presumption is that the promise was made under a belief that regular notice was given, inasmuch as such notice need not be personal. *Frimble v. Thorn*, 16 John. R. 154; *Jones et al. v. Savage*, 6 Wend. 658; *Leonard v. Gary*, 10 Wend. 504.

A stipulation by the indorser of a note to waive notice of demand of payment, does not dispense with the demand itself. *Backus v. Shepherd*, 11 Wend. 629; 6 Mass. R. 524. Where, however, the payee transfers a negotiable note, and at the same time guaranties its payment if not collected of the maker by due course of law, and also waives notice of demand; demand as well as notice, is waived. Id. The question of diligence in such case, being a question of law and fact, should be submitted to the jury. Id.

The general rule that payment must be demanded from the maker of a note, and notice of its non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited in support of it. Although the indorser has become the personal representative of the maker who has deceased, this circumstance does not relieve the holder from the obligation to demand payment of the note, and give notice to the indorser. *Magruder v. Union Bank of Georgetown*, 3 Peters' R. 87; *Union Bank of Georgetown v. Magruder*, 7 Id. 287.

Whether the evidence will amount to a waiver, is a matter of fact; and the sufficiency of the proof for this purpose is for the consideration of the jury. *Union Bank of Georgetown v. Magruder*, 7 Peters' R. 287.

If the drawer or indorser of a bill has, under an ignorance of the facts, paid the amount of the bill or note to the holder, he may recover the money back in an action for money had and received. *Garland v. Salem Bank*, 9 Mass. R. 408. * * See *Coggill v. The American Exchange Bank*, 1 Comstock N. Y. R. 113, where it was held, that the drawee and acceptor of a bill, the indorsement upon which had been forged, could not recover back from the holder the amount of the bill. * * An agreement made by the indorser, before the note became payable, to pay the

of notice; and the jury may infer that due notice had been given, where part of the money due upon the bill has been paid, without making objection, for want of notice of dishonor.(1) And, in general, if the drawer of a bill deal with it after it is dishonored, with knowledge of the circumstances, it is sufficient to charge him.(2) But it seems that an express promise to pay must be proved, to render an indorser liable, where there has been an omission to give notice of dishonor.(3)

Protest.

Where a foreign bill is presented, and acceptance or payment refused, a protest is essentially necessary;(4) it has been thought necessary also in

holder, in consideration of time being given, was held equivalent to proof of demand and notice. *Norton v. Lewis*, 2 Conn. R. 478.

If an indorser, supposing a regular demand and notice to have been made and his supposed liability, this is not a waiver. *Tower v. Durell*, 9 Mass. R. 332. In an action against the indorser of a negotiable note, the confession of the defendant, not of the fact, but that the maker of the note had informed him of the fact, is not evidence; for the declaration of the maker, if it had been made in open court at the trial of the cause, would not have been evidence of the fact. *Id.*

* * The indorser of a note may, before its maturity, make a valid agreement to waive a presentment and notice of non-payment, and such an agreement does not require a consideration. *Addington v. Davis*, 3 Denio, 16; S. C., in error, 1 Comstock R. 186. A waiver of *protest* dispenses with the necessity of *demand* of payment and notice of non-payment. *Id.* The maker of a note before its maturity assigned his property preferring his indorser as a creditor to the amount of the note, who transferred his interest under the assignment to the holder; held, that a demand and notice were not necessary to charge the indorser. *Id.* See *Union Bank v. Hyde*, 6 Wheat. R. 572; *Com. Bank v. Hughes*, 17 Wend. R. 98; *Id.* 407; *Burke v. M'Kay*, 2 How. S. C. 66. * *

(1) *Vaughan v. Fuller*, 2 Str. 1246; *Horford v. Wilson*, 1 Taunt. 12.

NOTE 788.—A letter written by the drawer of a bill, six days after the day on which the drawer should have received notice of dishonor, and containing ambiguous expressions respecting the non-payment of the bill, was held to be properly left to the jury as evidence, from which they might or might not infer that notice had been given on the proper day. *Booth et al. v. Jacobs et al.*, 3 Nev. & Malk. 351.

(2) See *Cooper v. Wall*, by Lord Tenterden, Ch. J.; *Chitty on Bills*, 236 (7th ed.) Notice was held not to be dispensed with in the following cases: *Goodall v. Dolly*, 1 T. R. 712; *Dennis v. Morrice*, 3 Esp. 158; *Cuming v. French*, 2 Camp. 106; *Borrodaile v. Lowe*, 4 Taunt. 93; *Rouse v. Redwood*, 1 Esp. C. 155.

(3) By *Mansfield*, Ch. J., 4 Taunt. 97.

(4) *Bayley on Bills* (4th ed.) 209; *Gale v. Walsh*, 5 T. R. 239. Proof of noting alone is insufficient. 2 T. R. 713; *Orr v. Magennis*, 7 East, 358.

NOTE 789.—Although the protest must be produced in evidence, yet where there are a set of bills, which is usually the case, it is not necessary to prove the identical bill which was presented to the drawee or acceptor; but proof of any other bill of the same set, is sufficient. *Kenworthy v. Hopkins*, 1 John. Cas. 107.

Though protest is the legal notice in case of a foreign bill, the omission to state it can only be taken advantage of by special demurrer, if notice in fact, of the dishonor be stated; so that notice of non-payment seems most important. *Salmons v. Stavely*, 3 Doug. 298.

The contract of indorsement is to be construed according to the laws of the place where it was made, and the execution of it contemplated by the parties. In respect to the holder of the bill, the indorser is the drawer. Therefore, the indorsee of a bill of exchange, payable at a certain number of days after sight, drawn in a French West India Island, on a mercantile house in Bordeaux, and transferred in the city of New York by the payee, need not present the bill for payment after protest for acceptance, notwithstanding that by the French *Code de Commerce* the

the case of an inland bill,(1) when a protest is averred.(2) In an action on a foreign bill presented abroad, the dishonor of the bill will be proved by producing the protest, purporting to be attested by a notary public, or if there is not any notary near the place, purporting to have been made out by an inhabitant in the presence of two witnesses;(3) proof of the notary's attestation, or of the affixing of the seal, will not be requisite.(3) But the presentment of a foreign bill in this country must be proved, in the same manner as if it were an inland bill or promissory note.(4) If the drawer resides abroad, a copy or some memorial of the protest ought to be sent to him, accompanying the notice of the non-acceptance or non-payment;(5) but if he resides in this country, though at the time of the

holder is not excused the protest for non-payment by the protest for non-acceptance, and loses all claim against the indorser, if the bill be not presented for protest of non-payment. *Aymar v. Sheldon et al.*, 12 Wend. 439. The principle is, that the nature and extent of the liabilities of both drawer and indorser are to be determined by the law of the place where the bill is drawn or indorsement made. *Id.*; *Hix v. Brown*, 12 John. R. 142. In such case, the payee of the bill is bound to conform to the French law in respect to bills of exchange, to enforce his remedies against the drawers; but not so the indorsee; he is only required to comply with the law merchant here, the indorsement having been made in the city of New York; and according to which his right of action is perfect, after protest for non-acceptance. *Aymar v. Sheldon et al.*, *supra*.

If the holder of a bill, subject to certain duties and obligations in reference to the law of the place where the bill is drawn or made payable, wishes to impose the same obligation upon his indorsee, it behoves him to make a special indorsement; otherwise the indorsee incurs only the obligations imposed by the law of the place of the indorsement. *Id.* (*Williams v. Wade*, 1 Metcalf, 82.)

Where the second of a set of three bills of exchange, is protested for non-acceptance, and a suit is brought against the indorser, and the plaintiff declares on the first of the set, he is not entitled to recover, unless he produces the second of the set which was protested, or accounts satisfactorily for its non-production; the defendant may require its production to guard against a subsequent claim, by an acceptor *supra* protest. *Wells v. Whitehead*, 15 Wend. 527.

(1) NOTE 790.—Protest is necessary in case of an inland bill. *Tassel v. Lewis*, 1 Ld. Raym. 743; *Young v. Bryan et al.*, 6 Wheat. 146; *Bank of North America v. M'Knight*, 1 Yeates. Rep. 145.

(The general rule is that neither promissory notes nor inland bills, need to be protested. Though made in one state, and payable in another, a promissory note need not be protested (*Bay v. Church*, 15 Conn. R. 15); it is not, when so drawn, a foreign bill, nor will a certificate of protest be received in evidence, as in the case of a foreign bill. *Kirtland v. Wanzer*, 2 Duer R. 278. Both notes and inland bills, may, as a general rule be protested; but this is not required. *Edwards on Bills and Promissory Notes*, 463, 584.)

(2) *Benlager v. Talleyrand*, 2 Esp. C. 550; by Lord Kenyon, see *Windle v. Andrew*, 2 B. & Ald. 700.

(3) *Anon.*, 12 Mod. 345; S. C., Rep. temp. Holt, 297. See *Chaters v. Bell*, 4 Esp. C. 48, that the protest may be drawn up at any time before the trial, if the bill be duly noted.

(4) *Chesmer v. Noyes*, 4 Camp. 129.

(5) NOTE 791.—*Chit. on Bills* (8th Am. ed.) 498; *Blakely v. Grant*, 6 Mass. R. 386. But *Lenox v. Leverett*, 10 Id. 1, seems *contra*. In *Wells v. Whitehead* (15 Wend. 527), it was held, not necessary to the support of an action against an indorser of a bill of exchange, that notice of non-acceptance should be accompanied with a copy of the bill and protest; notice alone is sufficient. The court cite *Chitty on Bills*, and 10 Mass. R. 2, and note. But Mr. Chitty, in his last edition (*supra*), says that "a copy of it (protest), or some other memorial, must, within a reason-

non acceptance he may happen to be out of the country,(1) or if he has returned from abroad before the bill becomes due,(2) notice of the protest will not be requisite, and notice of dishonor is sufficient. In the case of an acceptance for honor a protest for non-payment by the drawee is not required.(3)

The necessity of proving the protest will be superseded by evidence that the drawer of a bill had no reasonable expectation of its being honored,(4) or by proof of an admission by the party of his liability.(5)

An indorsement is evidence of money lent by the indorsee to the indorser,(6) and by the payee of a bill to the drawer;(7) but it seems that a bill would not be evidence of money had and received by the drawer for the use of the holder, or of money paid by the holder to the use of the drawer.(8)

able time, be sent with a letter of advice or notice of the dishonor, to the persons on whom the holder means to call for payment."

(1) *Cromwell v. Aynson*, 2 Esp. C. 511; *Gorstrey v. Mead*, Bull. N. P. 272. See *Chaters v. Bell*, 4 Esp. C. 49. In *Chitty on Bills*, 217 (7th ed.), it is said that a copy of the protest need not be communicated.

(2) *Robins v. Gibson*, 1 Maule & Sel. 288; S. C., 3 Camp. 335.

(3) *Williams v. Germaine*, 7 B. & C. 470.

(4) *Legge v. Thorpe*, 12 East, 171; *vide ante*, 218.

(5) *Gibson v. Coggon*, 2 Camp. 188; *Patterson v. Becher*, 6 B. Moore, 319; *Greenaway v. Headley*, 4 Camp. 52.

(6) *Keesbower v. Tims*, *Bayley on Bills* (4th ed.) 288.

(7) *Bayley on Bills*, 286 (4th ed.).

(8) *Vide ante*, note 53.

NOTE 792.—*Eales v. Dicker*, 1 Mood. & Malk. 324; *Butler v. Wright*, 20 John. R. 367. Held, that the plaintiff, as indorsee of a negotiable note, was entitled to recover as for money paid by him, on the count for money paid, &c.; it appearing that the plaintiff, who was second indorser, had paid the money at the bank in part payment of the note; but as the note was not fully paid, the property of the note still continued in the bank; defendant being first payee and first indorser. *Spencer, C. J.*, said: "It is not questioned that the plaintiff had a right, when he was called upon by the bank, to pay up the note; and had he done so, his remedy against the defendant, either by declaring on the note, or for money had and received, or for money paid, laid out and expended, would have been clear and perfect. The fact exists, that the plaintiff has paid 380 dollars on the note, to the holders of it, which the defendant ought to have paid, with a further sum to satisfy it in full."

Evidence of an existing debt is sufficient to support a count upon an account stated. Thus, in an action by the indorsee against the indorser of a bill of exchange, evidence of an acknowledgement of an existing debt, and of a promise to pay by the defendant, is admissible and sufficient to support a count upon an account stated. *Wagstaffe v. Boardman*, 9 Dow. & Ry. 248.

A bill or note is *prima facie* evidence, under a count for money had and received, against the drawer or indorser. *Page's Adm'r v. Bank of Alexandria*, 7 Wheat. 35; *State Bank v. Hurd*, 12 Mass. R. 172. In *Pierce v. Crofts* (12 John. R. 90), it was held, that the holder of a bill payable to A., B. or bearer, might either, as the bearer or the indorsee thereof, recover on a count for money had and received. But in a very late case in Pennsylvania, it is said, that the principle is applicable only where there is privity of contract between the plaintiff and defendant, and a money consideration has passed between them, of which the note, being for money, is *prima facie* evidence; for instance, as between the payee and the maker, or between the indorsee and his immediate indorser, but not as between the indorsee and the maker, or the indorsee and a remote indorser. *Kennedy v. Carpenter*, 2 Whar. R. 344. (But see *ante*, note.)

In an action by the indorsee against the indorser of a promissory note, the maker is a competent witness for the plaintiff; for, if the indorser is made to pay, the maker will be liable to pay him; if the indorser is not made to pay, the maker will be liable to pay the indorsee; and his liability to one cannot exceed in extent his liability to the other.(1) The maker is likewise a competent witness for the defendant, as to prove that the date of a note has been altered.(2)

In an action by the indorsee against the drawer of a bill, an indorser is, in general, a competent witness either for the plaintiff or for the defendant. He is competent for the plaintiff, because, though the plaintiff's succeeding in the action may possibly prevent him from calling for payment from the indorser, it is not certain that it will have that effect; and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor. He is competent for the defendant, because, if the plaintiff fail against the drawer or the acceptor, he is driven either to sue the indorser or to abandon his claim.(3) An indorser has been admitted, upon a bill drawn for his accommodation, to prove, for the plaintiff, that the plaintiff gave him value for it;(4) and he has been admitted, for the defendant, to prove payment of a note,(5) and to prove that an unstamped bill, dated abroad, had, in fact, been made in England.(6) So, he has been admitted, for the plaintiff to prove his own indorsement.(7)

A bank check, being in effect the same as an inland bill of exchange, is admissible in evidence under the money counts. *Cruger v. Armstrong et al.*, 5 John. R. 5; *Cushing v. Gore et al.*, 15 Mass. R. 69; 6 Mumf. R. 8. * * It is an inland bill. *Harker v. Anderson*, 21 Wend. 372. See the authorities cited in the elaborate opinion of Cowen J., in that case. * *

(1) *Venning v. Shuttleworth*, Bayley on Bills (4th ed.) 422.

NOTE 793.—*Emerick v. Harley*, 2 Whar. R. 50. Held, that a party to a note was inadmissible to prove that the note was not actually negotiated to the plaintiff in the ordinary course of such transactions. See also *Griffith v. Reford*, 1 Rawle, 196, and *Gest v. Espy*, 2 Watts, 265, to the same point. In *Geoghegan v. Reid et al.* (2 Whart. R. 152), it was held, that the indorser of a negotiable note was not a competent witness to prove the genuineness of the maker's handwriting. So, it has been held, that the maker cannot be a witness for the indorsee against the indorser, unless released; because a verdict against defendant might be used as evidence in an action by the latter against him. *Pierce v. Butler*, 14 Mass. R. 303. It seems to be settled differently in New York. The maker there is considered as standing indifferent between the parties, unless in the case of an accommodation note, where he cannot be a witness for the indorser. *Hubly v. Brown et al.*, 16 John. R. 70; *Skelding et al. v. Warren*, 15 Id. 275.

If a party to a negotiable instrument is disinterested, he is competent to prove matters subsequently arising, and which would defeat the plaintiff's recovery. *Powell v. Waters*, 17 John. R. 176, *M'Fadden v. Maxwell*, Id. 188.

(2) *Levy v. Essex*, Chitty on Bills, 413 (7th ed.)

(3) Bayley on Bills (4th ed), 422.

(4) *Shuttleworth v. Stevens*, 1 Campb. 408; Bayley on Bills, 422.

(5) *Charrington v. Milner*, Peake's C. 6. See *Birt v. Kershaw*, 2 East, 458; Vol. I, Chap. 5, Sects. 4 and 5.

(6) *Jordaine v. Lashbrooke*, 7 T. R. 601.

(7) *Richardson v. Allan*, 2 Stark. N. P. C. 334. And upon the subject of the competency of the parties to bills and notes, *vide ante*, Vol. I, Chap. 5, Sects. 4 and 5.

A prior indorser is competent to prove, that the defendant promised to pay the bill after it became due ;(1) and the drawee is competent to prove that he had no effects of the drawer in his hands when the bill was drawn.(2) The payee of an accommodation bill, who has indorsed it for a valuable consideration is a competent witness for the plaintiff to prove the consideration ; for although he would be liable to the plaintiff for the consideration, if the action fail, yet he would be equally liable to the

(1) *Stephens v. Lynch*, 2 Campb. 332; S. C., 12 East, 38.

NOTE 794.—An indorser not shown to have been made liable by notice of the dishonor of a note, and not called to prove the genuineness of the note, is a *competent witness*, in an action by the indorsee against the maker, to show that the note is not usurious. *Berratto v. Snowden*, 5 Wend. 181. In *The Juniata Bank v. Brown* (5 Serg. & Rawle, 232), it was held, that an indorser was admissible; the Supreme Court, however, put it on the ground that, as indorser, he was discharged. Where the indorser had ordered the note to be paid to the plaintiff *at his own risk*, Parsons, C. J., said: if, notwithstanding this stipulation, the indorser is answerable, if the maker do not pay the note, then the witness (the indorser) is interested, and ought not to have been sworn. The court held him to be a competent witness on the ground that he was not liable on his special indorsement. *Rice v. Stearns*, 3 Mass. R. 225. In *Tuthill v. Davis* (20 John. R. 285), the indorser was admitted to prove usury. But where the payee of a note payable to bearer, was admitted as a witness for the plaintiff to prove the execution of the note, and testified that he had no interest, having transferred the note to one C., at his risk, as to the solvency of the maker, the court said he was responsible upon an implied warranty that the note was not forged; and had, therefore, a direct interest in establishing the fact which he was called to prove; by obtaining a verdict for the plaintiff on the plea of non-assumpsit, he protected himself against his own warranty. *Herrick v. Whitney*, 15 John. R. 240; *Shaver v. Ehle*, 16 Id. 201.

On principles of legal policy, an original party to an usurious or gaming negotiable security, which is void in the hands of an innocent purchaser, shall not be a witness against such purchaser, because his testimony is to establish the original fraud, by enabling a fraudulent party to raise money on such security, and afterwards to protect him from any liability on his indorsement. Per Parsons, C. J., in *Barker v. Prentiss*, 6 Mass. R. 430. But a party to such security, when disinterested, may be a witness to prove any subsequent facts which admit the legality of the instrument in its original form. Id. The payee who had indorsed the note with a saving of his own liability, was admitted to prove a fraudulent alteration of the note after its execution. *Parker v. Hanson*, 7 Id. 470. So, to prove that the note was put into circulation fraudulently after the indorsement. *Woodhull v. Holmes*, 10 John. R. 231. The drawer of a bill was admitted to prove certain conditions to which the acceptance of the bill was subject; and that the same were made known to the payee at the time the bill was drawn. *Storer v. Logan et al.*, 9 Id. 55.

A subsequent indorser is not a competent witness in an action by the holder against defendant who was payee and first indorser, on the ground that he has an interest in the event of the suit. *Talbot v. Clark*, 8 Pick. 51, and cases there cited. It seems, however, that if released, he may be a witness. Id.

No person who is a party to a negotiable instrument, shall be permitted to invalidate it. *U. States v. Dunn*, 6 Pet. R. 51; *Bank of the Metropolis v. Jones*, 8 Id. 12. Upon this principle the drawer was excluded from testifying in favor of the indorser. And it has been held, in England that stat. 3 and 4 W. IV, c. 42, § 26, does not make the drawer of an accommodation bill a competent witness for the defendant in an action by the indorsee against the acceptor. The defendant, therefore, cannot examine him without a release. *Burgess v. Cuttill*, 6 C. & P. 284.

(2) *Staples v. Okines*, 1 Esp. C. 331; *Legge v. Thorpe*, 2 Campb. 310.

defendant for money paid in case it should succeed.(1) It has been held, that the acceptor is not a competent witness for the defendant to prove a set-off, on the ground that he is answerable to the drawer only to the amount to which the plaintiff recovers against the defendant.(2)

III. Lastly, of the evidence in actions by the drawer or indorser of a bill of exchange against the acceptor, and by the indorser of a promissory note against the maker, after payment to the holder.

The drawer, when he takes up the bill after its negotiation, is referred back to his original contract with the acceptor; the acceptor is discharged with respect to the drawer, until the bill returns to the drawer; but when that happens, the right of the drawer revives, and the bill which is the evidence of the contract of the acceptor, proves that his undertaking was to pay a certain sum of money at a fixed time.(3)

Acceptance, effect of.

The proofs respecting the acceptance of the defendant, and the presentment for payment, have been before considered. The acceptance is evidence that the acceptor received value from the drawer, who would not be obliged, in the first instance, to prove that he had effects in the acceptor's hands; but if this is the ground of defence, the burden of proof will be on the defendant.(4) The bankruptcy of the acceptor has been held to be no defence, under the 39 G. III, c. 121, against the drawer who had paid the bill since the bankruptcy.(5)

The payment of the money mentioned in a bill or note, may be proved by the payee or indorsee, who returned it. A general receipt on the back of a bill, is not of itself evidence of the payment by the drawer, though he produces the bill;(6) for it may be, that the drawer and acceptor have

(1) *Shuttleworth v. Stevens*, 1 Campb. 407.

NOTE 795.—The holder of a bill or note has nothing to do with the preceding indorsements, and whether forged or not, his immediate indorser is liable to him. The last indorsement is a guaranty of the preceding indorsements, and admits the handwriting of the drawer and prior indorser. *Harris v. Bradley*, 7 Yerg. R. 310.

(2) *Mainwaring v. Mytton*, 1 Stark. N. P. C. 83; *Bayley on Bills* (4th ed.), 424.

(3) *Lawrence, J.*, in *Cowley v. Dunlop*, 7 T. R. 572. The drawer or indorser may negotiate the bill again at any period. *Hubbard v. Jackson*, 4 Bing. 390; *Callow v. Lawrence*, 3 Maule & Selw. 95.

NOTE 796.—*Vide Riggs v. Lindsay*, 7 Cranch, 500. When and how the drawer may maintain an action against the acceptor, *vide Parker v. United States*, Pet. R. 262.

(4) *Vere v. Lewis*, 3 T. R. 183.

(5) *Mead v. Braham*, 3 Maule & Selw. 91.

(6) *Sholey v. Walsby*, Peake's C. 24.

NOTE 797.—RECEIPT ON THE BACK OF A BILL NOT OF ITSELF EVIDENCE.—A receipt is an admission only, and an admission, though evidence against the person who made it, and those claiming under him, except as to the person who may have been induced by it to alter his condition, is not conclusive. *Stratton v. Rastal*, 2 T. R. 366; *Wyatt v. Marquis of Hertford*, 3 East, 147; *Herne v. Rogers*, 9 Barn. & Cress. 586. It may be contradicted or explained by parol evidence. *Graves v. Key*, 3 Barn. & Adol. 313. A bill of exchange was drawn by A. on B., and indorsed

settled their accounts, and on such settlement the bill may have been delivered up; the receipt, therefore, requires some explanation, before it can be admitted as evidence of payment by the drawer on the return of the bill.

If the drawer should, in consequence of a material variance, fail on the special count, it seems doubtful whether he can recover on the common count for money had and received, without proof of a consideration passing between the parties.(1) If indeed the bill is drawn payable to the order of the drawer, so that the drawer is also the payee, and there are only two parties to the instrument, the case is similar to that between the indorsee and maker of a note; and the plaintiff may, perhaps, be allowed to recover on the count for money had and received.(2)

to C. The bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it became due, D. paid the balance to C., the holder, and the holder indorsed the bill and wrote a receipt on it in general terms; held, that the receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to explain it; and it appearing thereby that D. paid the balance, not on the account of the acceptor or drawer, but in order to acquire an interest in the bill as purchaser, it might be indorsed by D. after it became due, so as to give the indorsee all the right which C., the holder, had before the indorsement, and such indorsee might, therefore, recover from the drawer the balance unpaid by him. *Id.*

(1) See *Thompson v. Morgan*, 3 Campb. 101; *Scholey v. Walsby*, Peake's C. 24.

(2) *Thompson v. Morgan*, 3 Campb. 101.

NOTE 798.—A bill of exchange drawn in America on a house in London, payable to order, was indorsed by the payee generally to A., and by him in these words: "Pay to B. or his order for my use." B. applied to his bankers to discount the bill, and they without making any inquiry, did so, and applied the proceeds to the use of B.; held, that the indorsement was restrictive; that the property in the bill remained in A., and that he was entitled to recover the amount of the bill from the banker. *Sigourney v. Lloyd et al.*, 8 Barn. & Cress. 622. Such an indorsement will not prevent the indorsee from receiving the money from the acceptor when the bill becomes due; but the indorsee must look to the principal for the application of it. A person taking a bill so indorsed, takes it at his peril, and is bound by the state of accounts between the parties. The above judgment was affirmed in the Exchequer Chamber. 3 Young & J. 229. The law is the same in France. *Poth. pl. 89.*

Upon an express promise to pay to the factor of any one for the use of the principal, the factor may have an action in his own name. When the indorsement of a bill directed the defendant to pay the contents to the order of the plaintiff's value in account, the indorsee holding it for the use of the indorser, made him his factor, as to that bill. *Van Staphorst v. Pearce*, 4 Mass. R. 258.

An indorser of a bill cannot recover from the acceptor the costs incurred in an action brought against him by the indorsee; there is no obligation on the acceptor, except that raised by the custom of merchants. That custom does not even give a right to an indorser to recover re-exchange, much less costs in an action incurred by him on the bill. *Dawson v. Morgan*, 9 Barn. & Cress. 618. There is no privity of contract between an indorser and acceptor.

If drawer sues acceptor, upon the bill, and fails in consequence of having altered the bill in a material part, he may still recover upon counts on the original consideration. *Atkinson v. Hawdon*, 2 Adol. & Ell. 628. It has, indeed, been decided, that in consequence of a bill being altered, the holder's remedy for the debt was altogether gone (*Alderson v. Langdale*, 3 Barn. & Adol. 660); but there the defendant was the drawer, and the plaintiff who had altered the bill, was an indorsee. He by such alteration, had deprived the drawer of his remedy against the acceptor, and could not, therefore, sue the drawer upon the original consideration.

The drawer of a bill, payable to a third person cannot, it seems, recover upon the count for money paid to the acceptor's use, without proof of the consideration between him and the acceptor. In the case of *Cowley v. Dunlop*,⁽¹⁾ Mr. Justice Lawrence, with reference to the question, whether the drawer of a bill of exchange, who is obliged to take it up after having negotiated it, is not confined to his action on the bill to recover against the acceptor, is reported to have said, "It seems to me he is; for I see no reason to raise an implied assumpsit, as for money paid by the drawer for the acceptor, when the contract arising out of the bill and the custom are fully sufficient to enable him to recover what he may be obliged to pay on the acceptor's refusal."⁽²⁾

CHAPTER II.

OF EVIDENCE IN ACTIONS ON POLICIES OF MARINE INSURANCE.

THE principal points in considering this subject, are, first, the proof of the policy of insurance, upon which the plaintiff's right of action is founded; secondly, the interest in the subject matter of insurance; thirdly, the loss of the property insured, and the compliance with warranties; and lastly matters in defence, such as concealment, and misrepresentation.

First, as to the proof of the policy.

The original policy of insurance, is the best evidence of the contract and undertaking on the part of the defendant; this, therefore, ought to be produced and proved.⁽³⁾ If the policy is subscribed by a third person, as the agent of the defendant, (in which case the plaintiff may declare upon it as being signed by the defendant himself,⁽⁴⁾ the authority of the

(1) 1 T. R. 572.

(2) NOTE 799.—The obligation on the drawee to pay a *check* and a bill of exchange are the same. Both contain a request from the drawer to the *drawee*, to pay a sum of money to a third person, in whose favor the check or bill is drawn. *City Bank of New Orleans v. Girard Bank*, 10 Lou. R. 562. * * And see *Harker v. Anderson*, 21 Wend. 372, as to the generic identity of checks with bills of exchange. * * Where a bill is paid *supra* protest, for the honor of the drawer, he can only recover of the *drawee* the costs of protest for non-acceptance. *Id.*

If A. has accepted three bills for the accommodation of B., and is obliged to pay them, and also to pay the costs of two actions brought upon two of them; held, that A cannot, in an action against B., recover the amount of the costs of the two actions, if his declaration contain only the common money counts; but that to recover these costs, he should have declared specially. *Seaver v. Seaver*, 6 Car. & Payne, 673; 2 Chitt. Pl. 124.

(3) As to the proof of written instruments, see Vol. II, Chap. 7.

(4) *Nicholson v. Croft*, 2 Burr. 1188.

NOTE 800.—An agent may be appointed by parol. *Merritt v. Clason*, 12 John. R. 102; *Pratt*

agent must be regularly proved; and this may be done by the person who subscribed as agent, or by the power of attorney, or other writings of the defendant, by which he was appointed; or it would be sufficient to show that the defendant has recognized his act on this particular occasion, or that he has recognized him on several other occasions as his agent for the subscribing policies.(1) If it appears that the agent was appointed by a power of attorney, and if there is no evidence of any recognition of the agent's authority, it seems necessary to produce the written authority;(2) but it has been held, that after a general recognition(3) by the defendant of the agent's authority is established, the power of attorney need not be produced.(4)

A policy of insurance, unstamped at the time of the execution, cannot be rendered valid by a stamp which the commissioners have subsequently

v. Putnam, 13 Mass. R. 361. It is a general rule that an agent is, *ex necessitate*, a competent witness to prove transactions connected with his agency. Fisher v. Willard, 13 Mass. R. 379; Miller v. Hayman, 1 Yeates' R. 22; Wright v. Mifflin, 2 Id. 38; (Gould v. Norfolk Lead Co., 9 Cush. Mass. 338. The authority of an agent may be inferred from the directions given by principal (Lunsford v. Smith, 12 Gratt. 554); from the relation of parties and conduct of business. Dodd v. Acklom, 46 Com. Law Rep. 672; Filman v. Lynn, 30 Id. 597.) As to the authority of an agent, *vide* Odiorne v. Maxey, 13 Mass. R. 178; S. C., 15 Id. 39; Chomqua v. Mason, 1 Gall. 342; Evans v. Potter, 2 Id. 13; Jackson v. Neely, 1 Caines' R. 167.

(1) Neal v. Irving, 1 Esp. C. 61. Such a recognition, though not expressly stated in the report in this case, must be presumed. See Courteen v. Touse, 1 Campb. 43, *n.* As to the proof of agency in general, see Vol. I.

NOTE 801.—Brockelbank v. Sugrue (5 Car. & Payne, 21), where it was held, that a memorandum indorsed on a ship's policy of insurance for a change of voyage, and signed by an agent of the company, was sufficient to prove that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advised the company of it; though when a new policy was required, he always sent the proposals to the company; and that the other policies, on which such memorandum had been signed, need not be produced. So, where a clerk acts as a general agent, held, that an implied authority to effect an insurance might be implied, it being within the scope of the agent's authority. Barlow v. Leckie, 4 J. B. Moore, 8.

* * See Conover v. Mutual Ins. Co. of Albany, 3 Denio, 254, and S. C. in error, 1 Comstock R. 290, where the authority of the secretary to prove an assignment of the policy was inferred from previous acts regularly entered in the book of the company. And as to the ratification of the acts of agents, see Dunlap's Paley on Agency, p. 172, *n. q*; 2 Kent's C. 616; Lawrence v. Taylor, 5 Hill, 107, 113; Moss v. The Rossie Lead Mining Company, Id. 137; Corning v. Southland, 3 Hill, 552; Forrestier v. Boardman, 1 Story R. 43; Benedict v. Smith, 10 Paige, 127. * * Emmet v. Reed, 4 Seld. 312, 160.

(Where an agent is authorized to receive applications for insurance and re-insurance, to be submitted to the officer of the company for approval, with power to make such applications binding upon the company until their disapproval is communicated to the assured, and contracts to extend a policy, and the vessel is wrecked before any communication made to the company, the contract is valid and binding on the company. Leeds v. The Mechanics' Ins. Co., 4 Seld. N. Y. R. 351.)

(2) See Johnson v. Mason, 1 Esp. C. 89.

(3) As to the ratification of the agent's authorized acts, *vide* Hartshorn v. Wright, Peter's R. 64; Conn v. Penn, Id. 496. The ratification of unauthorized acts, to be valid, must appear to have been made with knowledge of all the facts. Nixon v. Palmer, 4 Selden, 398.

(4) Houghton v. Ewbank, 3 Campb. 88.

affixed, on payment of a penalty.(1) And a policy which covers several distinct interests cannot be read unless it has a stamp in respect of each fractional part of 100*l.* included in each separate interest, although the stamp on the instrument would have been sufficient, if the interests had been united.(2) The alterations which may be made in the terms of the policy, without requiring a new stamp, have already been noticed.(3)

Construction.

Policies cannot be contradicted, or valued by any antecedent written agreement of the parties, or by parol evidence of what passed at the time of effecting the policy.(4) The rule is universal, and applies to this as to every other written contract.

The usage of merchants, with reference to which the parties are supposed to contract, is frequently resorted to for the purpose of explaining

(1) *Roderick v. Hovell*, 3 Campb. 103; *Rapp v. Allnut*, Id. 106; 15 East, 601, 603. The stamp duties on policies are regulated, with respect to their amount, by 35 G. III, c. 184. And see 54 G. III, c. 144, respecting stamped slips.

(2) *Rapp v. Allnut*, 15 East, 601.

(3) Payment of money into court precludes the defendant from objecting that the policy has been altered. *Andrews v. Palsgrave*, 9 East, 325.

(4) See *ante* of the text and notes.

NOTE 802.—*Wilson v. Hanson*, 3 Fairf. R. 58; *Mann v. Mann*, 14 John. R. 14; *Higginson v. Dall*, 13 Mass. R. 96. Representations, however, of the state of the vessel, and giving a description of the voyage, may be proved by oral or written testimony, when the object is to falsify those representations; for many things material to the risk are stated in the application for insurance which are not usually made a part of the policy; and it is a part of the law of insurance, that such representations may be so proved. Warranties, however, must always be inserted in the policy, as also any agreements as to the policy being vacated on the happening of any event agreed on by the parties. Per Parker, Ch. J., Id. 100.

In the case of *Higgins v. Livermore* (14 Mass. R. 106), which was a policy upon a vessel, it was determined that the phrase "*Swedish Brig Sophia*," amounted to a warranty that the vessel was in fact a Swede, or at least that she was regularly documented as such. In the subsequent case of *Lewis v. Thatcher* (15 Mass. R. 431), Chief Justice Parker observes: "This qualification of the opinion was unfortunate, as it probably led to the present action, in which an attempt is made to recover, although it is agreed that the vessel belonged to *American* citizens, and was only colorably furnished with the documents tending to prove her a *Swede*." Held, in the latter case, that parol evidence was not admissible to prove that something less than such warranty was intended by the parties to the contract. Where there is a written contract, that must be abided by; and the parties should conform their contract to their actual intentions. To say in writing, that they will warrant one thing, and then prove that they meant to warrant something less, would be opening a door to frauds and perjuries, which the rules of law have aimed to close. Per Parker, Ch. J. in Id.

What is the true intent and meaning of a written instrument, is not matter of intrinsic averment, but in cases where there is no latent ambiguity, depends on the instrument itself. And an averment that the sum stated in the condition of a bond is erroneously inserted for another sum, is inadmissible upon the general ground that it contradicts the language of the condition. *United States v. Thompson*, 1 Gall. R. 388. But the written date is not conclusive evidence of the time of the transaction. This, when controverted and material, may be proved by extraneous evidence, notwithstanding a written date. *Lee v. Massachusetts Fire and M. Ins. Co.*, 6 Mas. R. 219.

* * See *Ambiguity* in Index to Vols. I, and II of the text and notes; Duer on Ins. p. 174 *et seq.*; and the authorities cited, *post*, note 804.

or defining the terms of a policy ;(1) for the terms used in policies very commonly acquire, by the well known usage of trade, a peculiar sense, distinct from the popular sense of the word.(2) However, usage is not admissible to contradict the plain unequivocal language of a policy ;(3) nor is the mere opinion of witnesses admissible to explain the terms of a policy which are in dispute, if they have had no actual experience of any usage upon the subject.(4) The usage here spoken of, is the general usage of the whole trade in the place where the policy is effected ; and therefore it has been held, that an usage among underwriters frequenting Lloyd's Coffee-house will not conclude persons who are not in the habit of resorting there for the purpose of effecting insurances.(5)

(1) NOTE 803.—The opinion of merchants and others is admissible to prove that the Mauritius is considered in mercantile contracts as an East India island, although treated by geographers as an African island. *Robertson v. Money*, 1 Ryl. & Mood. 75 ; *Uhde v. Walters*, 3 Campb. 16.

The phrase *usage of trade* implies a restriction to that class of merchants who deal in the article. Underwriters insuring by certain words are bound to know the mercantile meaning of the words, and are liable according to that meaning. *Astor v. The Union Ins. Co.*, 7 Cowen, 202. The policy may be explained by showing a known usage of trade. *Coit v. Commercial Ins. Co.*, 7 John. R. 385, 390. A local usage, to affect the construction of a contract must appear to be so well settled, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that the contract was made in reference to it. *Eager v. Atlas Ins. Co.*, 14 Pick. 141.

(2) NOTE 804.—* * For various illustrations of the rule that general *usage* may be given in evidence to aid in interpreting a contract, see tit. *Usage*, in the Index to Vols. I and II, of the text and notes. For a very able discussion of the subject in which the rule and its limitations are stated with admirable clearness and precision, see 1 Duer on Ins. pp. 179 to 195 ; Id. 255 to 282, and the accompanying proofs and illustrations. And see 3 Kent C. (6th ed.) p. 260, and note d ; *Mallen v. May*, 13 M. & W. 511 ; *Finney v. Bedford Comm. Ins. Co.*, 8 Metc. 348. * *

(3) NOTE 805.—Usage of trade is not admissible to take a case out of the operation of a statute. *Dunham v. Gould*, 16 John. R. 367. No particular usage opposed to the established principles of law can be sustained. Thus, in *Homer v. Dorr* (10 Mass. R. 26), the insurance was on property laden from Boston to Archangel, and back to Boston, taking the risk on shore as well as on board. In an action on the premium note, it was held, that the whole note was recoverable, although no property was returned in the ship ; and it was proved to be the general usage in Boston, where the insurance was effected, to return a portion of the premium in such cases. The rule of deducting one-third new for old, probably originated in usage, but it has been long known and settled in the commercial world, and has been adopted in courts, so that now it is a well settled principle of law. Per Shaw, Ch. J., in *Eager v. Atlas Ins. Co.*, 14 Pick. 141. If local usages could be admitted to control the rule in question, the object and intention of the rule would be defeated. Id.

(No usage or custom can be set up to contradict or vary the terms of a contract, when these are plain and unambiguous ; nor can usage be shown to control the rules of law. The office of a custom or usage of trade or business is to interpret or explain the language used (*Wadworth v. Allcott*, 2 Selden N. Y. R. 64) ; or to ascertain the nature and extent of the contract, in the absence of express stipulations, or where the meaning is equivocal or obscure. *Beals v. Terry*, 2 Sand. N. Y. R. 127 ; *Hone v. The M. Safety Ins. Co.*, 1 Sand. 137 ; 2 Sumn. 567.)

(4) *Syers v. Bridge*, Doug. 527. See Vol. II.

(5) *Gaybay and another v. Lloyd*, 3 Barn. & Cross, 793. And see *Palmer v. Blackburn*, 7 B. Moore, 339 ; S. C., 1 Bing. 63.

NOTE 806.—Courts take no notice of local and particular usages ; they are to be proved like other facts, and necessarily by parol evidence. *Eager v. Atlas Ins. Co.*, 14 Pick. 144 ; *Gor-*

Secondly, as to the proof of interest in the subject matter of insurance.(1)

Bill of lading.

The interest of the party for whom an insurance on goods and mer-

don v. Little, 8 Serg. & Rawle, 557; Snowden v. Warder, 3 Rawle, 103; Smith v. Wright, 1 Caines' R. 44.

* * A general usage, which contradicts a settled rule of commercial law, is inadmissible to vary a contract. Hone v. Mutual Safety Ins. Co., 1 Sandf. Super. C. R. 137; S. P., Woodruff v. Merchants' Bank, 25 Wend. 675; S. C. in error, 6 Hill, 174; Dyckers v. Alstyne, 3 Hill, 593; S. C. in error, 7 Hill, 498. As to the competency of evidence of usage, generally, see the text, Vol. II.

The usage of a foreign country may be proved by parol, although it originated in a law or edict of the government of the country. Livingston v. Maryland Ins. Co., 7 Cranch, 506. But see *Consequa v. Willings*, 1 Peters' C. C. R. 225, 229.

(1) NOTE 807.—The owner of a vessel mortgaged or hypothecated, has an interest which he may insure generally, and without specifying its nature. *Kenny v. Clarkson & Van Horne*, 1 John. R. 385; *Higginson v. Dall*, 13 Mass. R. 96. But the holder of the mortgage or bottomry bond must insure *eo nomine*. *Kenny v. Clarkson & Van Horne*, 1 John. R. 385. The hirer of a vessel who contracts with the owner to make insurance, has a sufficient insurable interest, and he need not state to the underwriters the particular nature of his interest, unless questioned concerning it by them. *Bartlett & Goodwin v. Walter*, 13 Mass. R. 267. So, where the purchaser of a cargo assigns it as security for a debt, taking the bill of lading and making out the invoice in the name of the creditor, the former has, notwithstanding, an interest which he may insure generally; and it has been held that a *bona fide* equitable interest in property, as is that of the debtor in this case, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured; unless there should be a false affirmation or representation, or a concealment after inquiry of the true state of the property. *Locke v. North American Ins. Co.*, 13 Mass. R. 61. So by an insurance on *property* on board of a ship effected on behalf of the master of the ship, whose only interest on board was a commission on the homeward cargo, such commission is insured. *Holbrook v. Brown*, 2 Mass. R. 280. * * And current bank bills have been adjudged to be comprehended under the generic name of property. *Whiton v. Old Colony Ins. Co.*, 2 Metc. 1. * * A part owner of a vessel who has hired the remainder, with a covenant to pay the value in case of a loss, may insure the whole vessel as his property. *Oliver v. Greene*, 3 Mass. R. 133. See further as to insurable interest, *Toppan v. Atkinson*, 2 Id. 385; *Murray & Ogden v. The Columbian Ins. Co.*, 11 John. R. 302; *Fontaine v. Phoenix Ins. Co.*, 11 Id. 293.

* * As to an insurable interest, generally, consult 3 Kent, C. 262, 278; 3 Stephen's N. B. 2092, 2110; 2 Greenleaf's Ev. § 379, and notes; 2 American Leading Cases, 246, 352. Profits must be insured as such. *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. Super. C. R. 137. And see 3 Neville & Manning, 819. The insured must have an interest when the insurance was made (*Howard v. Albany Ins. Co.*, 3 Denio, 301), and when the loss occurred. *Hancox v. Fishing Ins. Co.*, 3 Sumner, 142. But it has been held that the words *lost or not lost*, in a policy, will cover an interest acquired after the loss. *Sutherland v. Pratt*, 11 Meeson & Welsby, 296. And Mr. Justice Story, in *Hammond v. Allen* (2 Sumner, 397), expressed the opinion, that even without the words *lost or not lost*, the policy would cover a lost ship whose loss was unknown to the parties when the policy was effected. * *

(In fire policies, the assured must have an insurable interest when the contract is made and when the loss happens. *Howard v. Albany Ins. Co.*, 3 Denio R. 301. If he have no interest when the contract is made, it is a mere wager. *Id.* A transfer avoids the policy, unless the company assents to the assignment. *Bodle v. Chenango Co. M. Ins. Co.*, 2 Comst. 53; *Murdock v. The Same*, Id. 210.)

chandise is effected, is frequently proved by means of bills of lading. A bill of lading, signed by the master, and indorsed to a *bona fide* holder by the consignee of goods, is an immediate transfer of all interest in the goods to the indorsee: "it conveys the property upon a *bona fide* indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery would do, if so intended." (1) And by a recent statute, any person who is intrusted with a bill of lading is competent to transfer the property to which it relates, either by way of sale, or of deposit, provided the party to whom it is conveyed have no knowledge, by the document or otherwise, that he is not the actual and *bona fide* owner. (2)

If a bill of lading is produced in evidence for the purpose of showing that the goods are the property of the *consignee*, it requires only proof of the master's signature. (3) If he is dead, at the time of the trial, proof of the fact of his death, and of his signature, has been considered sufficient evidence of the interest of the consignee; (4) and, if he is alive, proof of his signature will be equally sufficient for this purpose, though it will not be evidence of the shipping of the goods, as it would in the case of his death. If the master who has signed the bill of lading, and is since dead, has made a memorandum on the bill, that the contents of the boxes on board were unknown, it is scarcely necessary to observe, that such an instrument cannot be evidence of the quantity of the goods, or of the vesting of the property in the consignee. (5)

Bills of lading "for goods, merchandise, or effects to be exported," require a 3s. stamp. (6) And bills of lading for goods and merchandise

(1) Lord Ellenborough in *Newson v. Thornton*, 6 East, 40. See *Lickbarrow v. Mason*, 2 T. R. 63; *M'Andrews v. Bell*, 1 Esp. C. 373; *Cumming v. Brown*, 9 East, 106. As to the nature and forms of bills of lading, the reader is referred to *Abbot's Treatise on the Law of Merchant Ships* (5th ed.), p. 214.

NOTE 808.—The legal property in goods passes by a bill of lading and an assignment thereof, *bona fide*, and for a fair consideration, though the assignment be made after the arrival of the goods in port. *Chandler v. Beldon*, 18 John. R. 147. The indorsement of a bill of lading, without a delivery of it, vests no property in the indorsee. *Buffington v. Curtis*, 15 Mass. R. 528. By the delivery of the goods to the master, of which the bill of lading is the evidence, the property vests in the consignee, subject only to be divested by the consignor, by the exercise of his right of stoppage *in transitu*, in case of the insolvency of the consignee. *Ludlow v. Bowne*, 1 John. R. 15, 16; *Potter v. Lansing*, 1 Id. 215. A bill of lading is not conclusive as to the property in the goods. *Maryland Ins. Co. v. Ruden's Adm'r*, 6 Cranch, 338. (See also *Brower v. Peabody*, 3 Kernan R. 121.)

(2) Stat. 6 Geo. IV, c. 94, § 2. See *Fletcher v. Heath*, 7 Barn. & Cress. 517. And the case of *Wright v. Campbell*, 4 Burr. 2047, before the statute.

(3) The bill of lading for the outward cargo, is no proof of interest in the return cargo. *Beal v. Pettit*, 1 Wash. C. C. R. 241.

(4) *Haddon v. Parry*, 3 Taunt. 303.

(5) 3 Taunt. 303.

(6) St. 48 G. III, c. 149; Sch. Part I.

to be carried coastwise (that is, from one port of Great Britain to another port), are now subject to the same duty.(1)

Shipping of goods.

In addition to the proof of the master's signature, and of that of the indorser, where the plaintiff's interest arises from the indorsement of a bill of lading, it is necessary to give evidence of the shipping of the insured goods. This fact admits of various kinds of proof. It may be proved by the master of the ship, or the mate, or other person present at the time of the delivery. A bill of lading, signed by the master of the ship, and acknowledging the receipt of the goods there specified, will be evidence, after his death, of the shipment of the goods;(2) for the deceased master charges himself by this instrument with the receipt of the goods; and upon this ground, from analogy to many other cases of a similar nature,(3) the instrument has been considered admissible evidence on the part of the consignee against third persons. If the master is not deceased at the time of the trial, the bill of lading is not evidence of the shipment of the goods on board.(4) The shipment of the goods has been sometimes proved by certain official documents; as, in the case of *Johnson v. Ward*,(5) where a copy of an official paper containing an account of the cargo of a ship (the original having been made in pursuance of an act of Parliament by an officer of the customs, and lodged there as an official document), was admitted as proof that the insured property was put on board.(6)

A bill of lading, though the most usual proof of property in the goods shipped, is not the only proof; the owner may convey his interest in any other form that is effectual for the purpose of sale. Thus, the production of a bill of parcels in the handwriting of a person living abroad, with his receipt affixed, has been allowed to be evidence of property in a cargo.(7)

(1) St. 55 G. III, c. 184; Sch. Part I. *Vide* 5 Taunt. 533.

(2) *Haddow v. Parry*, 3 Taunt. 303.

(3) See Vol. I.

(4) *Dickson v. Lodge*, 1 Stark. N. P. C. 226.

(5) 6 Esp. 47. The official paper, in this case, was proved to have gone with the ship.

(6) NOTE 809.—Interest in a cargo is proved by a person who saw the articles brought on board, and was knowing to the articles bought by the plaintiff. *Peyton v. Hallett*, 1 Caines' R. 363. So, it has been held, that abstracts from the books of merchants abroad, are evidence of the shipment of goods, if supported by other proof. *Beel v. Keeley*, 2 Yeates' R. 255. The notarial copy of an agreement made in Philadelphia, respecting the loading of a vessel insured, was not permitted in evidence against the underwriters; the original being in the hands of an agent abroad. *Donatle v. Insurance Co. of North America*, 4 Id. 275. So, letters of the captain were not considered sufficient proof of the property shipped, without the invoices or bills of lading. *Crousillat v. Ball*, 3 Yeates' R. 375.

(As against a carrier, a bill of lading partakes of a twofold character. It is a receipt and a contract; it specifies and describes the goods received on board, and contains an engagement to carry and deliver them. *Wolfe v. Dalerme*, 3 Sand. 12; *Backus v. The Marengo*, 6 M'Lean Rep. 487.)

(7) *Russell v. Boehme*, Str. 1127.

The shipment of goods, on account of the purchaser, according to the agreement or course of dealings between the parties, is analogous to a delivery to a land carrier, and operates as an actual delivery to the purchaser.(1)

Interest in ship. 1. Possession.

When a ship is the subject matter of insurance, the interest of the party may be shown by proving his possession of the ship, or the possession of those to whom he has committed it, or that he has directed the loading of the ship and purchased the stores, or paid the persons employed on board.(2) Such acts are presumptive evidence of ownership, and sufficient in the first instance, to entitle the plaintiff to recover, without the aid of any documentary evidence or title deeds. The most common and ordinary proof is the evidence of the captain, stating that the persons who are

(1) *Vide infra*, "goods sold and delivered."

NOTE 810.—If the bill of lading is *to the order of the shippers*, and indorsed, still the property vests in the consignee upon the shipment. *Ludlow v. Eddy*, 1 John. R. 15, 16; *Potter v. Lansing*, Id. 215. Upon a shipment to be sold, on joint account, both of shipper and consignee, or of the shipper alone, at the option of the consignee, held that the right of property does not vest in the consignee until he makes his election. *The Venus*, Rae, master, 8 Cranch, 253, 275, *et seq.* Orders were received before the declaration of war, but by reason of embarrassments on the part of the shippers, and before executing the orders, they made an assignment of the goods to bankers as security for advances, requesting the consignees to remit the amount to the bankers, the invoice being for account and risk of the consignees, but stating the property in the goods to be in the bankers; held, that notwithstanding the assignment, the property in the goods originally vested in the consignees; the same having been purchased and shipped in pursuance of their orders. *The Mary and Susan*, 1 Wheat. 25. To make the shipment a delivery to the consignee, the goods must have been shipped in consequence of some contract of sale. *The Frances*, 8 Cranch, 359, 418. The property in that case vests in the purchaser, although by the bill of lading the goods are consigned to another person. But if consigned to the purchaser, and the bill of lading is inclosed to the shipper's agent, with directions not to deliver them until paid for, the property continues in the shipper. *The Merimac*, 8 Cranch, 317. See, also, *The St. Joze Indiano*, 1 Wheat. 208.

A bill of lading was signed by the master thus: "Received of the Delaware and Hudson Canal Company, on board the sloop *Invincible*, whereof I am master, forty tons *Lackawana* coal, which I promise to deliver to J. or order at New York, he paying freight for same;" but the master, instead of delivering the same to J., in New York, carried the same to Connecticut, for the purpose of delivering it to L. there, who had ordered the same from J. at New York; held, that J. was entitled to the same as against the creditors of L.; although it appeared that the clerk of J., in New York, verbally authorized the master to carry the coal to Connecticut, without stopping at New York, such authority on the part of the clerk being without authority, and contrary to the usual course of business. *Jones v. Warner*, 11 Conn. R. 40. The evidence also to show such verbal authority was held to be inadmissible, inasmuch as it went to contradict the bill of lading.

(A bill of lading procured by fraud, or fraudulently signed by the master, does not pass the title to the cargo. *Brower v. Peabody*, 3 Kernan N. Y. R. 121; *Schooner Freeman v. Buckingham*, 18 How. U. S. 182.)

(2) *Amery v. Rogers*, 1 Esp. N. P. C. 206; *Thomas v. Foyle*, 5 Esp. 88; 14 East, 233; *Pirie v. Anderson*, 4 Taunt. 657. Possession of a ship under a transfer, though the transfer is void for non-compliance with the register acts, is a sufficient title in trover. *Sutton v. Buck*, 2 Taunt. 302.

represented in the declaration as owners, employed him in that character; and though it should afterwards appear, on his cross examination, that they were entitled to the ownership under a bill of sale, yet this will not make it necessary for the plaintiff to produce that document, or to produce the ship's register, or to give, in the first instance, any ulterior proof of their property.(1) "The mere fact of possession by them, as owners," said Lord Ellenborough, in the case of *Robertson v. French*, above cited,(2) "is sufficient *prima facie* evidence of ownership, without the aid of any documentary proof or title deeds on the subject, until such further evidence should be rendered necessary in support of the *prima facie* case of ownership, in consequence of the abduction of some contrary proof on the other side." And in the same case Lord Ellenborough observed, that although a prior register in the name of J. S. as owner in 1792, and a subsequent register to the same person upon a sale in 1802, under a decree of the Court of Vice-Admiralty, were given in evidence by the defendant, yet these were perfectly consistent with a title in other persons in the meantime, agreeable to the averment in the declaration. But if the defendant, in answer to such *prima facie* evidence, prove by the registry, that the ship was registered, as belonging to another person, at the time when the insurance was made, the plaintiff cannot recover.(3)

Proof of possession, then, without the production of the register, is *prima facie* evidence of an interest in the ship, as it would have been before the register acts. Indeed any of the proofs of ownership, which would have been admissible before the register acts, will now also be equally admissible.(4) But where the additional proof of registry is required, in order to make the other evidence admissible,(5) as were no acts of ownership have been exercised by the purchaser of the ship, the registration must be regularly proved.

2. Bills of sale.

If the plaintiff claim the property in the ship under a bill of sale, or other instrument in writing, such written instrument ought to be produced.(6) The purchase of a ship in a foreign country has been proved

(1) *Robertson v. French*, 4 East, 130; 5 Esp. 88; *Marsh v. Robinson*, 4 Esp. 99.

(2) 4 East, 137.

(3) *Marsh v. Robinson*, 4 Esp. 99.

(4) NOTE 811.—*Wendover v. Hogeboom*, 7 John. R. 308; *Hatch v. Smith*, 5 Mass. R. 42.

It has been repeatedly held, that the registry at the custom-house does not determine the ownership of a vessel, and that its object is merely to show her national character, and entitle her to the advantages secured by the laws of the United States to vessels of our own country. Per Oakley, J., in *Ring v. Franklin*, 2 Hall, 1; *Sharp v. United Ins. Co.*, 14 John. R. 201; *Leonard v. Huntington*, 15 Id. 302.

(5) See 4 Taunt. 657.

(6) Where the ship must be registered, the bill of sale must contain a recital of the certificate of registry. 6 Geo. IV, 110, § 31.

NOTE 812.—A bill of sale or other instrument in writing or under seal, is not essential to the

by a copy of the bill of sale, issued by a public officer, whose duty it was to record the original, and authenticate the copy.(1)

Where the interest is proved by means of a bill of sale, it appears to be necessary, in those cases where the Register Act requires the ship to be registered, for the plaintiff to give evidence of the registration.(2) And the averment of interest in the plaintiff's declaration must correspond with the title of the ship contained in the register. Thus, where, in an action upon a policy of insurance, the interest in the freight of a ship was alleged to be in four persons, who were partners in trade, and had jointly purchased and paid for the ship, but had caused her to be registered in the names of two of them alone, it was decided, that the action was not maintainable.(3) The register, however, is not evidence of the transaction of sale, for it amounts to no more than a declaration by the party that he is owner, which a man cannot convert into evidence of his own title.(4)

By the statute 6 Geo. IV, c. 41, § 1, bills of sale, assignments, and mortgages of ships, are exempted from stamp duty. And by the Registry Act 6 Geo. IV, c. 110, § 43, office copies of the registers and entries of ships, and of the necessary affidavits, are made evidence without the production of the originals, or the attendance of the collector or comptroller.

Interest in freight.

Where a policy of insurance is on freight, the plaintiff must show that he is interested in the freight sought to be recovered by proving an inchoate right to it, arising either upon the actual shipment of goods, or some contract for freight, under which, except for the wrongful act of the

transfer of a ship, more than any other chattel. *Bixby v. Franklin Ins. Co.*, 8 Pick. 86; *Lamb v. Durand*, 13 Mass. R. 54; *Taggard v. Loring*, 16 Id. 336. Mr. Justice Story, however, seemed to consider a written document as essential to the transfer of a ship which navigates the ocean (*Obl v. Eagle Ins. Co.*, 4 Mason, 390, 394): and this was the doctrine of Lord Stowell in *The Sisters* (5 Rob. 138).

(When a vessel is transferred by a bill of sale, the contract cannot be qualified or enlarged by parol evidence. *Burchard v. Tapscott*, 3 Duer R. 363.)

(1) *Woodward v. Larkin*, 3 Esp. 287. See *Richardson v. Mellish*, 1 Ry. & Mo. 66.

(2) For the law relating to the registry on transfer of ships, see Lord Tenterden's Treatise on the Law of Merchant Ships (5th ed.), and the late statute, 6 Geo. IV, c. 110, § 37.

(3) *Camden v. Anderson*, 5 T. R. 709. And see *Marsh v. Robinson*, 4 Esp. 98; and 6 G. 1V, c. 90, § 31.

(4) By *Le Blanc, J.*, *Tinkler v. Walpole*, 14 East, 232; *Pirie v. Anderson*, 4 Taunt. 652, by Lord Ellenborough, *Flower v. Young*, 3 Campb. 240. See Vol. II.

NOTE 81:—Where the plaintiff sought to recover back the premium of insurance, on the allegation that he and his brother, R. S., were not the owners when the policy was effected; and to prove this, offered the register of the ship; held, that the register, which was in the name of the other persons, was not *prima facie* evidence that the plaintiff was not the owner. *Sharp v. United Ins. Co.*, 14 John. R. 201.

A copy of the register, certified to be a true copy by the collector, is not evidence, on proof of the collector's handwriting, but it should be proved in the strict and regular manner, which is by a copy compared with the original record kept by the collector, by a witness who can testify to its being a true copy. *Coolidge v. The New York Fire Ins. Co.*, 14 John. 308.

party with whom he has contracted, he would have been in a condition to earn freight, if the voyage had not been stopped by a peril insured against.(1) Payment of money into court precludes the defendant from objecting that the averment of interest is not substantiated.(2)

Proof of interest as averred.

A material variance between the interest averred(3) in the declaration, and that proved at the trial, is a ground of nonsuit. The allegation, on whose account, and for whose benefit the policy was made, is a material allegation, and the statement ought to be strictly conformable with the fact.(4) Thus, where interest was alleged to be in a single person, and the

(1) Davidson v. Willasey, 1 Maule & Selw. 313; Thompson v. Taylor, 6 T. R. 478; Horncastle v. Stuart, 7 East, 400; Forbes v. Aspinall, 13 East, 323.

NOTE 814.—The advance of the freight, gives no right to insure beyond the amount of the advance; and where the owner of the vessel is liable to refund in case of loss, his right to insure that amount—resulting from the lien the charterer has upon the freight for his security—requires that proof should be made of the actual payment of the money alleged to be advanced. Robbins v. New York Ins. Co., 1 Hall, 325. In most cases the charterer will have a lien upon the freight for the advances he makes the ship owners, as his security against their inability to refund. That lien gives him an interest under the charter party as or in the nature of a mortgage, which he may insure; and the better opinion seems to be, that he may insure it in general terms under the name of freight, without describing it as a mortgage interest. But to entitle him to recover, he must prove the fact of the advance. Per Jones, Ch. J., in *Id.*

An insurance "on goods" is sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject matter of insurance be rightly described, the particular interest in it need not be specified. Crowley v. Cohen, 3 Barn. & Adol. 478.

* * See *ante*, note 807. In Hancox v. Fishing Ins. Co. (3 Sumner, 132), an insurance on *outfits*, in a whaling voyage, was held not to terminate *pro tanto* with their consumption or distribution, but attaches to the *proceeds* of the adventure. * *

(2) By Lord Ellenborough, 16 East, 146.

(3) NOTE 815.—The plaintiff alleged that *his* store was consumed by fire; held, that although this was not a technical averment that he was the owner, yet that it was sufficient after verdict; because, according to well established principles applicable to fire insurance, a verdict should not have been found for the plaintiff, unless he had given evidence to the jury that the property was *his* at the time it was consumed. Lane v. Maine Mutual Fire Ins. Co., 3 Fairf. R. 44, 50. The declaration might, perhaps, have been adjudged defective upon special demurrer. 2 Peters R. 25. (See 2 Comst. 210.)

* * "His buildings," in a fire policy, were held not to be equivalent to a warranty that the insured was owner; and not to amount to a material representation, where his interest was only that of a tenant for a year. Niblo v. North Am. Fire Ins. Co., 1 Sandf. Super. C. R. 551. * *

A mortgagee of a ship, at least since the statute (6 Geo. IV, ch. 110, § 45) has a distinct interest from that of the mortgagor, to the extent *prima facie* of the value mortgaged. Park, J., in Irving v. Richardson, 2 Barn. & Adol. 193. Therefore, when suing on a policy in respect to his interest as a mortgagee, he must aver that he was interested to the amount insured; and cannot recover above the value mortgaged. *Id.* Before that act, the mortgagee of a ship was, in point of law, the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself. But by the statute, the interests of mortgagor and mortgagee are more distinctly served than they formerly were. The mortgagor now does not cease to be an owner. *Id.* (As to the interest of a mortgagee in a fire policy, see 5 Duer R. 1.)

(4) NOTE 816.—Held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject matter of insurance be

policy purported to be made on his account, whereas in fact several were jointly interested, and the policy was made on their joint account, the variance was held to be fatal.(1) Lord Ellenborough, in delivering the judgment of the court in this case, said: "The underwriters are entitled to have it stated truly upon the record, whose interest the policy was to protect. Although an action upon a policy may be brought in the name of the person who effected it, though he is not the person actually interested; yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are admissible in evidence against the plaintiff, and what would be a defence against them is, in many instances, a defence against the plaintiff: and with a view to apprise the underwriter, whose declaration it may be material for him to be prepared to prove, and whose case he is to meet, he ought to be truly informed by the record, for whose interest, and on whose behalf the policy was made. It certainly is material also, in point of public policy and convenience, that a disclosure of the true interest, meant to be covered by the policy, should be correctly made, in order to exclude the property of enemies from the benefit of British insurance." The rule, indeed, is general, that in an action on a contract, the contracting parties ought to be named in the declaration :(2)

rightly described, the particular interest in it need not be specified. *Crowley v. Cohen*, 3 Barn. & Adol. 478. Goods in the custody of carriers, are constantly described as their goods in indictments and declarations in trespass.

"The averment in substance, is nothing more than that the parties for whose benefit the insurance was made, had an interest in the subject of that insurance. They are not bound by the terms of the averment to show anything more than that they have an interest; and if they show an interest to the extent of one hundredth part of the cargo, it will be sufficient." Per Chamber J., in *Page v. Fry*, 2 Bos. & Pull. 240; *Pacific Ins. Co. v. Catlett*, 4 Wend. 75.

(1) *Bell v. Ansley*, 16 East, 141; *Cohen v. Hannam*, 5 Taunt. 101; *Carruthers v. Sheddon*, 1 Marshall, 416; S. C., 6 Taunt. 14; and *Bell v. Janson*, 1 Maule & Selw. 201.

NOTE 817.—*Ante*, last note. See, also, *The Pacific Ins. Co. v. Catlett*, 4 Wend. 75, 80, *et seq.* (The owner need not be named in the policy; but the action must be brought in his name. *Waters v. Allen*, 5 Hill N. Y. R. 421; 6 Paige, 583.)

(2) NOTE 818.—*Pacific Ins. Co. v. Catlett*, 4 Wend. 75.

In the case of the omission of proper parties as plaintiffs in an action *ex contractu*, the defendant may plead the non-joinder in abatement; or avail himself of it, as a variance, under the general issue, to nonsuit the plaintiff: or, if the defect appear upon the pleadings, may demur, or move in arrest of judgment, or bring a writ of error, and where the action is founded upon a deed, may craveoyer and then demur. 1 Saund. 153, n. 1, 291, f; 1 John. R. 122, 128; Con. Dig. Abatement, E, 12; 7 Mod. 116; Str. 1146, 820; 2 John. Cas. 384; 16 John. R. 34; Dunl. Pr. 33, 34. The want of proper plaintiffs in actions on contract, is an exception to the merits, and is to be taken advantage of, either on demurrer, in bar, or on the general issue, but not by plea in abatement. Per Parsons, C. J., in *Baker v. Jewell*, 6 Mass. R. 460; *Scott v. Goodwin*, 1 B. & P. 67. The authorities all apply to plaintiffs, where the title is not wholly in one, and where the right of action depends on a title, which is alleged to be in one, but is proved to be in two or more, and it so appears by the pleadings, or in the progress of the suit. The variance in that case is fatal. *Converse v. Symmes*, 10 Mass. R. 317. The one plaintiff cannot recover his portion of the right, to which two or more are jointly entitled. The case of defendants is otherwise. *Id.* "If there are less plaintiffs than there ought to be, it goes to a nonsuit; if less defendants, it is only in abatement." Per Mansfield, C. J., in *Barnard v. Kinworthy*, cited 1 Bos-

& Pul. 73, *in notis*. In the subsequent case of *Thompson v. Haskins* (11 Mass. R. 420), it was said: "that it is manifest that, even in the case of plaintiffs, an omission of one or more does not go to destroy the action, without a plea in abatement; unless in actions upon contract, in which the law seems still to be, that a failure to join all those who ought to be plaintiffs in the suit, will cause a nonsuit, or even an arrest of judgment, if the defect appear of record, although it be not pleaded in abatement." It was there held, in that case, that a tenant in common might maintain an action of *trespass quare, &c.*, for a tort done to the common property; unless the defendant should take advantage of the omission to join the other tenant by plea in abatement. *Id.*; *Cabell v. Vaughan*, 1 Saund. R. 291, S. P.

Where there was an averment in a declaration on a policy, that A. B. C. D., and certain persons trading under the firm of E. and F. & Co., were interested in the property, it was held to be sufficient on a motion in arrest of judgment; but *quere*, whether the uncertainty as to the names of the persons who compose the firm is a ground of special demurrer. It seems sufficient at the trial to prove that there is such a firm, without proving the names of the persons who compose the firm. *Wright v. Welbie*, 1 Chit. R. 49.

As a part owner may insure his individual interest, without specifying that interest; yet, if it clearly appears that the owner who effected an insurance did it on joint account, and the language is for *account of whom it may concern*, or of *the owners*, then every person having an interest may claim the benefit of the policy, but no one can recover for more than the interest which he proves. *Turner v. Burrows*, 5 Wend. 541; S. C., 8 Id. 144. Neither a part owner nor the ship's husband who insure a vessel, can recover in respect to the interest of a co-owner, without proving express authority. *Id.*

The averment of a joint interest with others is not supported by proof of a sole interest. Per *Thompson, J.*, in 1 *Peters' C. C. R.* 615; *Dumas v. Jones*, 4 Mass. R. 647. And where G., B. and M. were the owners of the vessel, and also jointly interested in the property on board, and the policy was, "Cause F. and T., for the owners of brig *Sampson*, to be assured," &c.; and the declaration averred that G., B. and M. were the owners of the vessel, and that they were jointly interested in the property on board to the amount of ———; and G. was solely interested in property to the amount of ———; held, that in such case both the joint and separate property of G. was recoverable; and the precise interest of G. was matter of evidence; but there being no evidence that the other part owners ordered any insurance or adopted the same after it was effected, they were not insured, and therefore were entitled to recover the premium under the count for money had and received. *Foster v. United Ins. Co.*, 11 Pick. 85.

In the cases in the text, it is said that joint owners of property, insured for their joint use, cannot recover on account, averring the interest to be in one of them. But in *De Forest v. The Fulton Fire Ins. Co.* (1 Hall, 84, 136), *Oakley, J.*, observes, that if the decision turned upon the rule referred to in the English cases, "it would be necessary to consider how far the rule, as to the averment of interest above alluded to, has its origin in the English statute in restraint of gaming insurances. I prefer, however, that my opinion should rest on the broad ground that the plaintiff had an insurable interest in the 'goods held on commission,' to their full value, without regard to their lien." The terms of the policy in that case were, "as well the property of the assured, as held by them in trust or commission, contained in store No. 82 South street;" and the declaration contained a count upon each of the three policies made by defendants, averring "that the plaintiffs were possessed of divers goods and merchandise, as well the property of the assured, as held by them in trust or on commission, to the amount, &c., to the damage of the plaintiffs," &c. The declaration proceeded on the ground that the insurable interest was in the plaintiffs; "it predicates (observes Chief Justice Jones, p. 102) the loss it claims, as the loss of the plaintiffs themselves, and substantially avers the interest to have been in them. The proof of the averment was, that they held goods on commission for sale, as factors, which were deteriorated by the fire, to the amount of the claim. And it is clear, that to entitle them to recover the entire amount of the loss upon those goods, it must be shown that the possession and special ownership established by the proofs in the cause, constituted an insurable interest, and that they had a right to insure that interest in their own names, without any further disclosure of the peculiar nature of the interest, than that they held the goods on commission." *Id.* A consignee, with general powers to manage and sell the property, has an insurable interest in the goods in

if it were otherwise, the defendant might be surprised by having one of the parties called as witness against him; or what would be still worse, one of them might sit undiscovered among the jury.(1)

Interest at what time.

An averment of interest at the time of effecting a policy is immaterial, and need not be proved; it will be sufficient to prove, that the plaintiff was interested at the commencement of the risk.(2) And if a policy allege the interest to be in a person who was interested at the time of effecting the policy, it is sufficient to prove his adoption of the policy, by means of a letter written by him after the loss.(3)

his possession as consignee, and may insure them in his own name, and aver the interest in himself. *Id.*

In *Oliver v. Green* (3 Mass. R. 133), a part owner of a ship chartered the residue of her, with an agreement to pay a specific sum if she should be lost, and insured the whole ship as his own property, without stating the nature of his interest; and he recovered for the whole value of her, notwithstanding that the objection that short interest was taken. So, in *Bartlett v. Walter* (13 Id. 267), the charterer of a vessel, who agreed to insure her, was held to have an insurable interest; and he recovered the actual value, on a count averring interest in himself.

Upon restricted policies, as where names of the assured are inserted in the policies, the interest must be averred and shown to be in the person insured. Thus, in *Graves v. The Boston Marine Ins. Co.* (2 Cranch, 419), a policy on a cargo in which Graves and Barnewall were jointly interested, was held to cover the interest of Graves only, because his name alone was inserted in the policy, and the insurance was in its terms for him only, and not for whomsoever it might concern. So, in *Baker v. Marine Ins. Co.* (2 Mason, 369), an insurance was effected on goods which had been abandoned to the insurers and accepted by them, but the goods had been purchased by the master himself, for the original owners, at a sale of them in a port of necessity, and the policy was for account of the master, the original owner, or both of them: the sale to the master being held to confer no title upon him, the policy was adjudged to be inoperative, because the property being vested in the insurers by the abandonment, and the acceptance of it prior to the insurance, the persons named in the policy had no insurable interest upon which it could attach. And in all cases where the names of the assured are inserted in the policy, the insurance is restricted to the assured specially named therein. Per *Jones, C. J.*, in *De Forest v. The Fulton Fire Insurance Co.*, *supra*. In both marine and fire policies, the policy, in its principle, without any special agreement engrafted upon it, is a contract of indemnity, and the assured must show an insurable interest, and a loss to himself, to entitle him to recover. *Id.*

A consignee, who holds the bill of lading and invoices of the goods in his own name, has an insurable interest in them, and may recover the sum insured. *Buck v. Chesapeake Ins. Co.*, 1 Pet. R. 151. The term *interest* does not necessarily imply property in the subject of insurance. (A carrier has an insurable interest in the cargo. 2 Sand. R. 490.)

(1) 5 Taunt. 106.

(2) *Rhind v. Wilkinson*, 2 Taunt. 237; 6 Taunt. 465.

(3) *Hagedorn v. Oliverson*, 2 Maule & Selw. 485. And see *Lucena v. Crawford*, 2 N. R. 269; *Routh v. Thompson*, 13 East, 274; and stat. 28 Geo. III, c. 56.

NOTE 819.—*Newsom's Adm'r v. Douglass*, 7 Har. & John. 417.

A change in the interest, after the policy is effected, much less after the loss has happened, cannot be set up as an answer by the underwriters against a claim for such loss. *Tindal, C. J.*, in *Sparkes v. Marshall*, *Bingham's N. C.* 761. For if the plaintiff had an insurable interest at the time the policy was effected, whatever change may have taken in the property since, can have no effect in relieving the underwriters from their liability, as the plaintiff may sue on the policy, for the benefit of the party to whom such property has passed. *Id.*

* * In *Howard & Ryckman v. The Albany Ins. Co.* (3 Denio, 302), the plaintiffs were insured on their brewery and stock. In a suit on the policy, the defendants pleaded specially that before the loss the plaintiff Ryckman had assigned his entire interest in the subject to the plaintiff Howard. On special demurrer the defendants had judgment; the court holding (Bronson, J., dissenting), that the plaintiffs could not recover for want of a joint interest at the time of the loss. This decision is not very satisfactory, and the grounds on which it rests do not appear, the able, dissenting opinion of Mr. Justice Bronson being the only one delivered. The policy contained a condition by which it was to become void, if assigned without the consent of the company, but (as was suggested by Mr. Justice Bronson) there was nothing in the policy concerning either a general or partial assignment of the *subject* insured. The sounder opinion would seem to be, that Howard was entitled to recover an indemnity on the basis of his original share. (See also 2 Comst. 53.)

The transfer of the policy and its *subject* matter, by operation of law, does not avoid the policy; though it is otherwise where the transfer is by the act of the insured. *Dewitt v. Worcester Mar. Ins. Co.*, 11 Metc. 429. If the insured die, his personal representatives succeed to his rights; and his creditors succeed if he become bankrupt. In these cases, the interest of the insured is *represented*. And if the transfer be of the nature of a mortgage, or trust, the insured may nevertheless sue and recover to the extent of his residuary interest. *Carrol v. The Boston Mar. Ins. Co.*, 8 Mass. 515; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76. The reason seems to be, that whereas there is a *nominal* transfer of the interest, it substantially and beneficially remains in the insured. In *Delancey v. Stoddard* (1 Term. R. 22), Ashurst, J., said that a policy might be assigned in equity; and that in the King's Bench an action would be permitted to be brought by trustees. In *Powles v. Innes* (11 Mees. & Welsb. R. 10), Parke, B., said, that the parties might sue as trustees for the purchaser. Chancellor Kent (3 Com. 262, n. e, 6th ed.) says, it would seem from the cases that an assignment of the policy is only available when transferred in trust. *Heath v. Am. Ins. Co.*, N. Y. Superior Court, May, 1841. And see *Howard v. Albany Ins. Co.*, *supra*. If an assignment be not prohibited by the terms of the policy, it is assignable in equity, like other choses in action. 3 Kent C. 375; *Smith v. Saratoga M. Fire Ins. Co.*, 1 Hill, 497. The restraint upon transfer exists only before a loss occurs (*Id.*); and applies only to voluntary sales, and not to sales on executions. *Id.* 375; *Brichta v. Fayette Ins. Co.*, 2 Hall N. Y. R. 372; *Strong v. Man. Ins. Co.*, 10 Pick. 40. And see *Trumbull v. Portage M. Ins. Co.*, 12 Ohio R. 305; *Ætna Fire Ins. Co. v. Taylor*, 16 Wend. 385; *Wilson v. Hill*, 3 Metc. 66. Where, in pursuance of the conditions in the policy, the defendants consent to the assignment, the assignee cannot sue in his own name, except upon an express promise to respond to him. *Jessel v. Williamsburgh Ins. Co.*, 3 Hill, 88. But under special provisions in the defendant's charters, the suit *must* be in the name of the assignee. *Mann v. Herkimer C. M. Ins. Co.*, 4 Hill, 187; *Ferris v. North Am. Ins. Co.*, 1 Hill, 71. * *

In an action on a policy of insurance against an incorporated company, by the terms of whose act of incorporation an *assignee* of the assured may bring an action on the policy *in his own name*, if the *subject insured* has been transferred to him, it is necessary that the plaintiff aver in his declaration that he has become the *purchaser* or *assignee of the subject insured*; a general averment that the plaintiff became and was interested in the buildings insured, and that the assured transferred all his right and interest in the policy to the plaintiff, is not sufficient. *Granger v. The Howard Ins. Co.*, 5 Wend. 200. The statute being the foundation of the plaintiff's right of action, he is bound to show that he comes within the provisions of the act. *Id.*

In all the cases cited in the text, "the contest was between the *owner* or his agent on the one hand, and the *underwriters* on the other; and they were decided upon the principle that a consent given to what has been done by one acting as an agent without authority, has, as against a third party, a retrospective operation." Per Walworth, Chancellor, in 8 Wend. 152. But if the insurance of the vessel is coupled with an insurance on the *freight* and *cargo* also, and the party effecting the insurance interded the whole as a joint adventure, he is not liable to his co-owner for his proportion of the moneys obtained from the insurer on the loss of the vessel, unless the co-owner consents to participate with him in the whole transaction. *Id.*

Where A. authorizes B. to effect an insurance for him, or B., without authority, designs to insure for A., and in either case B. directs a sole agent to insure in such sub-agent's name, with the general clause, the policy will enure to A.'s benefit, although his interest was not known to

Proof of loss.

It is necessary for the plaintiff, in proving the loss he has sustained, to show that it occurred in the course of a legal voyage; and where a voyage is illegal in itself, but has been legalized by a license, the license must be produced. The decisions respecting the evidence necessary to prove a license have principally reference to a time of war; and it has been held, that if a license granted by the government of this country is lost, it ought to be proved by examined copies from official books, and not by parol evidence.(1) On proof that goods, which cannot be exported without a license, were entered for exportation at the custom house, it will be presumed that there was a license to export them.(2) Where a license has been granted to certain persons by name, in general terms, it is sufficient to show that the license has been applied to the ship and voyage in question, without further connecting the plaintiff with the persons to whom the license has been granted.(3) Foreign licenses must be proved to have issued from the proper authority, or their genuineness must be shown from circumstances.(4)

Loss in voyage insured.

It is also a necessary part of the proof of the loss, to show that it occurred in the course of the voyage insured. In the case of a supposed loss at sea, proof of a particular destination by charter party would be a ground of presuming, that it was the chartered voyage, on which the ship sailed; or the proof of clearing out for a particular port would afford a presumption that she set sail for that port, when she dropped from her moorings.(5) And a convoy bond signed by the captain, and the plaintiff as owner, or a

the sub-agent or to the underwriters, in like manner as it would have done, had it been immediately effected by B. himself. *Newsom's Adm'r v. Douglass*, 7 Har. & John. 417.

But if the policy was not effected with reference to his interest, his interest is not insured; for no one can, by subsequent adoption, avail himself of a policy *for whom it may concern*, who was not at the time in the contemplation of the party procuring the insurance, and for whose benefit it was not intended, notwithstanding any interest he may have in the thing insured. *Id.*

In an action of *assumpsit* by C., claiming to be the owner of the property insured, against D., to recover the amount received by D., upon certain policies of insurance effected in his name, *for account of whom they might concern*; held, that it was competent for D. to show that the policies were effected by him as the agent of a third person, and that the letters of that person to D., directing the insurances, were admissible evidence of that fact. *Id.* The words, "whom it may concern," in a policy of insurance, mean such persons only as were in the contemplation of the contract; they suppose an agency, and look solely to the principal, in whose behalf or on whose account the agent acts—such principal is the one alone whom it concerns; and his existence may be proved by extrinsic evidence. *Id.*

(1) *Rhind v. Wilkinson*, 2 Taunt. 243; *Eyre v. Palsgrave*, 2 Campb. 606. Parol evidence may be given of foreign licenses, if lost. *Kensington v. Inglis*, 8 East, 273.

(2) *Van Omeron v. Dowick*, 2 Campb. C. 44.

(3) *Butler v. Alnutt*, 1 Stark. N. P. C. 222. See *Robinson v. Morris*, 5 Taunt. 720.

(4) *Evereth v. Tunno*, 1 Stark. N. P. C. 508.

(5) By Lord Ellenborough, 2 Campb. 52. And see *Koster v. Innis*, 1 Ry. & Mo. 335.

license to carry a cargo to the place of destination mentioned in the policy, are evidence to the same effect (1) If a ship is insured for one voyage, and sails upon another, the underwriters will be discharged, notwithstanding the loss happens before the ship has reached the dividing point between the two voyages.(2) But, where the ultimate termini of the intended voyage are the same as those described in the policy, although an intermediate voyage is contemplated, the voyage is to be considered the same until the deviation is commenced.(3)

Time of loss.

An averment that a ship was lost in the course of her voyage, will not be supported by evidence, that, before the ship had her complete cargo on board, she was driven from her moorings by bad weather and lost, for the underwriter would be led to make different inquiries respecting the state of the ship at the time of the loss in the two cases.(4) But, in a case where a declaration stated, that the ship sailed *after* the making of the policy, and the ship was proved to have sailed before, the court thought the variance immaterial.(5) It seems, that a shipping entry at the custom-house is evidence of the time a vessel sailed.(6)

Cause of loss.

The loss must be a direct and immediate consequence of the peril insured against, and which is averred in the plaintiff's declaration, and not a remote consequence of it.(7) Thus, if a ship be driven on an enemy's coast by stress of weather, the proof of this fact will support an averment

(1) *Cohen v. Hinckley*, 2 Campb. 51; *Marshall v. Parker*, 2 Campb. 69.

(2) *Woodridge v. Boydell*, Doug. 16. See *Marsden v. Reed*, 3 East, 576.

(3) *Hare v. Travis*, 7 Barn. & Cress. 14; *Kewley v. Ryan*, 2 H. Bl. 343. See *Foster v. Wilmer*, 2 Str. 1249. See, also, *Hare v. Travis*, 7 Barn. & Cress. 18; *Doyle v. Powell*, 4 Barn. & Adel. 272.

(4) *Abithol v. Bristow*, 6 Taunt. 464.

(5) *Peppin v. Solomons*, 5 T. R. 496; 6 Taunt. 465.

(6) *Hughes v. Wilson*, 1 Stark. N. P. C. 180.

(7) By Lord Ellenborough, 5 Maule & Selw. 436.

NOTE 820.—Where the loss laid in the declaration is by a peril of the sea, the cause of the loss is the point of inquiry; it is not sufficient for the insured to prove that there were storms during the voyage, unless he can fairly trace the injury sustained to that cause; for it may, nevertheless, appear that the injury which caused the breaking up of the voyage, arose from the ordinary circumstances of a long voyage. Per Washington, J., in *Coles v. The Mar. Ins. Co.*, 3 Wash. C. C. R. 159.

Where an insurance covered some bales of blankets, and the question arose as to the cause of the damage, evidence was admitted to show that like damage had arisen upon other blankets of the same manufacture imported in other vessels, and that the damage did not arise from the peril insured against, but from the manufacture or the packing; the object being to prove that the injury did not arise from sea damage, and not to impute fraud to the manufacturer. *Bradford v. Boylston F. & M. Ins. Co.*, 11 Pick. 162.

of a loss by capture, but not of a loss by the perils of the seas.(1) And where the immediate cause of the loss is the violence of the winds and waves, the underwriters will not be excused by proving that the loss was remotely occasioned by the negligence of the crew.(2)

If the loss may, consistently with the statement in the declaration, be proved to have proceeded from several causes, the payment of money into court is not exclusively applicable to any particular cause of loss, and cannot be treated by the plaintiff as an admission of it.(3)

(1) *Greene v. Elmsley*, Peake's C. 278. And see *Hodgson v. Malcolm*, 2 N. R. 336; *Hagedorn v. Whitmore*, 1 Stark. N. P. C. 157.

(2) *Walker v. Maitland*, 5 Barn. & Ald. 174. And see 7 Barn. & Cress. 223; *Busk v. Royal Ex., Ass.*, 2 Barn. & Ald. 73; or by barratry of the master. *Heyman v. Parish*, 2 Campb. 149.

NOTE 821.—*Waters v. The Merchants' Louisville Ins. Co.*, 11 Pet. R. 213. A steamboat was insured on the western waters for twelve months; one of the perils insured against was fire, and the vessel by the explosion of gunpowder; held, that a loss by the barratry of the master and crew, "as the efficient agents;" or, in other words, "that the fire was communicated and occasioned by the direct act and agency of the master and crew, intentionally done for a barratrous purpose," was not a loss within the policy. *Id.* But a loss by fire, remotely caused by the negligence, carelessness, or unskillfulness of the master and crew of the vessel, was a loss within the true intent and meaning of the policy. *Id.* See, also, the observations of *Weston, C. J.* in 3 Fairf. R. 240, 247. Where the loss was by fire, and barratry also was insured against; held, that in such a policy, a loss which was remotely caused by the master or the crew, was a risk taken in the policy. *The Petapasco Ins. Co. v. Coulter*, 3 Pet. R. 222. And in the *Columbian Ins. Co. of Alexandria v. Lawrence* (10 Pet. R. 507), the court thought that in marine policies, whether containing the risk of barratry, or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy; notwithstanding that it might have been occasioned remotely by the negligence of the master and mariners. This opinion was confirmed by the court, in *Waters v. The Merch. Lou. Ins. Co.* (*supra*). As to the taking of gunpowder on board, that depends on the usage of trade. *Id.*

* * The underwriters are liable, though the loss was remotely caused by the negligent loading of the cargo. *Redman v. Wilson*, 14 M. & W. 476. * *

(In the case of a fire policy conditioned that the insurer will not be liable for loss caused by an explosion of the steam boiler; the insurer is not liable for loss of goods by fire communicated by an explosion of the boiler. *St. John v. Amer. M. F. & Marine Ins. Co.*, 1 Kernan, 516.)

(3) *Everth v. Bell*, 7 Taunt. 450. And see by *Best, C. J.*, 2 Bing. 383.

NOTE 822.—Where the defendant paid money into court, under a rule, without distinguishing to which of the counts the payment was applicable; held, that this was an admission of the contract as set forth in the declaration. *Jones v. Hoar*, 5 Pick. 290, and *Bennett v. Francis*, 2 Bos. & Pull. 550. But the court may grant leave to amend in such cases; it being within the discretion of the court to apply the rule or not, as equity shall require; for it may happen that by mere inadvertency, where there are several counts, a general tender is made, when it is intended only to be made to one or more, but not to all the counts. *Id.* And in an action on an implied promise, the payment of money into court is an admission of the contract as stated in the declaration. *Huntington v. American Bank*, 6 Pick. 340.

The plaintiff, by taking the money out of court, will not be precluded from proceeding for a total loss, when he informs the defendant's attorney at the time of his intention to go for a total loss. 1 John. R. 192.

Payment of money into court, upon a count on a policy, estops the defendant from showing that the vessel was unseaworthy, or that the action was brought too soon. *Harrison v. Douglas*, 5 N. & M. 180.

Loss by perils of the sea.

An averment of a loss by perils of the sea is satisfied by proof of the vessel being run down by another ship, through negligence or misfortune.(1) And where cattle were insured, warranted free from mortality, and in the course of the voyage a storm happened, and some of the cattle were killed in consequence of the rolling of the ship, and others received injury, from which they afterwards died, it was held to be a loss by perils of the seas.(2) But where a ship was hove down upon a beach for the purpose of being repaired, and was bilged and damaged by the rising of the tide, it was determined that the facts did not support an averment of a loss of this description.(3) And where the loss is alleged to be by the perils of the seas, it is not competent for the plaintiff to prove and recover the amount of goods insured, which were sold to pay the expense of repairs occasioned by sea damage, the master having no other means of raising money.(4)

Loss presumed.

There is no fixed rule of law for ascertaining at what precise period a ship, which has been for some time missing and unheard of, shall be considered as lost. This must vary with the circumstances of each particular case. Upon a short voyage the presumption of loss must naturally arise sooner than upon a more distant. All that can be necessary in such inquiries is, the best proof that the nature of the case admits.(5) A practice, it is said, has prevailed among insurers, that a ship shall be deemed lost, if not heard of for six months after her departure for any part of Europe, or after the time of the latest intelligence; and in twelve months, if for greater a distance.(6) The plaintiff need not show, that the ship has not since been heard of at her place of destination; but it will be sufficient to prove that no information has been received in this country within a reasonable time, since her departure.(7) And although a report has been heard of the crew having been saved, as well as of the ship having foundered, it does not seem necessary, at least, for the owner of the goods merely, to make a search after the crew, especially if the vessel is foreign,

(1) *Buller v. Fisher*, 3 Esp. 67; *Smith v. Scott*, 4 Taunt. 126; *Mathews v. Howard Ins. Co.*, 1 Kernan N. Y. R. 9.

(2) *Lawrence v. Aberdeen*, 5 B. & Ald. 109; *Gabay v. Lloyd*, 3 B. & C. 793.

(3) *Thompson v. Whitmore*, 3 Taunt. 227.

(4) *Sarquy v. Hobson*, 2 B. & C. 7; 4 Bing. 131. And see *Moody v. Jones*, 4 B. & C. 394. And further, upon the loss by perils of the sea, *Cullen v. Butler*, 5 Maule & Sel. 461; *Fletcher v. Inglis*, 2 B. & Ald. 315; *Phillips v. Barber*, 5 B. & Ald. 161; *Hahn v. Corbet*, 2 Bing. 205; *Hagedorn v. Whitmore*, 1 Stark. N. P. C. 157.

(5) *Green v. Brown*, 2 Stra. 1199; *Newby v. Read*, *Park's Insur.* 106; *Huntman v. Thornton*, *Holt's C.* 243.

(6) *Park on Insur.* 107.

(7) *Trenlow v. Oswen*, 2 Campb. N. P. C. 35.

and a length of time has elapsed.(1) Mere rumors are not entitled to any weight, if it appears that no intelligence respecting a missing ship has been received from persons capable of giving authentic information.(2) The presumption of loss may be strengthened by proof of collateral circumstances, as that other ships which sailed at the time have actually arrived.(3)

Loss by capture and detention.

An entry in the book kept at Lloyd's, stating the capture of a ship, is evidence of that fact.(4) But the sentence of a foreign court of admiralty is not evidence of a capture, though, after independent proof of the capture, it will be evidence of the facts on which the condemnation proceeded.(5)

(1) *Koster v. Read*, 6 B. & C. 21.

(2) *By Bayley, J.*, Id.

(3) *Newby v. Read*, *Park on Insur.* 106.

* * See *ante* of the text. There must be some evidence that the ship actually sailed on the voyage insured. *Cohen v. Hinchley*, 2 Campb. 51, per Lord Ellenborough; *Coster v. Innes, R. & Moo.* 333; per *Abbott, C. J.*, 2 Gr. Ev. § 386; 1 *Taylor on Ev.* § 122. * *

(4) *Abel v. Potts*, 3 Esp. 242. The defendant was a subscriber to Lloyd's. On the distinction between detention and capture, see *by Lord Ellenborough, Beale v. Thompson*, 4 East, 561.

NOTE 823.—Where the stipulation in the policy was, that no abandonment should be made on account of hostile capture or detention, until after proof of such detention having continued three months; the capture and detention took place in June, information of the fact was received in Boston in September, and notice of an intention to abandon was then given; but at that time, as the assured could not give proof that the vessel had been detained ninety days; held, that, by the terms of the policy, he had no right to abandon, and his notice could only operate prospectively. *Lovering v. Mercantile Mar. Ins. Co.*, 12 Pick. 348. But as proof was received here and offered to the underwriters in December, that the ship had been detained, actually or constructively, for more than ninety days, at that time, the abandonment took effect, and vested in the assured the right to recover for a total loss by a capture and detention. Id. The right of abandonment, which would have existed at the moment of receiving information of the capture, but for the clause in the policy, was only postponed; but when this detention had continued during the stipulated period, the right became perfect, and was exercised, and then the assured became entitled to recover in the same way, and upon the same grounds, as he would have been upon an immediate abandonment, under a policy in common form. Per *Shaw, C. J.*, in Id. The result shows that there was a total loss on the 11th of June, and the abandonment refers to that cause, and relates to, and takes effect from that time. Id.

The kind or degree of proof requisite to be furnished, is not such as would be required to sustain an action, but such as is usually produced to underwriters as preliminary proof of loss; as the protest of the matter, a letter from an officer or agent having charge of the vessel, or any such evidence as will satisfy the clause in the policy, requiring notice and proof of loss sixty days before the commencement of an action. Id. The first notice not having been countermanded, the assured continuing to act upon it with the knowledge of the underwriters, until the time arrived when, by proof of the continuance of the detention, the assured could notify his intention with effect, this was in effect a renewal, revival and continuance of such notice, and sufficient to give effect to the abandonment, in the same manner as if a new notice had been given, after intelligence and proof of detention ninety days. Id; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 391.

* * On the subject of abandonment generally, see 3 *Selwyn's N. P.* 2166, 2182; 3 *Kent's C.* 318; 2 Gr. Ev. § 392, n. 3; 2 *Am. Lead. Cas.* 353, 396. * *

(5) *Marshall v. Parker*, 2 Campb. 69. And see *Wright v. Barnard*, 2 Esp. C. 700; and Vol. II,

Proof of a capture by collusion with the captain, will support an averment of a loss by capture, as well as of barratry.(1) The plaintiff may prove and recover for a loss occasioned by the wrongful detention of a vessel by a British ship of war.(2) And where a vessel is alleged to have been seized and confiscated by a foreign government, it is sufficient to prove, that the goods were forcibly taken possession of by the officers of government, without proving a sentence of condemnation.(3) But an averment of loss from seizure, in a hostile manner, by enemies unknown, is not proved by evidence, that the goods

A copy of the judgment is not made evidence by being handed over to the underwriters. *Flindt v. Atkins*, 3 Campb. 215.

NOTE 824.—A decree of a court of admiralty in the island of Hayti, not founded upon a libel made without a hearing, and unaccompanied with the usual formalities, condemning a vessel and cargo, for an alleged breach of blockade, was held not to be conclusive evidence of that fact. *Sawyer v. The Maine F. & Ins. Co.*, 12 Mass. R. 291. But a regular condemnation on the ground of a breach of blockade is *prima facie* evidence of the fact of a blockade. in an action where the policy excepts the risk of blockaded ports. *Radcliffe v. The United Ins. Co.*, 9 John. R. 277. A sentence of a court of admiralty is sufficient evidence of a condemnation, without showing the previous proceedings. *Gardere v. The Columbian Ins. Co.*, 7 John. R. 514; *Bourke v. Granbury*, 1 Virg. R. 16; 7 Wheat. 581.

To enable the assured to recover for a loss on the ground of a capture, a sentence of condemnation is not necessary; because the voyage is put an end to by the capture, the assured having a right, on notice of it, to abandon to the underwriters. *Ruan v. Gardner*, 1 Wash. C. C. R. 145.

The sentence of a condemnation of a foreign prize court is evidence of the facts which it purports to decide, in an action on a policy of insurance in the thing condemned, and was conclusive evidence thereof in Maryland, until the act of 1813, chapter 164, reduced it to the character of *prima facie* proof; but the proof upon which such sentence may have been predicated, is not, *per se*, admissible in such collateral action. *The Maryland Insurance Co., &c., v. Bathurst*, 5 Gill & John. 159.

The record of proceedings of a foreign court of admiralty, containing copies of various documents, and reciting the proof of the originals thereof being found on board of a vessel, condemned by such court, at the time of her capture, is not evidence that such documents were so found, in an action on the policy to recover the value of the condemned vessel. *Id.*

Where the sentence of a court of admiralty condemning a vessel, recited that *at the date of the decree*, the port which said vessel had attempted to enter was blockaded, evidence that *at the time of her capture*, such port was not in fact blockaded, is immaterial and irrelevant, in an action upon a policy to recover for a total loss arising from the condemnation. *Id.*

The party who offers the decree of such court, as proof of the loss of his vessel condemned thereby, may, since the act of 1813, contradict by proof, the facts and circumstances upon which such decree professes to be founded, where such facts are in issue between the parties in the cause in which the contradictory proof is offered. *Id.*

Where notice was given to the underwriters of a claim for the condemnation of the insured vessel, and they at first demanded the captain's protest, and after some correspondence, "the underwriters notified the insured that they did not consider themselves answerable for the claim:" this was held to be a waiver of objection to the proofs offered. *Id.*

* * See further as to the effect of sentences in foreign admiralty courts, Vol. II of the text; 1 Gr. Ev. §§ 540, 543; 2 Taylor on Ev. pp. 1008, 1107; and *Id.* pp. 1138, 1139. And see *post*, note 843. * *

(1) *Archangelo v. Thompson*, 2 Campb. 621.

(2) By Lord Ellenborough, *Hagedorn v. Whitmore*, 1 Stark. N. P. C. 159. And see *Green v. Jones*, 2 Lord Raym. 840; *Robertson v. Ewer*, 1 T. R. 61.

(3) *Carruthers v. Gray*, 3 Campb. 143.

were seized by the government of a foreign country, as goods about to be illegally exported.(1) And where a ship is detained in a foreign port by the captain, in consequence of the goods being attached by process of a foreign government which merely affects the goods, not the ship, the expenses of the delay cannot be proved as chargeable to the underwriters of the ship, under the clause of the policy respecting capture and detention.(2)

Loss by barratry.

It is sufficient *prima facie* evidence of a loss by barratry, to prove that the person who acted as master of the ship, carried her out of her course for his own purposes, by which means the loss occurred; and it is for the underwriter to prove, in his own discharge, that the person so acting as master, was the owner.(3) But it will not be sufficient to show that the vessel was lost, in consequence of the captain having occasioned it to deviate from his course, or from his improper treatment of it, if he is not proved to have acted against his better judgment, or from a fraudulent motive; for the act of a captain is not barratry, merely because it is against the interest of his owners, unless it be done with a criminal intent, of which strict proof is required.(4) Barratry may be committed by the general owner, where the vessel is let to a freighter.(5)

(1) *Matthie v. Potts*, 3 Bos. & Pul. 23.

(2) *Bradford v. Levy*, 1 R. & Mo. 331.

(3) *Ross v. Hunter*, 4 T. R. 33.

(4) *Phyn v. Royal Ex. Ass. Co.*, 7 T. R. 305; *Todd v. Ritchie*, 1 Stark. N. P. C. 240; *Bottonley v. Bovil*, 5 Barn. & Cressw. 212. As to what is reasonable evidence of barratry, see *Hack v. Thornton*, 1 Holt's C. 30; *Bradford v. Levy*, 1 Ry. & Mo. 331; *Everth v. Hannam*, 6 Taunt. 375.

(5) *Vallejo v. Wheeler*, Cowp. 143; *Soares v. Thornton*, 1 B. Moore, 373.

NOTE 825.—Barratry by the master of a vessel is defined to be any act of the master to the injury of his owners or freighters, without their assent, which is criminal in itself, or which is illegal or fraudulent as to the owners or freighters; or any willful neglect of his duty to them as an honest and faithful agent. Per Walworth, Ch., in *American Ins. Co. v. Dunham*, 15 Wend. 9. Where, by a policy, the barratry of the master and mariners is insured against, and the vessel is lost by the barratrous act of the master in attempting an *illicit trade* by *smuggling* a few articles in his possession, the underwriters were held liable, notwithstanding the policy contained a *warranty* against *illicit* or *prohibited trade*. Id. Such warranty is not broken, unless the *illicit trade* is carried on by the *assured* himself, or with his *knowledge* or assent; he is not affected by the acts of the master or mariners. Id.; *Suckley v. Delafield*, 2 Caines' Cas. 222. The clause inserted in the New York policies does not appear in the English policies; "but the decision of the court in *Haverlock v. Hancill* (3 T. R. 277) appears to be the same in principle as that of the Supreme Court" and Court of Errors, in *American Ins. Co. v. Dunham*, *supra*, per Walworth, Ch., who also cited *Wilcocks v. The Union Ins. Co.*, 2 Bin. 574; *Brown v. Same*, 5 Day's R. 1.

Upon a policy of insurance upon goods against loss by thieves, the underwriter is liable for a loss by thieves who are in no way connected with the ship, whether the robbery is perpetrated by a simple larceny or by open violence, although the master or ship owners may be also liable as common carriers for the loss. *The Atlantic Ins. Co. v. Storrow*, 5 Paige's R. 285.

* * In *Bryan v. The Am. Ins. Co.*, in the New York Superior Court, it was held, that the words "thieves, &c., barratry of the master and mariners," in a policy, applied not only to assail-

Loss by stranding.

With respect to the construction of the usual clause of warranty, inserted in policies of insurance, against average "unless general, or the ship be stranded," it has been held, that the stranding is a condition precedent, and where it is fulfilled, the plaintiff may give evidence of, and recover for average losses, though the injury to the cargo does not result from the stranding.(1) It is not merely a touching of the ground, which constitutes a stranding; the vessel must have been in a quiescent state.(2) And the taking of the ground must have occurred in consequence of some unforeseen accident, and not in the ordinary course of the navigation.(3) Where a ship was fixed on a rock for the space of fifteen or twenty minutes, the

ing and other thieves from without, but to thefts from within, by the passengers, mariners and others. The judgment of the Superior was affirmed by the Supreme Court. S. C., 1 Hill, 25; and by the Court of Errors, S. C., 26 Wend. 563. * *

Where the master or ship owners are liable to the assured, for a loss by theft, for which the underwriters are also liable, if there is an abandonment for a total loss, and the insurer pays the amount of that loss, he is entitled in equity to be subrogated to the right of the assured, as against the master or ship owner. And if the assured cancels the bill of lading, or discharges the claim against the master or ship owners for the loss, after he has obtained judgment against the underwriter, the Court of Chancery will relieve the latter against the judgment, *pro tanto*. Id.

* * For a further discussion as to the unskillful, negligent and barratrous acts of masters and mariners, see 3 Kent's C. 299, 307 (6th ed.) and notes; 3 Stephens' N. P. 2158, 2161; 2 Gr. Ev., § 390, n. 7; Camman v. Essex Marine Ins. Co., 3 Mason, 26; Perrin v. Protection Ins. Co., 11 Ohio, 147; Williams v. Suffolk Ins. Co., 3 Sumner, 276; Peters v. Warren Ins. Co., Id. 339; S. C., 1 Story R. 463; Hazard v. N. E. Marine Ins. Co., 1 Sumner, 218; Perrin v. The Protection Ins. Co., 11 Ohio, 147; Walker v. Maitland, 5 Barnw. & Ald. 171; Bishop v. Pentland, 7 Barnw. & Cress. 219; Redman v. Wilson, 14 Meeson & Welsb. 476; Copeland v. N. E. Marine Ins. Co., 2 Metc. 432; Dixon v. Sadler, 5 Mees. & Welsb. 405; Abbot on Shipping (5th Am. ed.) 243. * *

(1) Burnett v. Kensington, 7 T. R. 210; Harman v. Vaux, 3 Campb. 429.

(2) By Ld. Ellenborough, 3 Campb. 431; McDougal v. Royal Ex. Ass. Co., 1 Stark. N. P. C. 131; 4 Maule & Selw. 503; Hoffman v. Marshall, 2 Bing. N. C. 383.

(3) See Bishop v. Pentland, 7 Barn. & Cressw. 224; Hearne v. Edmonds, 1 Bro. & Bing. 388; Rayner v. Godmond, 5 Barn. & Ald. 228; Carruthers v. Sydebotham, 4 Maule & Selw. 77.

NOTE 826.—Upon the ebbing of the tide, a vessel took the ground in a tide harbor, in the place where it was intended she should; but in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged; held, not a stranding for which the underwriters were liable upon an insurance on corn, warranted free from average, unless general, or the ship be stranded. Kingsford v. Marshall, 8 Bing. 458. Such cases are decided upon the principle stated in the text; the taking of the ground was not in the ordinary course of navigation in which the ship is engaged either wholly or in part, but from some accidental or extraneous cause. The mere taking of the ground, therefore, in a tide harbor, in the place intended by the master and crew, or the proper officers of the harbor, cannot be held to constitute a stranding. Per Tindal, Ch. J., in Id. Upon the same principle was the case of Wells v. Hopwood (3 Barn. & Adol. 20), decided. The facts were similar to Bishop and Pentfield, and the decision upholds that case, although Parke, J., dissented.

* * And see Lake v. Columbian Ins. Co. 13 Ohio R. 48; 3 Kent's C. (6th ed.) 323, and note. * * See also 5 Paige, 285.

(A voluntary stranding of the vessel, done in good faith, for the purpose of saving the vessel or cargo from loss, comes within the usual clause. Bowring v. Elmslie, 7 T. R. 216 n.; Sturgess v. Cary, 2 Curtis C. 59.)

evidence of stranding was considered sufficient,(1) and the degree of damage sustained is immaterial.(2)

Amount of loss.

The plaintiff, though he declares as for a total loss, and proves only a partial loss, may recover to the extent of his proof.(3) If it appears that part of the goods insured, and which are alleged to have been lost, have in fact been saved, it seems that the plaintiff may give in evidence the expense of salvage, without having mentioned it in his declaration.(4) Salvage on the re-capture of a ship must be proved by producing the proceedings of the Admiralty Court, which ascertain its amount.(5) If there is no evidence by which the jury can estimate the extent of the loss, the plaintiff will be entitled to nominal damages.(6)

(1) *Baker v. Towrp*, 1 Stark. N. P. C. 436. And see *Barrow v. Bell*, 4 Barn. & Cress. 736; *Baring v. Hinckle*, Marsh. 240. A stranding may take place on piles. *Dobson v. Bolton*, Park. 117.

(2) *Harman v. Vaux*, 3 Campb. 431.

(3) *Gardiner v. Crossdale*, 2 Burr. 904; *Rucker v. Palsgrave*, 1 Campb. 557; 1 Taunt. 419.

NOTE 827.—*Winn v. Columbian Ins. Co.*, 12 Pick. 287; *Lawrence v. Van Horn*, 1 Caines' R. 276. When the plaintiff may recover the whole amount insured, although having an interest only in part, see *Davis v. Boardman*, 12 Mass. R. 80. Where a partial loss is incurred during the continuance of the risk, and afterwards a total loss, the insured is entitled to compensation from the insurers for the partial loss, in addition to the total loss. *Barker v. Phoenix Ins. Co.*, 8 John. R. 307; *Wood v. The Lincoln and Ken. Ins. Co.*, 6 Mass. R. 479. As where a vessel during her voyage puts into a port of necessity, and is repaired, and afterwards proceeds on her voyage and is totally lost, the insured is entitled to recover the partial loss arising from the repairs, and general average consequent thereon, in addition to the total loss. *Saltus v. The Commercial Ins. Co.*, 10 John. R. 487. So, the insured may recover above the sum insured, for the expenses of labor and travel and for the expense and recovery of the property insured. *Watson v. The Marine Insurance Company*, 7 John. R. 412; *M'Bride v. Same*, Id. 431.

The plaintiff may declare in one count for a general average loss, and for a total loss afterwards by the perils of the seas, and recover damages according to the proof. *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131.

Where the demand is for a total loss, and a total loss is *proved*, a verdict may be found for a partial loss. *Mitchell v. Edie*, 1 T. R. 616; *Watson v. Insurance Company of North America*, 1 Bin. 47. Thus, where the plaintiff alleged a total loss, and on the trial he proved a capture and condemnation; but, as he had not abandoned, held, that nevertheless the jury might estimate the value of the *spes recuperandi*, and, after deducting it from the sum insured, find the remainder as a partial loss. Id.

(4) *Cary v. King*, Rep. temp. Hardwicke, 304.

As to the rule that the declaration need not state a particular damage, and for the exception of the rule, see Com. Dig. pl. c. 84; 2 John. R. 149; 16 Id. 122.

(5) *Thelluson v. Shedden*, 2 N. R. 229.

(6) *Tanner v. Bennett*, 1 Ry. & Mo. 182; *Feize v. Thompson*, 7 Taunt. 121. As to the manner of estimating a loss on ship, see 1 Ry. & Mo. 378; 2 T. R. 407; 5 Maule & Selw. 13. On goods, 4 Taunt. 511; 2 East, 581; 3 Bos. & Pul. 308; 12 East, 639; 1 Esp. C. 77. On freight, 1 Bing. 62. And see *Stevens on Averages*.

NOTE 828.—Where there is an actual total loss of any article, distinctly valued in the policy, that valuation must govern in all cases; it is in the nature of liquidated damages, and saves the necessity of proving them. Per *Thompson, J.*, in *Harris v. Eagle Fire Company*, 5 John. R. 368. Thus, among the articles insured were 380 kegs manufactured tobacco, stated on the back of the

Valued policies.

In open policies, the assured must prove the extent of his loss; but in valued policies, if the loss be a total one, he need only prove, that his interest is not merely colorable.⁽¹⁾ But where the property is greatly over

policy "as worth \$9,000;" 157 kegs were lost, which were stated to be of the same kind and quality as the whole 380 kegs; held, that the assured were entitled to recover according to the valuation on the policy; the same rule prevails in case of a partial loss as where there has been a total loss. *Id.*; 8 John. R. 229.

In an action upon an open policy, the court admitted the invoice of the cargo as *prima facie* evidence of its value; in commercial cases, it is uniformly admitted, if it carries with it the proof of its fairness. *Graham v. The Penn. Ins. Co.*, 2 Wash. C. C. R. 113. And where it could not be made out when the cargo was completed, by reason of a capture of the vessel whilst it was loading, and it came to the agent of the plaintiff in a letter, it was admitted. *Id.*

In adjusting general average or contributions, no distinction is to be regarded between a valued and an open policy. *Clark v. United Fire and Mutual Insurance Company*, 7 Mass. R. 365; *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1.

The general principle is, that a loss under a policy against fire, is to be paid without contribution. The practice is supposed to be in conformity with this principle. But in a case in which defendants insured the plaintiffs' stock in trade to a certain amount, and for a time mentioned; a fire happening, the assured, with the knowledge and consent of the underwriters, spread blankets upon the building with a view to save it; and on the question who should sustain the loss of the damage to the blankets; held, that "the plaintiffs can claim only on the ground of a sacrifice of the property endangered by the fire, and for a proportion of which sacrifice they are equitably, if not legally, entitled to recover." And that, in such a case, the loss was matter of contribution, limited, however, to the building and the property therein immediately saved. *Welles v. Boston Ins. Co.*, 6 Pick. 182. The plaintiffs refused to accept less than the whole loss, because the blankets were part of their stock in trade; but the court considered that there was no foundation for this pretension.

The principle of contribution is, that everything saved by common expense and labor shall pay that expense in proportion to its value. But the owners of a cargo of a ship supposed to be wrecked have a right to save as much of it as they can, without being held to pay, on account of what is saved, any part of the expense which subsequently occurs. *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1.

(1) *Lewes v. Rucker*, 2 Burr. 1171. And see *Forbes v. Aspinall*, 13 East, 326; *Usher v. Noble*, 12 East, 646; *Feize v. Acquillar*, 3 Taunt. 507; *Marshall v. Parker*, 2 Campb. 69; *Shaw v. Felton*, 2 East, 109.

NOTE 829.—*Harris v. Eagle Fire Ins. Co.*, 5 John. R. 368. "1. The value of a vessel and goods, as an insurable interest, is to be taken at the port of lading, or where the risk commences. 2. This value may be proved by a stipulation between the parties, as in a valued policy; and then, in the event of a total loss, the value is understood to be settled without further proof. But valued policies have this operation only in the event of a total, and not in the adjustment of a partial loss, whether general or particular." Per *Sewall, J.*, in *Clark v. United Marine and Fire Insurance Company*, 7 Mass. R. 365.

Upon a question of a constructive total loss, it has been held, that the valuation in the policy was *prima facie*, and, in the absence of other evidence, was to be taken as the true value. *Winn v. Columbian Insurance Company*, 12 Pick. 279; *The Petapasco Insurance Company*, 5 Pet. 604. * * And see *Portsmouth Insurance Company v. Brazee*, 16 Ohio R. 81. * *

A policy against fire, where the contract states the company have insured eight thousand five hundred dollars on one brick house and two wooden ones, is not a valued policy. *Wallace v. Insurance Company*, 4 Mill. Lou. R. 289. The loss by fire is scarcely ever a total loss, and the valuation of the policy is rather the fixing of a maximum, beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value. In France, valued policies are rejected, on reasons of public policy. *Id.*

valued, the insurance will be wholly void.(1) And if the loss be partial,

A trustee, consignee or factor, has an insurable interest in goods, as owner, to their full value, although he may not have a beneficial interest in them to any extent, and an insurance may be effected by him on the ground of his own interest; and, in such case, the insured will recover the amount of the entire loss sustained on the goods, without regard to his particular lien. *De Forest v. The Fulton Fire Insurance Company*, 1 Hall, 84. And where the contract did not, in terms, restrict the insurance to the assured specially named in the policy, but only that goods held in trust or on commission should be declared and insured as such, a simple declaration and insurance of merchandise, "as well the property of the assured, as held by them in trust or on commission," were held to be sufficient to satisfy the condition; and the assured was entitled in case of loss to the same measure of satisfaction as if they were his own absolute property. *Id.*

In an *open policy*, the rule is, to take the invoice price of goods in cases where the insured is entitled to recover upon a total loss. *Mumford v. Broome*, 1 John. Cas. 120; *Le Roy v. United Insurance Company*, 7 John. R. 343. The invoice price is here understood as the prime cost, and it is the plainest and simplest rule by which to test the value of the subject. Thus, the value of the goods at the outset, together with the customary charges, constitute the sum for the insurer to pay. *Id.*

* * See 3 Kent's C. (6th ed.) 335, 336, and notes. The insurer is not bound to pay interest unless there is an agreement to pay it, or he is in default. *Oriental Bank v. The Tremont Ins. Co.*, 4 Metc. R. 1. * *

(1) *Haigh v. De la Cour*, 3 Camp. 319; *Miner v. Tagert*, 3 Bin. 204.

NOTE 830.—If the over valuation be *bona fide* and innocent, the policy is good; if fraudulent, it is void. *Per Story, J.*, in *Alsop v. The Commercial Ins. Co.*, 1 Sum. R. 451. If both parties intended a policy on interest, and the plaintiff had a substantial interest on board, and the other valuation was *bona fide* made, and not with any intention to mislead or defraud the defendants, then the policy is good, and the plaintiff is entitled to recover. *Id.* The insurance was on profits, free of average, and salvages, and the policy to be the only proof of interest required. The policy was for \$10,000, and the profits valued at \$20,000; and the plaintiff recovered the amount mentioned in the policy; it appearing that there were shipped on board property to the amount of \$19,000, and the voyage having been commenced, the vessel was lost in the course of the voyage. *Id.* A policy on profits is not an insurance upon results, but upon expectations. *The Petapsoo Ins. Co. v. Coulter*, 3 Peters, 222. And where the freight was valued at three times its real value, the court refused to open the policy. *Coolidge v. The Gloucester Ins. Co.*, 15 Mass. R. 341. In this case it was wholly uncertain to what sum the freight to be obtained at A. would amount. All was fair. There was no evidence that the assured did not take all the goods they could get upon freight, or that they left any. If they had obtained no freight, there would have been nothing at risk, and the policy would not have attached. But if the parties do not agree to pay in case of loss, whether there were interest or no interest at risk, it would be a violation of the contract on the part of the assured, to put on board only what in comparison with the valuation might be considered as nominal. In the language of Yeates, J., in *Miner v. Tagert* (3 Binn. 205), "the amount will not be inquired into unless the valuation is grossly enormous." In *Wolcott v. Eagle Insurance Company* (4 Pick. R. 429), which was a valued policy upon the brig *Henry* and cargo, or freight, and a total loss happened within the year for which the insurance was effected, and it was objected that there was no cargo nor freight at the risk of the underwriters, but if there was anything on board which might be considered as cargo, and if there was any freight at risk, the policy must be opened to ascertain the extent of the interest of the assured in those subjects respectively. There were ten doubloons on board which was held to be all that could be considered *cargo*; the other property on board consisted partly of mules, and of hay, corn, &c., which were put on board for their subsistence on the voyage. The mules on deck were not within the policy, and are the subject of particular insurance, and are not included under the word cargo or *goods*. The plaintiff's interest, therefore, in the cargo covered by the policy, included but the ten doubloons and the freight of them; but as the plaintiffs intended to

there is no difference in the proof between a valued, and an open policy.(1)

apply their whole valuation to the mules, doubloons, &c., which were on board, the former not being covered by the policy as cargo; held, that the plaintiffs could recover only the part of it consisting of the doubloons and the freight of them. *Id.*

(1) 2 Saund. 201, n.; *Forbes v. Aspinall*, 13 East, 323; 2 Burr. 1171. See *Shaw v. Felton*, 2 East, 109; *Marshal v. Parker*, 3 Camp. N. P. C. 69.

NOTE 831.—Where the defendants underwrote upon the ship, and also on the *freight* of all goods laden or to be laden on board, 2,000 dollars from New Orleans to Gibraltar, and back to the United States, with liberty to go to Malaga and the Cape de Verds, she arrived at Gibraltar, purchased and shipped property, the freight of which was short of 2,000 dollars, for the United States, and then sailed for the Cape to procure salt; had it been obtained, the freight on the whole cargo would have equaled the stipulated amount; the brig was lost on her passage, and the plaintiffs demanded 2,000 dollars for the insurance upon freight; held, that the policy was an open one as to the freight; and the insured could only recover the freight of the cargo on board; co-extensive with this was his loss, and of consequence his right to indemnity. The right to *freight commenced* when the goods were put on board; or, at farthest, when a part have been received, and the rest are ready to be shipped; the freight, in this case, denoting the compensation for the transportation of merchandise. *Riley v. Hartford Ins. Co.*, 2 Conn. R. 368. But it is different where the freight is derived from the hire of the ship; it then denotes the compensation for the use of the ship; and this happens where there is a charter party of affreightment, or when the ship is *let to freight*. In this case, when the vessel is hired, so soon as the voyage is entered, *the right of freight commences*. Let the ports of her destination be ever so numerous, if there is an entire freight for the performance of the whole voyage, there is an *inchoate* right to the sum agreed on for freight, as soon as the ship breaks ground. From this moment, the hire of the ship is at risk, and constitutes a legal subject of insurance. Although the charterer omits to put on board the expected merchandise, and the ship performs her voyage in ballast, the right to freight is perfected. The voyage, though divisible, is not in charter parties usually divided. There is *one voyage*, consisting of destinations to several ports, and terminating at the place from whence the ship originally set sail. For this voyage there is *one freight* due on its ultimate completion. This *one freight* is at risk so soon as the voyage has commenced; an indemnity may be given against all the losses to which it may be exposed. *Hosmer, J.*, in *Id.*; *Thompson v. Taylor*, 6 T. R. 478; *Livingston v. Columbian Ins. Co.*, 3 John. R. 49; *Horncastle v. Stuart*, 7 East, 400; *De Longuemere v. Phoenix Ins. Co.*, 10 John. R. 127; *Same v. The New York Fire Ins. Co.*, *Id.* 201; *Mackenzie v. Shedden*, 2 Camp. 431. Any one who has an interest in the safe transportation of the property, may insure it in the name of freight. *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429.

Valued policy of insurance on ship and goods, at and from the coast of Africa to the ship's port of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and wheresoever; to trade backwards and forwards in any order, and to call or to proceed to the Azores, Madeira, &c., and all African islands; beginning the adventure on the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter or exchange with any ship or factories wheresoever she might call. 1. The policy does not protect an outward cargo, shipped before the vessel's arrival on the coast of Africa. 2. A considerable portion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy; held, that the valuation was opened and that, although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assured could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss. *Richman v. Carstairs*, 5 Barn. & Adol. 651.

An insurance "on the cargo or freight, both or either to the amount insured, valued at the sum insured," is an insurance of freight or cargo, if in the event the assured should have only one of those descriptions of property at risk in the voyage insured; and if he should have both

A payment into court of a per centage on a valued policy is not an admission of a total loss.(1)

Abandonment, when necessary.

If the property insured exists in specie, and is available for any useful purposes, and there is a chance of its recovery, the insurer cannot recover(2)

then it is an insurance of both, proportionably to the interest of the assured in the subjects respectively. *Faris v. The Newburyport Marine Ins. Co.*, 3 Mass. R. 476.

("When the policy is valued, it may frequently happen that the breaking up of the voyage, if a total loss may be recovered, would be far more advantageous to the ship owner, than its successful termination. It is plain that in these cases there is a direct temptation to dishonesty and fraud; nor can it be doubted that this is a temptation which it is the duty of a court of justice, as far as possible, to remove." Per Duer, J., in *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer R. 361. Hence a valued policy is a circumstance to be considered in determining the weight of evidence tending to show a right to abandon.)

(1) *Rucker v. Palsgrave*, 1 Taunt. 419.

(2) NOTE 832.—(The insured in a marine policy has a right to dissolve or put an end to the contract, so as to exonerate himself from the payment of the premium or entitle himself to demand its return, by electing not to commence the voyage or adventure to which the insurance relates. After the risk begins, it can only be terminated by consent of parties. It cannot be terminated by a mere notice of intention to do so. *N. Y. Fire Insurance Company v. Roberts*, 4 Duer R. 141.)

"It has prevailed as a general rule in the law insurance, from so early a time, that it is difficult to find a case in the books in which it is not taken as an admitted principle, that in order to recover for a constructive total loss, the assured must first abandon." Per Tindal, Ch. J., in *Roux v. Salvador*, 1 Bing. N. C. 526. Wherever the assured claims for a total loss, there being anything saved, he must first relinquish to the underwriter all his interest in what remains. *Id.* And this upon principle; for as the assured in no case is bound to consider the loss a total loss, but may always take to what is saved, and recover for an average loss; if it is to be held that abandonment is unnecessary where there has been a sale, the underwriter can have no certainty as to his rights or liabilities before the assured determines his election by bringing the action for a total loss. *Id.* Hides were insured from Valparaiso to Bordeaux, free of particular average, unless the ship were stranded. Arriving at Rio Janeiro, on their way to Bordeaux, in a state of incipient putridity, occasioned by a leak in the ship, they were sold for a fourth of their value at Rio. The ship was stranded on her passage from Rio to Bordeaux. The assured received the news of the damage to the hides, and of their sale, at the same time; held, that the stranding was not such as to make the underwriter liable for an average loss; and the assured could not recover as for a total loss, without abandonment. *Id.* The chief justice, after an able review of the cases, concludes: "As notice of abandonment, therefore, under the circumstances of this case, is an act of no difficulty to the assured—of great service to the underwriter, as it is well calculated to prevent fraud; as it is consistent with the general understanding which has prevailed in practice, and is sanctioned by the authority of decided cases, we think it was a necessary preliminary to the plaintiff's right to sue for a total loss in the present case; and, therefore, for want of such notice of abandonment, we give our judgment for the defendant." A contrary doctrine seems to have prevailed in *Gordon v. Massachusetts Fire and Marine Ins. Co.* (2 Pick. 249). And "founded upon pretty substantial reasons." Per Thompson, J., in 5 Peters' R. 604.

A late case decides that the assured may abandon although the injury to the vessel by the perils insured against should not exceed *one-half her value*; the master being unable to obtain funds to repair; and this even in her port of destination. *American Ins. Co. v. Ogden*, 15 Wend. 532.

* * But this judgment was subsequently reversed by the Court of Errors. S. C., 20 Wend. 287. * *

as for a total loss, without giving notice of abandonment.(1) And he cannot make an abandonment unless there has been a total loss, at some period of the voyage;(2) or at least the object of the insured must have been so far defeated by a peril in the policy, that it is not worth his while to pursue it.(3) A mere interruption of the voyage, where the property is

The assured cannot abandon on the ground of imminent danger, that a technical total loss will happen; the contract of the underwriters being to pay for a loss sustained. Per Putnam, J., in *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Bosley v. The Chesapeake Ins. Co.*, 3 Gill & John. 450; 6 Mass. R. 102; 12 Id. 170.

* * See the next note. * *

(1) See *Thornley v. Hebson*, 2 Barn. & Ald. 513; *Martin v. Crochat*, 14 East, 465; *Tunno v. Edwards*, 12 East, 491; *Cologan v. Lond. Ass.*, 5 M. & Selw. 455; *Robertson v. Clarke*, 1 Bing. 448; *Cambridge v. Anderton*, 2 Barn. & C. 693.

(2) *Cazalet v. St. Barbe*, 1 T. R. 187.

(3) 2 Burr. 1209; *Brown v. Smith*, 1 Dow, 349; *Hudson v. Harrison*, 3 Bro. & Bing. 97.

NOTE 833.—There must have existed, during the continuance of the risk, a total loss, either technical or real, occasioned by one of the perils insured against: otherwise there exists no right of abandonment. *Rhineland v. Ins. Co. of Pennsylvania*, 4 Cranch, 29. And the state of the loss at the time of the offer to abandon, fixes the rights of the parties. Id. The right to abandon is a vested right, and when legally exercised, the assured is entitled to recover as for a total loss; which subsequent events cannot prevent, unless with his consent manifested expressly, or by a reasonable implication from his subsequent conduct. Per Parsons, C. J., in *Wood v. Lincoln and Ken. Ins. Co.*, 6 Mass. R. 479; *Lee v. Bordman*, 3 Id. 238; *Munson v. N. E. M. Ins. Co.*, 4 Id. 83. The English rule, that the right to recover for a total loss is not made absolute by the state of facts on which the abandonment is founded, continuing to exist at the date of the abandonment, but is dependent upon subsequent events does not prevail here. Per Dorsey, J., in *Maryland &c. Ins. Co. v. Bathurst*, 5 Gill & John. 159. The right to recover of the assurer for a total loss is complete, if the loss which is the basis of an abandonment, continues at the time of abandonment, and of this consummate right or privilege, the assured cannot without default be deprived, but by his consent express or implied. Id.

The following are the principal causes of abandonment. 1. Capture. A capture by one belligerent from another, constitutes, in the technical sense of the word, a total loss, and gives an immediate right to the insured to abandon to the insurers, although the vessel may be afterwards captured and restored. 4 Cranch, 42. So, the capture of a neutral vessel by a belligerent, is a total loss, for which the assured may forthwith abandon, without waiting the result of proceedings in the prize court of the captor. *Rhineland v. Ins. Co. of Pennsylvania*, 4 Cranch, 29; 7 Cranch, 540; *Gardere v. Columbian Ins. Co.*, 7 John. R. 514; *Murray v. United Ins. Co.*, 2 John. Cas. 263; 10 John. R. 83; *Dorr v. N. E. Ins. Co.*, 11 Mass. R. 1. 2. The blockade of the port of destination or departure. *Schmidt v. The United Ins. Co.*, 1 John. R. 249; *Craig v. Same*, 6 John. R. 226; *Olivera v. The Union Ins. Co.*, 3 Wheat. 183. 3. When the vessel is prevented from sailing by an embargo imposed by our own, or a foreign government in whose ports she is lying. 4 Cranch, 42; *McBride v. Mar. Ins. Co.*, 5 John. R. 299; *Walden v. Phoenix Ins. Co.*, Id. 310; *Ogden v. The New York F. Ins. Co.*, 10 Id. 177; S. C., 12 Id. 25. 4. Where the vessel has sustained damage from some of the perils insured against, which cannot be repaired at an expense less than one half her value, after deducting from the amount of such repairs, one third *new for old*, the insured may abandon. *Smith v. Bell*, 2 Caines' Cas. in Err. 153; *Dupuy v. The United Ins. Co.*, 3 John. Cas. 182; *Stagg v. The Same*, 3 Id. 34; *Abbott v. Brooms*, 1 Caines' R. 292; *Wood v. Lincoln and Ken. Ins. Co.*, 6 Mass. R. 479; *Coolidge v. Mar. Ins. Co.*, 15 Id. 341. 5. In a policy on cargo, where there is a loss or deterioration of goods, not included in the usual memorandum, to the amount of half their value, or where there is a loss of a moiety of an article specifically insured, the insured may abandon. *Gardiner v. Smith*, 1 John. Cas. 141; *Jubah v. Randal*, 2 Caines' Cas. in Err. 324; *Vandenheuvel v. The United Ins. Co.*, 1 John. R. 406; *Moses*

v. *Columbian Ins. Co.*, 6 Id. 219. So, if different sorts of goods are specified and separately insured in the same policy, the insured may abandon any one sort or article, in case of loss, and retain the rest, in the same manner as if the different articles were insured by different policies. *Dedericks v. The Comm. Ins. Co.*, 10 John. R. 234. 6. If, by any accident or misfortune, the ship be prevented from proceeding on her voyage, and the voyage be thereby lost, this is a total loss of the cargo, if no other ship can be procured to carry it to its port of destination. But the mere stranding of the ship is not, of itself, deemed a total loss, so as to entitle the insured immediately to abandon. *Ludlow v. The Columbian Ins. Co.*, 1 John. R. 335; *Dorr v. The N. E. Ins. Co.*, 4 Mass. R. 221, 231; *Murray v. Hatch*, 6 Mass. R. 465; *Wood v. The Lincoln and Ken. Ins. Co.*, 7 Mass. R. 479; *Fuller v. M'Call*, 1 Yeates' R. 464. The loss of the voyage as to the cargo, is not a loss of the voyage as to the ship; so, if at the time of the offer to abandon, the ship be in the possession of the master, in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover as for a total loss of the vessel. *Alexander v. The Baltimore Ins. Co.*, 4 Cranch, 370; *Goold v. Shaw*, 1 John. Cas. 293; S. C., 2 Id. 442. So the damage to the ship or cargo, does not authorize the owner of the ship, who has made insurance on freight, to abandon on the policy on freight. *Griswold v. the New York Ins. Co.*, 1 John. R. 205; S. C., 3 Id. 321; *Bradhurst v. The Columbian Ins. Co.*, 9 John. R. 17. 7. Where salvage and expenses consequent upon a peril insured against, exceed one-half the value of the property. *Parage v. Dale*, 3 John. Cas. 156. As to other cases in which the insured may abandon, see *Bordes v. Hallett*, 1 Caines' R. 444; *Gilfert v. Hallett*, 2 John. Cas. 296; *Craig v. The United Ins. Co.*, 6 John. R. 226; *Corp v. Same*, 8 Id. 277; *King v. Delaware Ins. Co.*, 6 Cranch, 71; *Amory v. Jones*, 6 Mass. R. 318; *Tucker v. The Mar. and Fire Ins. Co.*, 12 Mass. R. 288. If any peril begins to act upon the subject, yet if it be removed before any loss takes place, and the voyage is not thereby broken up, but is, or may be resumed, the insured cannot abandon for a total loss. *Smith v. The Universal Ins. Co.*, 6 Wheat. 176.

We have seen that an abandonment or offer to abandon, duly made, fixes the rights of parties, unless subsequently modified or waived; and if the loss were total at the time of the abandonment, the right of the insured to compensation for a total loss cannot be divested by any subsequent change in the situation of the property; for, by abandonment the title of the insured vested in the insurer, to whose benefit, whatever can be saved or recovered, enures. But where, after a technical total loss, and before abandonment, the property has been recovered or restored, the insured cannot abandon. *Marshall v. Delaware Ins. Co.*, 4 Cranch, 402; *Muir v. United Ins. Co.*, 1 Caines' R. 49; *Olivera v. The Union Ins. Co.*, 3 Wheat. 183; *Martin v. Salem Mar. Ins. Co.*, 2 Mass. R. 420; *Amory v. Jones*, 6 Id. 318; *Tucker v. The United Mar. & F. Ins. Co.*, 12 Mass. R. 88. And if, at the time of abandonment, the property were restored or recovered, although the insured had no information of the fact, the abandonment is of no effect; the right to abandon depending not upon the information received, but upon the facts, at the time of the offer to abandon. *Marshall v. Delaware Ins. Co.*, 4 Cranch, 202, 206; *Church v. Bedient*, 1 Caines' Cas. in Err. 21; *Hallet v. Peyton*, Id. 8; *Dorr v. The Union Ins. Co.*, 8 Mass. R. 502; *Peele v. Merchants' Ins. Co.*, 3 Mason, 27; *Queen v. The Union Ins. Co.*, 2 Wash. C. C. R. 335; *Maryland Ins. Co. v. Bathurst*, 5 Gill & John. 159. The right to recover of the assurer for a total loss is complete, if the loss, which is its basis, contigue at the time of the abandonment. The object of the abandonment is to give to an injury or deprivation of the property, neither total or desperate, the same effect as if it were physically destroyed or rendered of no value, or irrecoverably lost to the insured; the insured, therefore, is not compelled to abandon on the happening of the event which would entitle him to do so; but he may wait the result, and if the loss should turn out to be total, he will recover for a total loss; and if only partial, for a partial loss. *Church v. Bedient*, 1 Caines' Cas. in Err. 21; *Hallet v. Peyton*, Id. 28; *Earl v. Shaw*, John. Cas. 313; *Roget v. Thurston*, 2 Id. 248; *Steinbach v. Columbian Ins. Co.*, 2 Caines R. 129; *Smith v. Steinbach*, 2 Caines' Cas. in Err. 158; *Suydam v. The Mar. Ins. Co.*, 2 John. R. 138; *Gordon v. Bowne*, Id. 150; *Gracie v. The N. Y. Ins. Co.*, 8 John. R. 237; *Dorr v. The The Union Ins. Co.*, 8 Mass. R. 494. Hence, where there is, in the first instance, an actual total loss, an abandonment is unnecessary. As to abandonment on policy on profits, see *Tom v. Smith*, 3 Caines R. 245.

Where there is an insurance on a ship, and she receives an injury to an amount exceeding half her value, the assured cannot abandon as for a technical total loss, if he be the owner of the

in safety, and not of a perishable nature, is not a sufficient ground for abandonment; there must be a destruction of the contemplated adventure.(1) The abandonment must be positive, unconditional, and extend to the whole subject matter of the insurance.(2) A parol abandonment is sufficient, but it is more convenient to give the notice in writing.(3) In

freight and cargo, and the latter be liable to such an amount of general average contribution, as when deducted, reduces the estimated expense of repairs below half the value of the vessel, allowing the deduction of one-third new for old; he is only entitled to recover as for a *partial loss*. *Pezany v. The National Ins. Co.*, 15 Wend. 453.

So, also, it was held that the vessel having arrived at the port of her destination, where her owners resided, in a repairable state, the assured had no right to abandon-as for a technical *total loss*. *Id.*

As to a necessity which will justify a sale of the ship, see *Somes v. Sugrue*, 4 Carr. & Payne 276.

* * On the subject of abandonment, generally, see 3 Kent's C. (6th ed.) 318, 335, and the notes; 2 Am. Lead. Cas. 189, 230; 3 Selwyn's N. P. 2166, 2182; 2 Gr. Ev. § 392, n. 3. See also the following more recent cases, illustrating various points in the law of abandonment: *American Ins. Co. v. Ogden*, 20 Wend. 287; *Smith v. Manufac. Ins. Co.*, 7 Metcalf 448; *Brazee v. The Portsmouth Ins. Co.*, 16 Ohio R. 81; *Rouse v. Salvador*, 3 Bing. N. C. R. 266; *Robinson v. The Commonwealth Ins. Co.*, 3 Sumner, 220; *Williams v. Suffolk Ins. Co.*, *Id.* 270; *Hazard v. N. E. Ins. Co.*, 1 *Id.* 218; *Bradlie v. The Maryland Ins. Co.*, 12 Peters, 378; *Chase v. Commonwealth Ins. Co.*, 20 Pick. 143; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 466; *Hall v. Franklin Ins. Co.*, *Id.* 583; *Reynolds v. Ocean Ins. Co.*, 22 *Id.* 191; *Robertson v. Western M. & F. Ins. Co.*, 19 Louis. R. 227. * *

(When the expense of repairing a vessel injured by perils of the sea insured against, will exceed a moiety of her value, there is a constructive total loss; and the owners may abandon, and demand its payment. They may also abandon her, where for any cause it is impossible to repair the vessel, as where there is a want of funds, material or workmen. The right to abandon depends upon the question whether a prudent owner, uninsured, would have broken up the voyage, or repaired his vessel, and continued to prosecute it. *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer R. 342, and cases there cited.)

(1) See *Parsons v. Scott*, 2 Taunt. 373; *Hunt v. Royal Exchange Insurance*, 5 Maule & Sel. 47; *Anderson v. Wallis*, 2 Maule & Sel. 240; *Gernon v. Roy. Exch. Assurance*, 6 Taunt. 383; *M'Iver v. Henderson*, 4 Maule & Selw. 576.

NOTE 834.—A vessel having goods on board upon which an insurance was effected, but which were warranted free from average, unless general, was placed in so much danger by perils of the sea, that the crew deserted her in order to save their lives, and the owner of the goods, upon receiving intelligence of this, gave notice of abandonment. A few days afterward the vessel was found by some fishermen, and towed into port and repaired, but the goods (which were of a perishable nature) had been so much injured by the salt water that they would not have been worth anything if forwarded to the place of destination; held, that the assured were entitled to recover for a total loss. *Parry v. Aberdeen*, 9 Barn. & Cress. 411. It was not merely loss of the voyage and the adventure, but in reality a loss of the thing insured.

* * See *ante*, note 833. * *

(2) *Parmeter v. Todhunter*, 1 Campb. N. P. C. 541; *M'Masters v. Shoolbred*, 1 Esp. C. 239; *Park on Insurance*, 229; *Marshall on Ins.* 600.

(3) By Lord Ellenborough in *Parmeter v. Todhunter*, 1 Campb. 541.

NOTE 835.—*Suydam v. The Mar. Ins. Co.*, 1 John. R. 181; *S. C.*, 2 *Id.* 138. The preliminary proofs need not be made at the time of the abandonment; it may be done afterwards. *Barker v. The Phoenix Ins. Co.*, 8 John. R. 307.

If the plaintiff, upon receiving advice of a total loss, elect to abandon, it is sufficient to state his determination and offer to abandon, together with notice of the particular loss upon which it

order to show that the underwriter has been put in a situation to do all that was necessary for the preservation of the property, the notice of abandonment(1) must be proved to have been given within a reasonable time after the loss has been heard of, allowing to the insured a convenient opportunity for examining into the circumstances which render abandonment expedient or otherwise.(2) When notice of abandonment is given, the acquiescence of the underwriters for a long time will amount to an acceptance of it.(3) Unless there has been an acceptance of the abandonment by the underwriters, it seems that the assured cannot recover as for a total loss, if the loss turn out to be partial before action brought.(4) An

is grounded. Per Kent, C. J., in *Id.* What is termed *preliminary proofs*, in our books, arose from the clause in the policy, that the loss is to be paid in thirty days; and as its object was only to furnish reasonable information to the insurer, so that he might be able to form some estimate of his rights and duties, before he was obliged to pay, it has always been liberally expounded, and is construed to require only the best evidence of the fact that the party possesses at the time. *Id.*; *Talcot v. Marine Insurance Co.*, 2 John. R. 130; *Haff v. The Same*, 4 John. R. 132. The agent who makes insurance for his principal, has authority to abandon without a former letter of attorney. *The Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268.

It seems, that in an abandonment, the cause of the loss must be stated, so that the underwriter may know whether it is a loss by a peril within the policy, and may exercise his judgment upon the facts, whether to accept or refuse the abandonment; for an abandonment cannot be made without a case justifying the act. Per Story, J., in *Hazard v. The N. E. Mar. Ins. Co.*, 1 Sum. R. 218, 221.

* * See *ante*, note 833. * *

(1) NOTE 836.—*Bell v. Veveridge*, 4 Dall. 272. But it must appear that the assured had notice of the loss, or the policy will not be vitiated. *Abel v. Potts*, 3 Esp. 242. In this case the loss was total, and continued so, and an abandonment was considered not necessary. There is no precise time from which a presumption of loss is to arise. It was proved that the vessel sailed from North Carolina for New York about the middle of February, 1802, and had not been heard of since, and that the preliminary proofs were exhibited to the defendant, at the expiration of one year from the sailing of the vessel; held, that there was in that a sufficient presumption of loss to justify the plaintiff to call on the defendant for payment. *Gordon v. Bowne*, 2 John. R. 150. See also *Brown v. Neilson*, 1 Caines' R. 325.

The owner should abandon within a reasonable time after notice; but what is a reasonable time, must depend on facts—and when the facts are found or agreed, it is a question of law. Per Parsons, C. J., in *Smith v. The Newburyport M. Ins. Co.*, 4 Mass. R. 668; *Murray v. Hatch*, 6 Id. 475; *The Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268; *The Maryland Ins. Co.*, Id. 338; *Livingston v. The Maryland Ins. Co.*, 7 Id. 506; *M'Calmot v. Murgatroyd*, 3 Yeates, 27. And delay, unaccounted for, will amount to a waiver of the right to abandon. Three years having elapsed since the capture, and nothing having been heard of the vessel and cargo, was held sufficient evidence of a loss, the fact of the capture being testified to by a part owner, who had no interest. *Ruan v. Gardner*, 1 Wash. C. C. R. 145.

* * See *ante*, note 833. * *

(2) See *Read v. Bonham*, 3 Bro. & Bing. 147; *Gernon v. Royal Ex. Ass.*, 1 Holt's C. 49; 6 Taunt. 383; *Mitchell v. Edie*, 1 T. R. 608; *Barker v. Blakes*, 9 East, 283; *Mellish v. Andrews*, 15 East, 13; *Kelly v. Walton*, 2 Campb. 155; *Anderson v. Roy. Ex. Ass.*, 7 East, 13; *Aldridge v. Bell*, 1 Stark. N. P. C. 498. In *Hunt v. Roy. Ex. Ass.* (5 Maule & Selw. 47), five days was considered an unreasonable time.

(3) *Hudson v. Harrison*, 3 Bro. & Bing. 97.

(4) See *Paterson v. Ritchie*, 4 M. & Sel. 933; *M'Iyer v. Anderson*, 4 M. & Sel. 576; *Bainbridge*

agent of the Committee of Lloyd's has not competent authority to accept a notice of abandonment as the representative of the underwriters.(1)

Adjustment.

When the amount of a partial loss is settled, the broker concerned, in general, procures the amount to be indorsed on the policy, and signed by the insurer, which is called an adjustment.(2) And an agent who has authority to subscribe a policy, is presumed to have authority to sign an adjustment of loss.(3) An adjustment is *prima facie* evidence of the amount

v. Neilson, 10 East, 324; *Brotherson v. Barder*, 5 M. & S. 422; *Cologan v. Lond. Ass.*, 5 M. & Sel. 451; *Brown v. Smith*, 1 Dow, 349; *Smith v. Robertson*, 2 Dow, 474.

NOTE 837.—By Bayley, J. If the subject matter of insurance ultimately exists in specie, so as to be capable of being restored to the hands of the assured, there cannot be a total loss, unless there has been an abandonment. Now, in order to justify an abandonment, there must have been that, in the course of the voyage, which at the time constituted a total loss. If, at one period of time, there was a total loss and abandonment, before news of the vessel's safety had been received, her subsequent return does not entitle the underwriters to say that it was no longer a total loss. The mere existence of the ship after a total loss and abandonment, will not reduce it to a case of partial loss. 4 Maule & Selw. 576; 5 Id. 447. The ship must be *in esse* in this kingdom, under such circumstances that the assured may, if they please, have possession, and may reasonably be expected to take it. *Holdsworth v. Wise*, 7 Barn. & Cress. 799.

See *Peele v. Suffolk Ins. Co.*, 7 Pick 254, that subsequent events must determine whether the loss was total at the time of the offer to abandon. The mere stranding of the vessel, however perilous, not of itself being a total loss, the assured may, if he please, get her off and repair her at the expense of the underwriter, in the form of a partial loss, or he may leave her to her fate, trusting to the proof that may entitle him to insist upon his abandonment and indemnity as for a total loss. But the underwriter is not, in such circumstances, obliged to accept the offer to abandon; he may also take the chance of the facts as they may appear, and he may take her into his possession and repair her, the assured refusing to do it, and if he can do it at an expense less than one half her value, he may restore her to the assured, and thus avoid paying for a total loss. Id. He must not delay the repairs beyond a reasonable time; if he does, he forfeits his right to return the ship. Id.

On the other hand, this doctrine has been questioned by high authority. *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27. The actual state of facts at the time of the abandonment, is considered the test, without being controlled by subsequent events.

If, after capture and abandonment, but before condemnation, a ship be ransomed by the captain, or retaken by the crew, or be recovered and delivered to the owners, who claim and use her as their own, they possess her under no new title or right of property; and this constitutes a waiver or surrender of the abandonment. *Maryland, &c. Ins. Co. v. Bathurst*, 5 Gill & John. 159.

The rule in New York is different, viz: that the insurers have a right to regard a purchase of the subject matter of insurance, by the insured or their agents, after its condemnation, as a waiver of the abandonment, and a conversion of the total into a partial loss. Id.

* * See *ante*, note 833. * *

(1) *Drake v. Marryat*, 1 Barn. & Cress. 473. *Vide post*, 284.

(2) For the principles upon which partial losses are adjusted, see *Hughes on Insurance*, ch. 14; *Stevens on Average*, *ante*, p. 255, n. 1.

(3) *Richardson v. Anderson*, 1 Campb. 43, n.

NOTE 838.—Where a broker, in whose name a policy under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was good payment as between the

plaintiff on the record and the defendants; and, therefore an answer to the action. *Gibson v. Winter*, 5 Barn. & Adol. 96. However, a different principle seems to have prevailed in *Ruan v. Gardner* (1 Wash. C. C. R. 145), and in *Motteux v. London Assurance Co.* (1 Atk. 547; 4 Bro. P. C. 436).

Where the broker acts under a *del credere* commission, he may be permitted to set off losses against the claim of the underwriter for premiums, which he would not be allowed to do, if he were acting as a broker without such a commission; because under such a commission he procures policies for his principals in his own name, although as agent, and he is considered as between the underwriters and himself, as the owner of the policies. Per *Putnam, J.*, in *Moody v. Webster*, 3 Pick. 424. In such case the broker is treated as principal. *Id.* And where it did not appear that the broker had a *del credere* commission, but he paid the losses upon receiving the abandonments, taking and holding the policies as his vouchers and for his security, within the general scope of his authority; held, that he had a lien on the policies for his general balance against the underwriter. Thus, in case where the underwriter had become bankrupt, and subsequently money was paid under the treaty with Spain into the hands of a third person; held, that the broker had a lien on the money so paid; it appearing that the latter had not filed a claim under the commission of bankruptcy. *Id.*

Where a broker had adjusted a loss with the agent of the insured, in whose name the policy was effected, and credited such party with the amount of the loss, and also charging the several underwriters with their proportions of the loss; held, that the underwriters were discharged from the claim of the real party in interest. *Erick v. Johnson*, 6 Mass. R. 193. By the negotiation of the assured and Mr. T., the office-keeper, and the delivery of the policy to him, he became authorized to collect the loss demanded from the several underwriters; and he collected it, and he received payment of their several proportions in their accounts with him, adjusted, as it is stated, before the action was commenced. Per *Sewall, J.*, in *Id.*

Where a policy was delivered for settlement by the insured to M., one of the brokers who effected it, and such broker having effected an adjustment, and debited the insurer with the amount, and also credited the insured, the latter being indebted to the broker; held, that such entry in the books of the broker was not to be considered as a payment to the assured, without the assent of the latter to such arrangement, whereby they directly or impliedly assent to look to the brokers, and not to the underwriters for the loss. *Bethune v. Neilson*, 2 Caines' R. 139. Though the policy being put into the hands of the broker, authorized him to make the adjustment, yet he has no authority to receive the money, unless the policy remains in his hands when the money becomes payable. *Id.* Therefore, where the assured took the policy out of the hands of the brokers, before the expiration of the time stipulated for the payment, it was held, that this was a revocation of all authority to receive payment. *Id.*

Where the master, who was part owner also, after a capture of the vessel and cargo and sale thereof, appointed an agent to prosecute the claim, and the agent compromised with the captors; held, that the receipt by the agent of the money for which the property had been sold, was a receipt by the insurer, for whose benefit the agent acted, and the assured were, therefore, entitled to recover on the policy their full loss. *Miller v. De Peyster*, 2 Caines' R. 301.

An underwriter has never been considered discharged as against the assured, until his name has been struck off the policy. Thus, a policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter in account for the loss, and transmits to the assured an account, in which he states himself to be the debtor for the amount of the loss; and for the balance of that account the assured draws a bill upon the broker, which the latter accepts, but does not pay. The underwriter's name never having been struck off the policy, it was held, that he was discharged. *Russell v. Bangley*, 4 Barn. & Adol. 395.

It is the practice to strike out the name when they adjust and pay the money afterwards. Therefore, in *Adams v. Saunders* (4 Car. & Payne, 25), where the policy was produced by the agent of the plaintiff, through whom it was effected, and the defendant's name was struck out, and written against it, "adjusted the general and particular average at £30 9s. *per cent.*;" it was held, that this was proof that the policy had been adjusted, but not that it had been satisfied; but the plaintiff was not allowed to go into evidence to show that some of the sums allowed at the time of the adjustment were too small; though Lord Tenterden said, if the adjustment was

of loss, and of the liability of the insurer, without any further proof.(1) But an adjustment is not in any case conclusive.(2) And it may be impeached by the underwriter; as where he can show that he signed it in consequence of some mistake or misconception, or that fraud has been practiced upon him.(3) And although he must make a strong case, after admitting his liability, yet it seems that until he has paid the money, he is at liberty to avail himself of any defence, which the facts or the law(4)

made without authority, or perhaps if it could be shown that some sum were shown to be wholly omitted, the plaintiff might be allowed to open it; but not because the amount is not sufficiently large.

* * See *Thornton v. The United States Ins. Co.*, 3 Fairf. 150; 3 Kent C. 335; 2 Gr. Ev., § 293. * *

(1) *Hogg v. Goldney*, Park on Ins. 193; *Beawes*, 310; *Rogers v. Naylor*, Id. 194; *Christie v. Combe*, 2 Esp. C. 489. An adjustment does not require a stamp. *Webbe v. Simpson*, Selw. 917 (4th ed.)

(2) *Steel v. Lacy*, 3 Taunt. 285.

NOTE 839.—Therefore, where the plaintiff's ship was insured from Richmond to Bremen, was compelled to put into C., an intermediate port, for the preservation of the ship, cargo and lives of the crew; and on the arrival of the ship at Bremen, her port of discharge, a general average of the loss was adjusted by the proper officers there, by which a certain sum was apportioned on the cargo, and the residue on the ship; but, in this adjustment no notice was taken by the officers who made it, of the wages and victualing of the crew, after the ship bore away for C.; and the question presented was, whether the Bremen adjustment was to be taken as conclusive between the parties; held, that such adjustment was not conclusive; since it conclusively appeared that losses were excluded from that adjustment, which by our laws were covered by the policy and to be borne by the insurer. Id.

An adjustment is not conclusive, if the party can show that it was made on the misrepresentation of the insured, and whether the misrepresentation proceeded from mistake or design, is not material. *Faugier v. Hallett*, 2 John. Cas. 233.

By a memorandum indorsed on the back of a policy, it was stated that a particular average loss of £54 per cent. had been settled between the plaintiff and defendant; held, that parol evidence was admissible to show, that by a previous arrangement, it was agreed that if the other underwriters paid a less sum, the surplus should be repaid. *Russell v. Dunskey*, 6 J. B. Moore, 233.

The loss is to be adjusted and contribution made at the port of discharge, and according to the laws and usages there existing. As between the parties, the foreign adjustment is conclusive. "The party contributing can recover nothing back; the party to whom the contribution is made can recover nothing further, and he who has been compelled actually to contribute on the basis of the foreign adjustment, can recover of his insurer the amount thus contributed and nothing more. To this extent we admit the conclusive character of foreign adjustments, but have been unable to find adjudged cases to carry us further. We have found no case where the party to whom the contribution has been made, has been restricted in his claim upon his underwriters to the sum apportioned as his share of the loss, by the foreign adjustment, when that sum fell short of a complete indemnity, according to the law of the place where the contract of assurance was entered into." Per *Harris, J.*, in *Thornton v. The United Ins. Co.*, 3 Fairf. R. 150. * * See the next preceding note. * * (As to the principles on which the adjustment is made, see *Nelson v. Belmont*, 5 Duer R. 310, and cases there cited.)

(3) *Rogers v. Naylor*, 2 Esp. C. 489; *Steel v. Lacy*, 3 Taunt. 285; 6 Taunt. 519; *Reyner v. Hall*, 4 Taunt. 725; *Shepherd v. Chester*, 1 Campb. 274.

(4) See *Herbert v. Champion*, 1 Campb. 134. See *Shepherd v. Chester*, Id. 274; *Sheriff v. Potts*, 5 Esp. 96; *Christian v. Combe*, 2 Esp. C. 489; *Voller v. Griffiths*, Selw. N. P. 917, (4th ed.)

of the case will furnish. An adjustment may be given in evidence without being stated specially in the declaration.(1)

Compliance with warranties.

Where the policy contains any warranty, it must be proved to have been strictly complied with. A warranty is regarded as a condition; and if its express terms be infringed, the underwriters will not under any circumstances, be liable.(2) Thus if a ship is warranted to sail on a certain day,(3) there will be a breach of warranty, if the day of departure is postponed, although it be proved that the vessel was detained by the orders of a colonial governor.(4) But, where the non-compliance with a warranty would amount to a breach of the law, it shall be presumed to have been complied with, unless the insurer produces evidence to the contrary.(5)

Convoy.

With respect to the warranty to sail with convoy, the official letter of the commander of a convoy, or the log-book of a man of war, is admis-

(1) *Rogers v. Naylor*, Park, 194; 2 Esp. C. 489; *Sheriff v. Potts*, 5 Esp. C. 96. See *Gammon v. Beverly*, 8 Taunt. 123.

(2) *De Hahn v. Hartley*, 1 T. R. 315; *Pawson v. Watson*, Cowper, 785.

NOTE 840.—In determining what shall constitute a warranty, and what shall be a representation merely, the general principle seems to be well settled that an express warranty must appear on the face of the policy, and that any instructions for insurance, unless inserted in the instrument itself, do not amount to a warranty. Per *Oakley, J.*, in 2 Hall, 608, 627, 628; *Snyder v. The Farm. Ins. & L. Co.*, 13 Wend. 92. Thus, where a survey was presented, stating that the building was divided by a stone partition, running *lengthwise to the roof*; and the policy was on goods in such building occupied by the insured and others, *more particularly described in the application and survey furnished by himself*, filed No. 928, in the office of the insurance company; on the trial, it appeared that the partition did not *extend to the roof*, and the side walls of the building were *five feet* above the stone partition; held, that this was only a representation, and no warranty; and the plaintiff recovered. *Snyder v. The F. Ins. & L. Co.*, *supra*. See also the *Jefferson Ins. Co. v. Cotheal*, 7 Id. 72; and *Dow v. Whetton*, 8 Id. 166.

(3) NOTE 841.—*Nelson v. Salvador*, 1 Mood. & Malk. 309; *Graham v. Barras*, 5 Barn. & Adol. 1011.

A warranty is never to be created by construction—must appear on the face of the policy, or at least form part of the contract. *Snyder v. Farmers' Ins. & L. Co.*, 13 Wend. 92. Unless the statement of the time of sailing is made the subject of warranty, or relied upon as a representation, and so understood by the parties, the court will construe such statement according to the circumstances of the case. Thus, where the order to insure stated that said brig will sail from La Plata in the course of this month; held, that this statement amounted merely to an opinion or belief of the insured, and consequently did not vitiate the policy, though the brig, instead of sailing in May, as mentioned, did not sail until July. *Allegre v. Maryland Insurance Company*, 2 Gill & John. 136. So, it was held, where the master wrote his agent that he should sail on the 12th; and the agent stated to the underwriters that he expected to sail about the 12th, it was no misrepresentation: such a statement amounts only to a strong expectation. *Rice v. N. E. M. Ins. Co.*, 4 Pick. 439. But in cases which go *beyond expectation*, where there is a misrepresentation of a material fact, the policy will be vacated. *Dennistoun v. Lillie*, 3 Bligh's R. 202. See, also, *Baxter v. The N. E. Ins. Co.*, 3 Mason, 96.

(4) *Hore v. Whitmore*, Cowp. 784; 7 T. R. 710; 3 Bos. & Pul. 515, 534.

(5) *Thornton v. Lane*, 4 Campb. 231.

sible in evidence to prove a compliance with the warranty, or the breach of it.(1) And in order to prove that a ship insured was of a particular nation, proof of her carrying the flag of that nation, at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, is *prima facie* evidence of the truth of the fact warranted.(2) And, on the other hand, the circumstance that, at the time of the capture, the ship's papers were thrown overboard, affords a presumption that the ship was not neutral.(3)

(1) *Watson v. King*, 4 Campb. 275; *D'Israeli v. Jowett*, 1 Esp. C. 427.

(2) *Archangelo v. Thompson*, 2 Campb. 620. As to the effect of sentences of courts of admiralty, in falsifying warranties, see Vol. II.

NOTE 842.—*Hibbert v. Pigou*, 3 Dougl. 224.

The description of a vessel in the policy, as the *American, Spanish, &c., vessel, called the, &c.*, is an implied warranty of her national character; and proof that the vessel was owned by an American citizen, and had all the papers for an American vessel except a register, having sailed with a sea letter only, was held to be a sufficient compliance with the warranty. *Barker v. Phoenix Insurance Company*, 8 John. R. 307. Insurance was made "on the cargo of the Swedish brig *Sophia*;" held, that these words amounted to a warranty that the vessel was Swedish property, or at least that she was furnished or documented as such; and evidence *abunde* to explain the intention of the parties, is not admissible. *Higgins v. Livermore*, 14 Mass. R. 106. See *Lewis v. Thatcher*, 15 Id. 431. Where the question was, whether the words in the policy, viz: *The Spanish brig New Constitution*, amounted to a warranty that the vessel was Spanish; held, that the description of the vessel in the policy, included her national character, and amounted to a warranty that she was in fact a *Spanish* vessel. Parol evidence of what was within the knowledge of the underwriters was not admissible. *Atherton v. Brown*, 14 Mass. R. 152. A warranty that a ship is American property, imports that the ship should be accompanied with the proper documents to show her character. *Coolidge v. The New York Fire Insurance Company*, 14 John. R. 308. See, also, as to evidence of national character, *The United States v. Furlong*, 5 Wheat. R. 184.

The national character of the property depends on the place of domicile of the owner, and not on that of his birth or citizenship. *Elbers v. The United Insurance Company*, 16 John. R. 128; *Livingston v. The Maryland Insurance Company*, 7 Cranch, 506.

The English cases seem to consider property bound to the country of the enemy, as exposed to capture; the American cases, on the other hand, adopt the principle that a neutral has a right to supply the belligerent nations, unless it be to a blockaded port, or in the case of contraband goods. *De Wolfe v. The New York Fire Insurance Company*, 20 John. R. 214; *S. C.*, 2 Cowen, 56.

Under the warranty of neutral property, it is sufficient for the plaintiff, in the first instance, to give general evidence of neutrality, leaving it to the defendant to show probable cause to suspect that the necessary papers are wanting; after which the burden of proof is upon the plaintiff. *Ludlow v. The Union Insurance Company*, 2 Serg. & Rawle, 119; *Ocean Insurance Company v. Francis*, 2 Wend. 64.

To prove that a vessel was documented as an American ship, the proper evidence is a sworn copy of the register; a certified copy not being legal evidence. *Coolidge v. The New York Fire Insurance Company*, 14 John. R. 308.

A ship warranted to depart with convoy, and sails without; the assured in such case is entitled to recover the premium; and such an usage is good, and may be proved by parol evidence. *Long v. Allan*, 4 Dougl. 276.

(3) By Buller, J., *Bernardo v. Motteux*, Doug. 575. On the construction of warranties

Evidence for defendant.

The principal facts to be proved, on the part of the plaintiff, having been considered, it may be convenient to mention, in this place, a few of the several grounds of defence, and to treat shortly of the evidence applicable to each.

The defendant, under the general plea of non-assumpsit, may prove anything that will have the effect of rendering the policy void, such as a concealment, or misrepresentation of circumstances, by which the underwriter may have been deceived or misled as to the nature of the risk.⁽¹⁾ The

according to which the proof of performance must be directed, see *Marshall on Insurance*, Book 1, ch. 9.

NOTE 843.—In New York, the rule is, that a sentence of a foreign court of admiralty, condemning the property as a good and lawful prize, according to the law of nations, is conclusive to change the property, but is only *prima facie* evidence of the facts on which the condemnation purports to have been founded. And in a collateral action, such evidence may be rebutted by showing that no such facts did, in reality, exist. *Vandenheuev v. The United Insurance Company*, 2 John. Cas. 451; *New York Fire Insurance Company v. De Wolfe*, 2 Cowen, 56; *Ocean Insurance Company v. Francis*, 2 Wend. 64. See, also, the observations of Parsons, C. J., in *Robinson v. Jones*, 8 Mass. R. 536.

In *Saloucci v. Woodmas* (3 Dougl. 134), where goods warranted neutral, on board the *Thetis*, "a Tuscan ship," and the ship and goods were captured by the Spaniards, and condemned as a "good and lawful capture," it was held that the sentence was conclusive evidence that the goods were not neutral.

* * See *note*, note 824. * *

(1) NOTE 844.—The obligation to disclose facts to an underwriter, is limited to such facts as would vary the risk or nature of the contract; no communication need be made of what is necessarily implied by the contract. Thus, in *Maryland and Phoenix Insurance Company v. Bathurst* (5 Gill & John. 159), and the *Maryland Insurance Company v. The New York Fire Insurance Company* (6 Cranch, 338), where an order for an insurance is against all risks, or all possible risks for whom it may concern, upon a certain defined voyage, the insured is not bound to communicate or disclose at the time of effecting such insurance, without inquiry from the underwriter, the particular circumstances connected with the voyage, which show that, in fact, it is a belligerent risk, as the transportation of hostile stores, troops, &c. So, facts of universal notoriety in the commercial world, at the time of effecting an insurance upon a particular voyage, which relate to the course of trade upon such voyage, which form a part of the public history of that time, are lights against which a court of justice cannot shut its eyes, and of which the law imputes knowledge to underwriters. *Id.* See, also, 10 John. R. 120, 126.

What facts, in the knowledge of the insured, are material and necessary to be communicated to the assurers at the time of effecting the insurance, is matter for a jury exclusively to determine; and though the judge, at the trial, may express his opinion as to the materiality of the facts, for their assistance, or by way of advice, in cases of doubt and difficulty, he ought not to give them positive direction or opinion as to the materiality of the facts concealed, so as to prevent the jury from exercising their own judgment, and deciding for themselves. *New York Fire Insurance Company v. Walden*, 12 John. R. 513. See, also, 3 Yeates' R. 30.

If, by the usage of trade, it be necessary that certain papers be on board, the concealment of those papers cannot affect the plaintiff's right to recover on the policy. *Livingston v. The Maryland Insurance Company*, 7 Cranch, 506; *Le Roy v. The United Insurance Company*, 7 John. R. 343.

The condition in a policy of insurance, that notices of all previous insurances upon the property insured shall be given or the policy to be void, applies only to insurances effected by the assured or his assigns; and not to previous insurances by the former owners of the property. *Tyler v.*

policy will be discharged, if every material circumstance which is within the particular knowledge of the insured, and not, as it were, in the middle between him and the underwriter, is not communicated.(1) The assured

Ætna Fire Insurance Company, 12 Wend. 507. A new trial was granted where the judges instead of submitting the question to the jury whether the concealment of the fact of a previous insurance was or was not material to the risk of a *subsequent insurance*, charged them that knowledge by the assured of a previous assurance and neglect to disclose the fact, was such a concealment of a fact material to the risk, as avoided the second policy. Id.

* * For an ample discussion of the subject of concealments and representations, as affecting marine policies, see 3 Kent C. 282, 287 (6th ed.), and the notes; 2 Am. L. Cas., pp. 328, 576; 2 Gr. Ev., §§ 383, 392, 396, 399, and notes; 3 Stephens' N. P. 2119, 2143; 2 Duer on Insurance, and the proofs and illustrations, 379, 796. It has been held in several cases, that a representation to the insurer imports an affirmation of some *past or existing* fact material to the risk, and not of a statement of matters resting merely in *expectation or intention*; and that, if the representation be in the nature of a *promise* for future conduct, it will be of no avail unless inserted in the policy. *Bryant v. Ocean Insurance Company*, 22 Pickering, 200; *Alston v. Mechanics' Mutual Insurance Company*, 4 Hill, 330. The doctrine of these cases has been questioned by Mr. Duer (*supra*), whose opinion is concurred in by Chancellor Kent. 3 Kent C. 285, n. d (6th ed.). * *

(A notice given to an agent of the insurance company, is notice to the company, when it relates to business within the scope of his agency. *McEwen v. Montgomery County Mutual Insurance Company*, 5 Hill (N. Y.), 101. And the act of an agent approving of an additional insurance, binds the company. *Potter v. Ontario and Livingston Mutual Insurance Company*, Id. 147.

Where the description or undertaking of the assured as to the use made, or to be made, of the premises, amounts to a warranty, it is not all material to inquire whether it was honestly or fraudulently made; if untrue or unperformed, it avoids the policy. *Mead v. The Northwestern Insurance Company*, 3 Selden R. 530.)

(1) By *Lord Ellenborough*, *Vallance v. Dewar*, 1 Campb. 503; *Sawtell v. London*, 5 Taunt. 383; *Gladstone v. King*, 1 Maule v. Selw. 35; *Buff v. Turner*, 2 Marsh. 46; *Freeland v. Glover*, 6 Esp. N. P. C. 14; *Boyd v. Dubois*, 3 Campb. N. P. C. 133. It is not necessary to communicate circumstances inserted in Lloyd's List. *Friere v. Woodhouse*, Holt's C. 572.

NOTE 845.—A party is not bound to communicate the time of sailing, unless at the time when the policy is effected, it is a missing ship. Per *Tindal, C. J.*, in *Elton v. Larkins*, 5 Car. & Payne, 385. In the case of *Ely v. Hallet* (2 Caines' R. 57), the plaintiff had special information of a violent storm which took place eleven hours after the vessel sailed, which he did not particularly describe to the underwriters; and it was held by a majority of the court that he could not recover. But in *Fiske v. N. E. M. Ins. Co.* (15 Pick. 310), where the ship was not a missing ship, but sailed on the 18th or 19th of November, 1831, from Boston to Smyrna, and back to Boston; the policy was written March 13, 1832—not quite four months after she sailed; but the usual length of such voyages is six months; the jury having found a verdict for the plaintiff, the court refused to set it aside, although it was in evidence that one underwriter had refused to underwrite, on being informed that there was a gale on November 22, 1831, and that the vessel had sailed three or four days previous; and although the plaintiffs did not disclose to the defendants the time when the ship sailed.

The *concealment* which vitiates a policy must be of a fact *material* to a just estimate of the risk. A merchant resident at S., shipped goods by the ship C. for England, and by another ship which sailed after the ship C., wrote to an agent in England, desiring him, if he received that letter before the C. arrived, to wait for thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods; the letter was received, and the agent having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him; the broker told the underwriter when the ship sailed, and when the letter ordering an insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before effecting an insurance. The C. never arrived. In an action on the policy,

is bound to communicate the information which he has received, though he does not know it to be true, and though it afterwards turns out to be false.(1) It is, however, sufficient to communicate facts, and there is no obligation to state any opinion or conclusion founded upon these facts.(2)

Opinion of underwriters.

A difference of opinion has been entertained upon the point, whether the evidence of underwriters as to the material nature of the circumstances concealed or misrepresented, and the effect they would have had on the premium, is admissible. In a case determined in the time of Lord Mansfield, a broker gave evidence, that he believed the defendant would not have meddled with the insurance, if he had seen certain letters; and his Lordship observed, that such an opinion, though it had been received, was not evidence.(3) In a later case, witnesses were allowed to prove, that, if certain facts had been communicated to them, they would not have engaged in the risk. But Chief Justice Gibbs, in summing up to the jury, justly observed, that the evidence led to nothing satisfactory, and ought to have been rejected.(4) In the last case which has occurred relative to this point, Holroyd J. is reported to have held, that a witness conversant in the subject of insurance might give his opinion, as a matter of judgment,

no fraud was imputed to the plaintiff, but several underwriters were called, who stated that, in their opinion, the matters not communicated were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the defendant. *Richards v. Murdock*, 10 Barn. & Cress. 527. The question of materiality is for the jury. However, it has since been considered that the evidence of underwriters was improperly admitted. *Campbell v. Richards*, 2 Nev. & Mann. 546; S. C., 5 Barn. & Adol. 840.

The announcement of a material fact at Lloyd's, in the *foreign* list, will not dispense with a communication from the insured. *Elton v. Larkins*, 8 Bing. 198.

* * See the next preceding note. * *

(1) *Lynch v. Hamilton*, 3 Taunt. 37.

NOTE 846.—If the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted upon entire good faith in procuring the insurance, he is not precluded from a recovery, nor is the policy void by the omission of the master to communicate intelligence of the loss, although such omission was fraudulent, to enable the owner to make insurance after the total loss, the owner not being conscious of any such act or design at the time of such insurance. Per Story, J., in *Ruggles v. General Int. Ins. Co.*, 4 Mason, 74; S. C., 12 Wheat. 408. (See *Bulkley v. Protection Ins. Co.*, 2 Paine C. C. 82; *Howard Ins. Co. v. Bruner*, 23 Penn. State R. 50; and *Myers v. Gerard Ins. Co.*, 26 Id. 192.)

* * But this doctrine has been powerfully combatted by Mr. Duer. 2 Duer on Ins. pp. 419, 430, and proofs and illustrations. * *

In an insurance on life, a suppression or false representation of facts, material to be known by the insurers, vitiates a policy, although it was in answer to a *parol* inquiry, and the policy is, by the articles of insurance, to be void on false answers being given to certain *written* inquiries. 8 Barn. & Cress. 586; *Miles v. Connecticut L. Ins. Co.*, 3 Gray R. 580.

(2) *Bell v. Bell*, 2 Camp. N. P. C. 475.

(3) *Carter v. Boehm*, Burr. 1905. See Vol. I.

(4) *Durrell v. Bederley*, Holt's C. 283.

whether particular facts, if disclosed, would have made a difference in the general opinion of underwriters, as to the amount of the premium.(1)

(1) *Berthom v. Loughenan*, 2 Stark. N. P. C. 258.

NOTE 847.—But it seems to be now settled, that the evidence of underwriters and brokers is not admissible to show that in their opinion the matters not communicated are material. *Campbell v. Richards*, 5 Barn. & Adol. 840; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72. However, in *Chapman v. Walton* (10 Bing. 57), defendant a broker, having effected policies of insurance on goods for R., R. putting into his hands a letter from the supercargo of the ship conveying the goods, told the defendant the policies were to be altered, and he must do the needful. In an action against the defendant for negligence in this matter, held, that the brokers might be called to say, looking at the policies, the invoices of the goods, and the letter, what alterations in the policies a skillful broker ought to have made. It is proper to remark, that this decision was made in the Court of Bankruptcy, in Trinity Term, 1833, Tindal, Ch. J., citing *Berthom v. Loughenan*, and *Richards v. Murdock*; and *Campbell v. Richards* (*supra*), was decided in Bail Court, in Michaelmas Term, 1833, Denman, Ch. J.

* * Mr. Duer admits that the English cases on this question are in a state of direct conflict, but inclines to the opinion, that the weight of authority is in favor of receiving the evidence, and that such has been the usual practice in the United States. 2 Duer on Ins. 683, and note; *Id.*, 780—788, Proofs and Illustrations. Chancellor Kent admits that the question is unsettled, but concurs with Mr. Duer, that the evidence is competent; 3 Kent's C. (6th ed.) 285, and note *d*, where the cases, for and against the competency of such evidence, are collected. See 1 Smith's Lead. Cases, 270, and the English and American notes, and tit. *Opinion* in index to Vols I and II. And see the cases cited in the following extract from Cowen and Hill's note, 529, to the last edition of Phil. on Ev.:—* *

"*Folkes v. Chad*, cited by our author, has lately been published from the MS. reports of Mr. Douglass. See 3 Dougl. R. 156. For the general doctrine advanced in this paragraph of our author, see also the opinion of Savage, C. J., in the *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 78, who adopts several of the illustrations contained in the text. See also *Corlis v. Little*, 1 Green, 232; *Crowell v. Kirk*, 3 Dev. 355; *Rochester v. Chester*, 3 N. H. R. 349, 365, 366; and *The People v. De Graff*, 1 Wheel. Cr. Cas. 205. 'People entertain opinions on almost every subject that comes into a court of justice, some on one side, some on the other; and if one man's opinion is evidence, every man's is also. But the jury is kept together in order to exclude all mere opinions, so as to bring them to decide on the merits of a title, according to their own opinion on the facts in evidence.' Per Ford, J., in *Corlis v. Little*, 1 Green, 232. So closely is this rule adhered to, that even subscribing witnesses to a will cannot be allowed to express an opinion as to the testator's sanity. Per Daniel, J., in *Crowell v. Kirk*, 3 Dev. 357. And clearly none other can be permitted to express such opinion, unless he be a physician, or a man possessing scientific knowledge on the subject. The opinions of witnesses are confined to men of science, art, or skill in some particular branch of business. Per Daniel, J., in *Crowell v. Kirk*, 3 Dev. 356, 357; per Ford, J., in *Corlis v. Little*, 1 Green, 232. A witness is not to state what constitutes mental capacity, or a disposing mind and memory, that being a matter of legal definition. He may state the testator's degree of intelligence or imbecility in the best way he can, so as to impart to the court and jury the knowledge of his meaning, that they may ascertain what was the state of the testator's mind and memory. Per Ruffin, J., in *Crowell v. Kirk*, 3 Dev. 358. Other cases, however, though they acknowledge the general rule, disagree with the above as to opinions upon sanity. On trying a defence of lunacy interposed against a promissory note, witnesses who were not professional were allowed to state their opinions, though held these must be given in connection with the facts on which they were formed. *Grant v. Thompson*, 4 Conn. R. 203, 208, 209. The court rely on *Swift's Ev.* 111, who makes sanity an exception to the general rule. He says the testimony of witnesses on this subject will generally be in the shape of an opinion. But they must detail the facts. *Id.* The same thing was allowed to subscribing witnesses to a will, as to the testator's sanity. *Pool v. Richardson*, 3 Mass. R. 330. And see *Dickinson v. Barber*, 9 Mass. R. 227. And to other witnesses, who spoke from actual knowledge of the tes-

tator. *Wogan v. Small*, 11 Sergeant & Rawle, 141; *Harrison v. Rowan*, 3 Wash. C. C. R. 580. Indeed, in *Wogan v. Small*, the court allowed the question, 'Did you think the testator fit or unfit to make a will?' and in *Rambler v. Tryon* (7 Serg. & Rawle, 90), held, that facts and opinions of sanity founded on them, may, as to a testator, be received from his acquaintances. Some of these authorities appear too anomalous to be relied on as a safe guide to the practitioner, out of the very courts where they arose.

"In questions of the value of property, the witness must often testify to opinion. *Swift's Ev.* 111; *Kellogg v. Krauser*, 14 Serg. & Rawle, 137, 141, 142; *Rochester v. Chester*, 3 N. H. R. 349, 365, 366, *contra*. So with regard to handwriting. *Swift's Ev.* 111. The value of a piece of land in market being material, the court refused to allow witnesses who had not been in a course of buying and selling such land, to give an opinion. They said it must be described, and the jury must judge. And they questioned the admissibility of such evidence, even from witnesses skilled in and used to dealing in such property in the neighborhood where it lay. *Rochester v. Chester*, 3 N. H. R. 349, 364 to 366. But *Kellogg v. Krauser* (14 Serg. & Rawle, 137, 141, 142), is directly the contrary. Mere naked opinion as to the age of a party from his appearance only was rejected. The opinion in the case was: 'I should think, from his appearance, that he was a minor between fourteen and seventeen years of age.' It was material to prove the person under twenty-one. The court thought that if the witnesses had stated the facts indicative of age, and then followed with an opinion, that would have been admissible. *Morse v. The State of Connecticut*, 6 Conn. R. 9, 13. And though usage of trade may be proved, this cannot be by mere naked opinion. *Austin v. Williams*, 2 Hamm. R. 61, 64. Of course a witness cannot be permitted to prove the opinions of others on any question. *Robbins v. Treadway*, 2 J. J. Marsh. 542. Whether buildings are so located and of such a description as to increase the risk above that covered by a premium in a policy of insurance, is not a matter of skill to be determined by experts in the business of insurance. And, therefore, the opinion of the president of an insurance company on this point, upon the facts disclosed in evidence, was excluded. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 77, 78. Nor can the opinion of underwriters whether certain circumstances, as rumors and the like, would have prevented an insurance, be received. *Id.* 79; *Richards v. Murdock*, 10 Barn. & Cress. 527, *infra*, S. C., *contra*. Nor a surveyor as to the proper location of a grant. *Farar's Heirs v. Warfield*, 8 Mart. Lou. R. (N. S.) 695. In justifying a libel accusing the plaintiff, a physician, of having so conducted in giving countenance to a quack, that no respectable physician could consult with him without injuring himself in the eyes of his brethren, it was held that medical gentlemen could not be asked on a statement of the plaintiff's conduct, whether the libel was true. *Tindal, C. J.*, said: 'Witnesses skilled in any art or science may be called to say what, in their judgment, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted. If in this case any specific rules of the medical profession had been given in evidence, the defendant perhaps might have been allowed to show that the plaintiff, by violating those rules, had rendered himself unworthy of the countenance of his brethren. But the answer here may depend altogether on the temper and peculiar opinion of the individual witness.' *Ramadge v. Ryan*, 9 Bing. 333.

"But in an action for breach of marriage promise, a witness for the plaintiff was allowed to answer the question whether, living with the plaintiff and from an observation of her deportment, &c., he was of opinion that the plaintiff was sincerely attached to the defendant. *M'Kee v. Nelsou*, 4 Cowen's R. 355.

"In respect to matters which call for opinions founded on peculiar knowledge, it is proper for the court first to ascertain whether the witness be an expert, that is to say, skilled in the matter to which his opinion is desired. They may be satisfied on this question by examining the witness himself and others, as was done in *Mendum's Case* (6 Rand. 709, 710). The objection was, that the witness offered did not possess such a degree of skill and experience as a surgeon, as would warrant the court in taking his opinion. The evidence was that the witness had graduated as a surgeon at the university, where ample means of surgical instruction existed, that he had practiced medicine and surgery seventeen years in the country, had performed surgical operations sometimes with, and sometimes without the aid of others, though very seldom. It appeared that he stood high as a physician in his neighborhood, and was confided in as a surgeon, &c. Another surgeon was examined as to the witness's standing. The witness himself was in-

terrogated as to his particular practice, and though he had never actually inspected a stab made by a knife or dirk, he was received, upon his general knowledge and experience, to give his opinion whether the particular wound was made by one or the other.

"Professional books or books of science (*e. g.*, medical books), are not admissible as evidence, though experts may be asked their judgment and the grounds of it, which may, in some degree, be founded on books as a part of their general knowledge. *Collier v. Simpson*, 5 Carr. & Payne, 73.

"With regard to the various departments of knowledge, from which opinions may be received, and the extent to which they are admissible, and may be relied on, the cases furnish, though not a full and perfect, yet a considerable variety of illustration. In an action for negligently steering a ship, you may ask experienced nautical men whether certain acts amounted to negligence. *Malton v. Nesbit*, 1 Carr. & Payne, 70. They may state to what they think the cause of the accident is attributable; but they ought not to say they consider the fault on one side or the other. *Jameson v. Drinkald*, 12 Moore, 148, 157. On the trial, it became important to ascertain whether certain heaps of stones were put up, and certain trees were anciently marked, for the purpose of making them monuments of boundaries. The plaintiff called S. H., an experienced and skillful surveyor, who testified as to the appearance of the stones and trees. His opinion was then asked, whether the trees and stones were or were not boundaries. This was objected to by the defendant, on the ground that the witness ought to be confined to the statement of facts, leaving the jury to judge whether the trees and stones were or were not boundaries. The court held the opinion of the witness competent; and Parkèr, C. J., said: 'He being a practical surveyor, with long experience, would have acquired skill in determining whether marks on trees and piles of stones were intended as monuments of boundaries.' *Davis v. Mason*, 4 Pick. 156, 157, 158, 159. The opinion of an underwriter was held admissible, that the withholding certain communications was a material suppression. *Richards v. Murdock*, 10 Barn. & Cress. 527.

"On a question whether the testatrix was sane, the physicians were asked, whether, from the circumstances of the patient, and the symptoms they observed, they were capable of forming an opinion of the soundness of her mind; and if so, whether they thence concluded that her mind was sound or unsound; and in either case, they were required to state the circumstances or symptoms from which they drew their conclusions. *Hathorn v. King*, 8 Mass. R. 371. In a subsequent case, the court denied general evidence of physicians, that a man was, in their opinion, insane, they not stating any circumstance on which their opinions proceeded. *Dickenson v. Barber*, 9 Mass. R. 225. These cases are cited with approbation by Savage, C. J., in *Jefferson Ins. Co. v. Cothéal*, 7 Wend. 78.

"On trials for murder by poisoning, the opinions of physicians are a very usual, and indeed, an almost indispensable resource, in settling the question whether the deceased came to his death from that cause. The opinions of skillful and practical chemists, though they do not profess medical knowledge, it is presumed may also be resorted to. The rules, observations and experiments by which professional opinion should be guided in these cases, are very handsomely discussed in 2 Beck's Medical Jurisprudence, ch. 3 to 7, inclusive. There is also a title devoted to this subject in Macnally's Ev. 225 to 229, the whole of ch. 30. So far as this goes to legal doctrine, directing the judicial application of medical or chemical skill, it is valuable; but in guiding that skill, it is obviously deficient; and must be so, coming from any hand short of an *expert* himself. Smattering and quackery are sufficiently dangerous anywhere; they are peculiarly so in medical jurisprudence. We had occasion; through Mr. Evans (*ante*, note 324), to suggest rules for appreciating this kind of evidence, though the distinctions of the witness be perfectly incomprehensible to untutored minds. Mr. Macnally's book certainly puts forward some other precautions which are not without their use. We are not to receive such opinions implicitly in all cases. In trials for infanticide, the floating of the lungs in water was formerly held to be ground on which a surgeon might justify an opinion that the deceased infant was born alive; a test which Doctor Hunter afterwards held insufficient. Macnally, 329. But see 1 Beck's Med. Jurispr. 225, 226. While the testimonies of professional men of known skill and just estimation are affirmative, they are generally to be credited; whereas, when negative, their evidence does not amount to the disproof of a charge otherwise established by various and independent circumstances. The party being interested in the death, having made secret preparations of poison

Representation.

The defendant may prove, under the general issue, that the insured, or his agent, have misrepresented a material fact, collateral to the policy.(1) But a representation need not be strictly and literally correct, it is sufficient if it is substantially true,(2) or if it is made *bona fide*, and upon pro-

without probable motive, having, in other instances, brought the life of the deceased into danger, having discovered an expectation of the fatal event; that event having taken place suddenly, and without previous ill health; having endeavored to stifle inquiry by precipitately burying the body, and afterwards, on inspection, signs agreeing with poison being observed, though medical men will not positively affirm, and are not uniform in their opinions that the signs could not have been owing to any other cause; such cumulative strength of circumstantial evidence wrought the conviction of Captain Donnelly for murder, by the ministration of laurel water to Sir Theodosius Boughton. The conviction, however, did not give general satisfaction. The strong charge of Buller, J., and the evidence of the medical witnesses, were afterwards severely criticised in several publications, and among others, in the 'Theory of Presumptive Proof,' a treatise noticed by us *ante*, note 323. A leading witness, Doctor Hunter, thought the signs did not raise a suspicion; but Buller, J., applied the strong language usual on such occasions, to the other facts in in proof: 'circumstances cannot lie.' See Macnally, 329, 330, in connection with appendix to Phill. Ev. (Am. ed.) 1816. Two respectable surgeons also differed upon the question whether one Jackson died by poison, though the body was opened the morning after his death; one pertinaciously adhering to the hypothesis of poison, and the other to a decided bilious habit of Jackson, wrought upon by the sudden agitation consequent on his being brought to the bar to receive sentence of death for high treason. He there fell, and expired suddenly, while his counsel were arguing in arrest of judgment. Macnally, 330, *et seq.* A physician may, with propriety, be called to show the position, direction and extent of a wound, and the obstacle an instrument might meet with in its progress. But whether, in a certain relative position, and in a particular manner, or by a particular motion, certain muscular strength would be equal to the infliction of a certain wound, seems to be more properly a matter for the jury, upon the facts. Goodwin's Case, N. Y. Gen. Sess., March, 1820, Colden, Mayor, presiding, 5 C. H. Rec. 25, 26, 31. A surgeon may speak, as to the cause of the death; but he should not go farther, and pronounce upon the merits, that the prisoner has or has not been guilty of murder. Per Park, J., in *Jameson v. Drinkald*, 12 Moore, 157. And see per Savage, C. J., to the same effect, in *Jefferson Ins. Co. v. Cotheal*, 7 Wendell, 78." (See 3 Selden R. 537.)

(1) *NORR* 848.—It is no defence to an action on a policy, that a representation was made of the cargo with which the ship was to sail on a future day, although in fact that representation induced the defendant to sign the policy, unless the misrepresentation was fraudulently made, *Flinn v. Tobin*, 1 Mood. & Malk. 367. The contract between the parties is the policy, which is in writing, and cannot be varied by parol. If, however, fraud was practiced to induce the defendant to underwrite, that will avoid the policy. *Id.* * * See *post*, note 850; 2 *Duer on Ins.* 664. * *

To constitute a representation, there should be an affirmation or denial of some fact; or an allegation which would plainly lead to the same conclusion. *Livingston v. The Maryland Ins. Co.*, 7 Cranch, 506.

It is said that there is always an implied representation on the part of the ship owner, that the ship's documents contain a true statement of the ownership, at least where she sails under a register. Per Story, J., in *Ohl v. Eagle Ins. Co.*, 4 Mason, 172. But a condition, or an implied undertaking, not expressed in the policy, may be superseded by a verbal or written statement. Or if the representation is referred to in the policy, it may be taken into consideration for the purpose of ascertaining the intention of the parties. Per Wilde, J., in *Parks v. General Int. Ins. Co.*, 5 Pick. 34. * * See *ante*, note 845, and *post*, note 850. * *

(2) *Pawson v. Watson*, Cowp. 785.

NORR 849.—*Delonguemere v. The Tradesmen Ins. Co.*, 2 Hall, 589. A substantial compli-

bable expectation.(1) A representation made to the underwriters at the time when their names are put down on the slip, will be binding on the insured, unless it be qualified or withdrawn before the execution of the policy.(2)

ance will be sufficient, if the representation is free from fraud. And a representation, to have the effect of a warranty, must be contained in the deed or writing itself; and must be part of the contract, and appear on the face of the policy. Per Jones, Ch. J., in *Id.* * * See the authorities cited *ante*, note 844. * *

In a fire policy, a building was described as "*a frame house filled in with brick*;" held, that it was competent for the assured to prove a *usage* as between insurers and insured, that a house filled in with brick front and rear, and supported on the one side by a wall of an adjoining house filled in with brick, and on the other side by the brick wall of an adjoining house, was considered "as a frame house filled in with brick," within the meaning of the policy. *Fowler v. The Aetna Fire Ins. Co.*, 7 Wend. 270. * * See *Snyder v. The Farmers' Ins. & L. Co.*, 13 Wend. 92; *S. C.*, 16 Id. 481; and the other cases cited *ante*, note 840. * * (See also *Mead v. The Northwestern Ins. Co.*, 3 Selden R. 530.)

(1) *Bowden v. Vaughan*, 10 East, 415.

(When the representations of the assured are incorporated into the contract, they constitute a warranty, which must be substantially true. *Lindsey v. Union M. F. Ins. Co.*, 3 R. I. 157. But where his representations are written down by the agent of the company, some of them being omitted as immaterial, it has been held that the insured is not concluded by the description. *Howard Ins. Co. v. Bruner*, 23 Penn. State R. 50. A description given by the assured and incorporated into the policy relating to the risk, is a warranty; and a warranty is in the nature of a condition precedent, and must be fulfilled before an action can be maintained against the insurer. 6 Cowen 673; *Wall v. The East River Ins. Co.*, 3 Selden R. 370; *Wood v. The Hartford Ins. Co.*, 13 Conn. 544; 3 Comst. 122; *Billings v. Tolland Ins. Co.*, 20 Conn. R. 139.

(2) See *Edwards v. Footner*, 1 Campb. 530; *Dawson v. Atty.*, 7 East, 367.

NOTE 850.—Generally, the terms of the policy are to be taken as the evidence of the contract; and if they are explicit, all proposals made, or conversation had, before the subscription, inconsistent therewith, are to be considered as waived, according to a well known construction of written contracts. Per Wilde, J., in *Parks v. General Int. Ins. Co.*, 5 Pick. 34. When the terms of the contract are explicit, they cannot be varied by the letter of the plaintiff, adduced to show his sense of the contract, written with a view to obtain an indemnity from another quarter. *Weston, J.*, in *Levy v. Merrill*, 4 Greenl. R. 180.

* * Mr. Duer (2 Duer on Ins. 658; *Id.* 711, and the proofs and illustrations) lays it down as a universal rule, that evidence of a positive representation is always competent, where its terms do not plainly contradict those of the policy; and Chancellor Kent expressly concurs in his opinion. 3 Kent C. (6th ed.) 284, note a. In *Alston v. The Mech. M. Ins. Co.* (4 Hill, 330), Chancellor Walworth laid it down, that parol evidence of what passed between the insured and the underwriters, at and previous to the delivery of the policy, is not admissible for the purpose of adding to or varying its terms, and that the insured cannot avail himself of a representation not inserted in the policy; and the Court of Errors (*Id.*) unanimously reversed the judgment of the Supreme Court (*S. C.*, 1 Hill, 510), which proceeded upon the opposite doctrine. *S. P.*, *Jennings v. Chango M. Ins. Co.*, 2 Denio, 75; *Bryant v. Ocean Ins. Co.*, 22 Pick. 209; *Holmes v. Charlestown M. Ins. Co.*, 10 Metc. 211. And see the text, Vol. II, and notes. As to the competency, generally, of extrinsic proof to explain or vary written contracts, see the text, Vol. II, and the notes; and 1 Gr. Ev. §§ 275—305. * *

(When the representation or engagement of the assured is inserted in the policy, parol evidence is not admissible for the purpose of adding to and thereby varying the terms of the written instrument (4 Hill R. 330); and the same has been recently held by the Court of Appeals in a case not yet reported. *Contra*, *Howard Ins. Co. v. Bruner*, 23 Penn. State R. 50.)

Representations to the first underwriters.

In an action against a second, or other subsequent underwriter, it has been the practice to admit evidence of representations made to the first underwriter, on the ground that the others give credit to the representations made to the first, and have faith in his judgment.(1) However, the rule has never been extended to any underwriter except the first; and the admissibility of the representations, even in that instance, has been thought to be founded more on precedent than on reason.(2) Lord Ellenborough has said upon this subject:(3) "Whenever the question comes distinctly before the court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark, that the proposition is to be received with great qualification. It may depend upon the time and circumstances, under which that communication was made; but on the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication made to him was virtually made to all the subsequent underwriters. But the question is of such a magnitude, that, if it should arise, I should direct it to be put on the record, in order that it might be submitted to the consideration of all the judges."

Order of names in slip.

In the case of *Marsden v. Reid*,(4) as the name of the underwriter, to whom the broker had made certain representations concerning the ship, stood in the policy after the name of the defendant, it was proposed, on the part of the defendant to give in evidence a separate slip of paper, which, as it was said, contained the names of the underwriters in the true order in which they had been originally applied to, and in which they had agreed to sign, and this order was different from that on the policy. This paper was tendered in evidence, to show the order in which the underwriters had in truth engaged, for the purpose of introducing evidence of a false representation made to the first underwriter. But Lord Ellenborough, C. J., at the trial, and the court afterwards, upon the discussion of the rule for setting aside the verdict, were of opinion, that the paper in question could not be received in evidence for this purpose, on account of the want of a stamp; the effect of the evidence being to show, through the medium of a writing, that the contract, entered into between these parties, was different from that which it appeared to be upon the face of the policy itself, inasmuch as the true contract was to be evidenced

(1) *Pawson v. Watson*, Cowp. 789; 3 East, 573; *Barber v. Fletcher*, Doug. 305; *Stackpole v. Simon*, MS. case reported in *Par's System of Insurance*, p. 648 (last ed.).

(2) See *Brine v. Featherstone*, 4 Taunt. 871.

(3) *Forrester v. Pigou*, 1 Maule & Selw. 13. And see 3 East, 573.

(4) 3 East, 573.

by the order in which the underwriters had engaged, as appeared by the paper produced.(1)

Seaworthiness.

Another ground of defence is, that the ship insured was not seaworthy at the commencement of the risk; for the seaworthiness is an implied condition or warranty in every policy.(2) If the inability of the ship

(1) NOTE 851.—Insurance was effected upon a ship and her freight by an agent of the assured, who delivered to the insurance broker a written memorandum, that the assured was the owner of one half the ship and freight, and that the policy was to take effect, if no insurance were made by the owner elsewhere; this memorandum not being inserted in the policy or annexed to it, was held not to be evidence to control the contract of the parties. *Higginson v. Dall*, 13 Mass. R. 96. The sole object for which the paper was offered, was to avoid the policy on account of an event specified in the paper; in fact to make the policy conditional, when by its terms it was absolute, thereby in effect annulling the contract by extrinsic matter proved by parol, and thus defeating the intention of the parties, as expressed in the instrument made to carry that intention into effect. In the subsequent case of *Parks v. General Int. Ins. Co.* (5 Pick. 34), the learned judge who delivered the judgment of the court observes: "Generally, no doubt, the terms of the policy are to be taken as the evidence of the contract; and if they are explicit, all proposals made or conversation had, before the subscription, inconsistent therewith, are to be considered as waived; according to a well known construction of written contracts. But a condition, or an implied undertaking, not expressed in the policy, may be superseded by a verbal or written statement. Or if the representation is referred to in the policy, it may be taken into consideration for the purpose of ascertaining the intention of the parties." So, it has been held that a verbal representation, made at the time the policy was effected, was not admissible; the evidence not being offered to show any fraud in the transaction. *New York Gas Light Co. v. Mechanics' Fire Ins. Co.*, 2 Hall, 108. And where the policy expressly assumed all risks contained in the regular policies of insurance; held, that loss by capture being one of the usual risks, the defendants could not introduce a letter from the plaintiffs for the purpose of showing that the policy covered only the risk of the sea; the court saying: "We are not at liberty to vary a contract, the terms of which are thus explicit, from any consideration drawn from the amount of the premium, or from the letter of the assured to their correspondent, adduced to show their sense of the contract, written with a view to obtain indemnity from another quarter." *Levy v. Merrill*, 4 Greenl. R. 180. * * See *ante*, note 852. * *

(2) NOTE 852.—*Rich v. Parker*, 7 T. R. 709; *Shore v. Bental*, 7 Barn. & Cress. 798; *Wedderburn v. Bell*, 1 Campb. 1. Sails, anchors, a sufficient crew, a master of competent skill and ability, to navigate the ship, and if she sail for a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board. *Smith on Mer. L. L. Lib.* p. 141 (No. 51.)

Seaworthiness is a term which always refers to the service in which the ship is engaged; therefore, a vessel may be seaworthy if designed for one service, which would not be if designed for another. *Hucks v. Thornton*, 1 Holt, 30. Although the general rule is, that if the ship be not seaworthy at the commencement of the voyage the policy will be avoided; yet there appears to be an exception in cases where the unseaworthiness results from a mistake or accident, which is remedied as soon as it is discovered, and before any loss has been occasioned by it. *Weir v. Aberdeen*, 2 Barn. & Adol. 320.

* * Where a vessel is seaworthy at the time of the commencement of the risk, and having put into port for repairs without repairing an unsuspected injury to her bottom, whereby she was rendered unseaworthy, the underwriters were held to be liable. *Starbuck v. New Engl. M. Ins. Co.*, 19 Pick. 198. Where the warranty of seaworthiness is complied with, an omission to refit properly at an intermediate port, if the loss is not caused by the omission, does not discharge the insurer. *Am. Ins. Co. v. Ogden*, 20 Wend. 287. To be seaworthy, a vessel must have a mate competent to act as master, in case of necessity. *Copeland v. N. E. Marine Ins. Co.*, 2 Mete-

to perform the voyage becomes evident immediately after leaving the port, or in a short time after the risk commences, without any apparent cause of injury, the presumption is, that this inability has arisen from causes existing before her setting sail on her intended voyage, and that the ship was not then seaworthy: and the burden of proof in such a case, is thrown upon the assured, to show that the inability arose from causes subsequent to the commencement of the voyage.(1) The defendant may also show, that the vessel was not equipped with proper documents, or with a competent crew, according to the circumstances of the navigation.(2) On the question of seaworthiness, ship builders

432. The stowing of all the water on deck does not render a vessel unseaworthy, or change the burden of proof as to her seaworthiness. *Deshon v. March Ins. Co.*, 11 Mete. 199. A vessel is presumed to be *seaworthy*, and the burden is upon the insurer to prove the contrary. *Martin v. Fishing Ins. Co.*, 20 Pick. 380. And if the underwriter admits in the policy, that she is seaworthy, he is estopped to disprove it. *Parfitt v. Thompson*, 13 Mees. & Welsb. 392. And see *Holmes v. Charlestown M. Ins. Co.*, 10 Mete. 21, where the insured was concluded, by his application, as to the value of a building; the amount of risk which the company were authorized to take being limited by statute. * *

(To be seaworthy, a steamer must have its machinery in good order. *Myers v. Girard Ins. Co.*, 26 Penn. State R. 192. On a time policy, there is no implied warranty of present or continued seaworthiness. *Thompson v. Hopper*, 34 Eng. Law & Eq. 266, 277; 20 Wend. 287.)

(1) *Watson v. Clark*, 1 Dow, 344; *Douglass v. Scougal*, 4 Dow, 269. And see *Annan v. Woodman*, 3 Taunt. 299; *Parker v. Potts*, 3 Dow, 23.

NOTE 853.—*Wallace v. Depau*, 2 Bay R. 503; *Talcot v. Marine Ins. Co.*, 2 John. R. 124; *Prescott v. Union Ins. Co.*, 1 Whar. 399. In the latter case, it was held, that the want of seaworthiness appearing by the evidence as existing at the commencement of the voyage, was a defence, although the vessel shall reach her port of destination. And it appearing in evidence that the vessel from her departure, with constant light breezes, leaked; that the leak continued increasing for nine days, so that the hands were obliged to pump, at first every hour, then every half hour, and then every fifteen minutes; afterwards a storm commenced, and the vessel labored much, and shipped great quantities of water, till they had to pump every five minutes, and she continued very leaky, damaging the cargo, until her arrival. No evidence was given by the insurer to account for this state of the ship; there was no evidence of wind or wave till the ninth day; held, that the inevitable presumption was, that she had an inherent defect at the time of sailing; and this was the *legal presumption*, which the court in charging the jury, were bound to state on the facts. *Id.*

* * But see the cases cited in the next preceding note. * *

In considering the evidence of seaworthiness, where a rational ground is laid, for the disability of the vessel to perform the voyage, by proof of severe gales to which she was exposed on the voyage: the burden of proof is upon the underwriters, to show satisfactorily that she was not seaworthy. *Watson v. Insurance Co. of North America*, 2 Wash. C. C. R. 480.

(2) *Clifford v. Hunter*, 2 Ry. & Mo. 104; *Munro v. Vandam*, 1 Park Ins. 333; *Douglass v. Scougal*, 4 Dow, 269; *Watt v. Morris*, 1 Dow, 32; *Wilkie v. Geddes*, 3 Dow, 57; *Forshaw v. Chabert*, 3 Brod. & Bing. 158; *Hucks v. Thornton*, 1 Holt's C. 30; *Bell v. Carstairs*, 14 East, 374; *Tate v. Levy*, Id. 481; *Christie v. Secretan*, 8 T. R. 192; *Law v. Hollingworth*, 7 T. R. 160; *Legg v. Farmer*, Id. 186; *Steel v. Lacy*, 3 Taunt. 285. See *Bush v. Royal Ex. Ass.*, 2 Barn. & Ald. 73, that the negligent absence of the crew is no breach of the implied warranty. And *Weir v. Aberdeen*, 2 Barn. & Ald. 320, that the defect of seaworthiness may be remedied, and the policy not vacated.

NOTE 854.—A non-compliance with the statute made for the benefit of the crew and passengers; as, that the vessel shall have a certain quantity of water, &c., under a penalty, will not render the vessel unseaworthy on this account. *Warren v. Manufacturers' Ins. Co.*, 13

may be admitted to state their opinion, on examining a survey(1) taken by others, although taken in their absence: the subject being a matter of skill and science.(2) A memorandum waiving the warranty of seaworthiness does not require a stamp.(3)

Illegal voyage. Deviation.

Other grounds of defence which may be proved under the general issue, are that the voyage, the trading, or insurance were prohibited by the laws of the country.(4) And if there be any illegality in the commencement

Pick. 518. The contract is founded on a transaction which is prohibited for the benefit of particular individuals, and therefore is only voidable by the party for whose benefit the prohibition is introduced.

Fontaine v. The Phoenix Ins. Co., 10 John. R. 58; *Treadwell v. Union Ins. Co.*, 6 Cowen, 270. If, in the course of the voyage, the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased. *Law v. Hollingsworth*, 7 T. R. 160. But if a vessel sails to a port where the establishment is such that it is not always possible to procure the assistance of a pilot before the vessel enters into the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all that it requires in such a case is, that the master use all reasonable efforts to obtain one. Per Parke, J., in *Philips v. Headlam*, 2 Barn. & Adol. 380. A ship insured at and from L. to Sierra Leone, arrived off the river Sierra Leone, where there was a regular establishment of pilots, about three o'clock in the evening. The captain hoisted a signal for a pilot; but no pilot having come on board, about ten o'clock at night, he attempted to enter the river without one, and in so doing the ship took the ground, and was lost. The judge left it to the jury whether the captain, in entering without a pilot, did what a prudent man ought to have done under the circumstances. The jury were of that opinion, and found for the plaintiff. On a motion for a new trial on the ground that the verdict was against evidence; held, that the underwriters were liable, and would have been so, although the captain had been wrong in attempting to enter the port without a pilot; he being a person of competent skill, having used due diligence to obtain a pilot, and having exercised his discretion *bona fide* under the circumstances. Id.

(1) NOTE 855.—A survey of a ship made in a foreign port as to her seaworthiness, is an *ex parte* document, and not evidence in chief on the part of the insured, unless called for by the defendant. *Saltus v. The Commercial Ins. Co.*, 10 John. R. 58. As to the admissibility and effect of a survey made in a foreign port, when authorized by the policy, *vide Dorr v. The Pacific Ins. Co.*, 7 Wheat. Rep. 581; *Steinmetz v. U. Ins. Co.*, 2 Serg. & Rawle, 293. The survey made after a disaster in a foreign port, is not evidence of the facts stated in it; but only of the fact that the survey was made. *Watson v. The Ins. Co. of North America*, 2 Wash. C. C. Rep. 152.

(2) *Beckwith v. Sydebotham*, 1 Campb. 117; *Thornton v. Royal Ex. Ass.*, Peake's C. 26; Vol. II, Chap. 10.

(3) *Weir v. Aberdeen*, 2 Barn. & Ald. 325. And see *Hubbard v. Jackson*, 4 Taunt. 174.

(4) NOTE 856.—A distinction is said to exist between cases in which the contract violates a law designed for the protection of the public, and those in which it violates a law merely designed for the protection of the revenue; and that in the former cases only is the contract void. *Brown v. Duncan*, 10 Barn. & Cress. 93. But it seems doubtful whether this distinction can be sustained. In *Wetherill v. Jones* (3 Barn. & Adol. 223), Lord Tenterden says: "where a contract which a party seeks to enforce, is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books, in which an action on the contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. In *De Begnis v. Armistead* (10 Bing. 107), held, that the

of the intregal voyage, an insurance effected on the latter part of it, which, taken by itself, would be legal, is void.(1) But, it seems, that it is not an objection to a policy that it is made in contravention of the revenue laws of a foreign country.(2) The defendant will be discharged, on proof that the ship has deviated before the loss; for it is an implied condition, that the ship shall pursue the most direct course from the point of starting, to the point of destination.(3) But a mere intention to deviate, adopted after the sail-

plaintiff, being participant in the concern, could not recover money at the request of the defendant, in the conduct of an unlicensed theatre. See text, and note.

(Where a policy contains a clause of insurance against barratry by master or mariners, and the master, without the knowledge of the insured, attempts an illicit trade of smuggling, the insurer is liable, though the policy contains a warranty by the assured against illicit trade. *The American Insurance Co. v. Dunham*, 15 Wend. 9.)

(1) *Wilson v. Marryatt*, 8 T. R. 31.

(2) By *Lawrence, J.*, 8 T. R. 197.

NOTE 857.—If the vessel have on board an enemy's license, the policy is thereby avoided. *Colquhoun v. The N. Y. F. Ins. Co.*, 15 John. R. 352; *Craig v. The United States Ins. Co.*, *Peters' C. C. R.* 410. But in a case where the voyage is lawful, being to a neutral port, the having on board a British license, was held not sufficient to vitiate the policy; the license not being used for any unlawful purpose. *Haywood v. Blake*, 12 Mass. R. 176. The decisions in New York and Massachusetts seem to be directly opposed. See, also, *Perkins v. N. E. Mar. Ins. Co.*, 12 Id. 214. The risk of condemnation for a breach of the trade laws of another country, though a lawful contract, is not within the policy, unless the voyage be to a place where no legal trade can be carried on. *Parker v. Jones*, 13 Mass. R. 173; *Gardiner v. Smith*, 1 John. Cas. 141. As to the effect of an enemy's license upon a contract of charter party, see *Ogden v. Barker*, 18 John. R. 87. Another ground of defence in an action on a policy, is the commission of some act prohibited by the law of nations; as the rescue of a neutral ship, detained for an alleged justifiable cause, from a belligerent. *McLellan v. The Maine F. & M. Ins. Co.*, 12 Mass. R. 245. See *Patterson v. Powell*, 9 Bing. 320, where an engagement in consideration of forty guineas, to pay £100, in case Brazilian shares should be done at a certain sum on a certain day, subscribed by several persons, each for themselves; held, a policy of insurance, and void under 14 Geo. III, chap. 48.

And the voyage is not illegal by reason of the non-compliance with a statute made for the benefit of the crew and passengers. *Warren v. Manufacturers' Ins. Co.*, 13 Pick. 518. So, where an act is enjoined under a penalty, and a contract is remotely and incidentally connected with the omission to do and perform the act enjoined, the contract is not necessarily void. Per *Wilde, J.*, in *Id.* There is nothing illegal, so as to void a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy, to which there is no intention of going; although the statute, in such case, gives a penalty. *Id.*; *Lord Ellenborough*, in *Atkinson v. Abbott*, 11 East, 135; *Ward v. Ward*, 13 Mass. R. 539.

(3) A ship must not touch at ports out of the order in which they are named in the policy. *Beaton v. Hayworth*, 6 T. R. 531. And a liberty to trade at ports is confined to a trading subordinate to the voyage. *Solly v. Whitmore*, 5 B. & Ald. 45; *Bottomly v. Bovill*, *Id.* 210.

NOTE 858.—What is a deviation, and when it is or is not justifiable, *vide* *Gillert v. Hallett*, 2 John. Cas. 296; *Lawrence v. Ocean Ins. Co.*, 11 John. R. 41; *United States v. The Pan Shearman*, *Pet.* 98; *Robinson v. The M. Ins. Co. of N. Y.*, 2 John. R. 89; 14 John. R. 315; *Snydam v. The M. Ins. Co.*, 2 Id. 138; *Laroche v. Oswin*, 2 East, 131; *Voe v. Robinson*, 9 John. R. 192; *Robertson v. The Col. Ins. Co.*, 8 Id. 491; *Kettle v. Wiggin*, 13 Mass. R. 68; *Ward v. Wood*, 13 Id. 539; *Duerhagen v. The U. States Ins. Co.*, 2 Serg. & Rawle, 309; *Hammond v. Reade*, 4 Barn. & Ald. 72. Where a vessel, having a letter of marque, but insured only for a mercantile adventure, makes a prize, it is a deviation. *Wiggin v. Amory*, 13 Mass. R. 118; *Wiggin v. Boardman*, 14 Id. 12. As to deviation by delay in commencing the voyage, *vide* *Earl v. Shaw*

ing of the vessel, and not carried into effect, does not vitiate the policy.(1)

An underwriter is not an incompetent witness, in an action against another underwriter, merely from the circumstance of his having subscribed his name on the same policy.(2) If he has entered into a consolidation rule, he has an interest in the result; and that will disqualify him as a witness. Or if he has chosen to pay his debt beforehand, upon a condition to be determined by the event of the suit, he becomes as much interested in the event, as if he were a party to a consolidation rule.(3) In an

1 John. Cas. 313. As to the distinction between an intended deviation, and a change of the voyage, *vide* Lawrence v. The Ocean Ins. Co., 11 John. R. 241. As to deviation to avoid capture, *vide* Reade v. The Com. Ins. Co., 3 John. R. 325; 10 Id. 83; Neilson v. The Columbian Ins. Co., 1 John. R. 301. The memorandum permitting a deviation to a particular place, without prejudice to the insurance, waives nothing more than the deviation mentioned. Gidden v. The Manufacturers' Ins. Co., 1 Sum. R. 232.

* * "The ordinary cases of necessity, which justify a deviation, are, stress of weather; want of necessary repairs, or men; to join convoy; to succor ships in distress; to avoid capture, or detention; sickness of the captain or crew; mutiny, and the like." 2 Gr. Ev., § 403, and note. And see 2 Phil. on Ins., 480, 576; 3 Kent's C. (6th ed.), 312-318. A deviation does not apply to a policy on time, for it has no prescribed track. Union Ins. Co. v. Tysen, 3 Hill, 118. Putting into port, to put a vessel in good trim, if it could not be conveniently done at sea, is not a deviation. Chase v. Eagle Ins. Co., 5 Pick. 51. A vessel driven by stress of weather, or by superior force, into a port of necessity, is still *at sea*, in reference to her port of departure, destination, and discharge. Per Chancellor Walworth, in Hutton v. The American Ins. Co., 7 Hill, 321. A deviation to save life does not discharge the insurer. The Henry Ewbank, 1 Sumner, 400; The Schooner Boston and cargo, Id. 328, S. P. And in William v. Box of Bullion (in the United States District Court of Massachusetts, 1843), it was held not to be an injurious delay to deviate so as to speak at sea to a vessel with a signal of distress, or to delay three hours to take in shipwrecked mariners. 6 Law Rep. 363. If a vessel be lost in an attempt to take another in tow, the insurer is discharged. Hermann v. Western M. & F. Ins. Co., 15 Louis. R. 516. And taking a vessel or boat in tow on the Mississippi, was held to be a deviation, and to discharge the insurers of the towing boat. Stewart v. Tennessee M. & F. Ins. Co., 1 Humph. 242; Natchez Ins. Co. v. Stanton, 2 Smedes & Marsh. Miss. R. 340. * *

(A question of deviation cannot arise on a time policy covering all or any voyages. Keeler v. Firemen's Ins. Co., 3 Hill R. 250. Where there is a general usage to stop at a certain port for more men, it is not a deviation to stop there. 38 Maine, 414. See 2 Paine C. C. 82.)

(1) Kewley v. Ryan, 2 H. Blac. 348.

(2) Bent v. Baker, 3 T. R. 27; Akers v. Thornton, 1 Esp. N. P. C. 414.

NOTE 859.—Upon the same principle, one seaman may be a witness for another, in any suit respecting the same voyage, if not interested in the event of the suit. Spurr v. Pearson, Mason, 104. A witness who has the legal title to property, in which the assured has an equitable interest, is a competent witness. Thus, the witness advanced the money with which the plaintiff purchased the cargo; the legal title of it was in the witness; the bill of lading, and all other documents necessary for the voyage, were in his name: but the witness for defendants, by whom the witness's interest was to be proved, testified that he stated the property to be the plaintiff's; held, that it did not appear that he was directly interested in the event of the suit; for his debt will remain against the plaintiff, notwithstanding there may be no recovery upon this policy. Locke v. North American Ins. Co., 13 Mass. 61. In such case, the witness, having the legal title, might insure his interest: and the plaintiff having an equitable interest, might insure that. Id.

(3) Forrester v. Pigou, 1 Maule & Sel. 9.

action on a policy of insurance on goods, the owner(1) of the vessel on board of which the goods were put, is not a competent witness for the plaintiff to prove the seaworthiness of the ship;(2) for he will be liable to an action at the suit of the plaintiff, if the plaintiff fail, and the verdict would be evidence against him in such action, as to the quantum of damages. For the same reason the captain of the vessel is not a competent witness for the defendant, the underwriter, to disprove the right of barratry.(3) When the only question at issue relates to the original destination of the ship, the captain is competent to give evidence on the point, though he is part owner of the ship.(4) He is also competent to prove the loss of the ship.(5) One who is jointly interested in the property, whether at the time of effecting the policy, or afterwards, is an incompetent witness for the plaintiff.(6)

(1) NOTE 860.—A part owner of a ship is competent to prove the loss, and other facts, although the policy was effected in his name and all others interested; it appearing that he had no interest in the event of the cause—the policy being in the name of the witness, his intention being to insure the goods on board. *Ruan v. Gardner*, 1 Wash. C. C. R. 145. The action was properly brought in the name of the principal, though not specially mentioned; the policy being in the usual form, in the name of the witness, and of all other persons having interest. See also next note.

(2) *Rothero v. Elton*, Peake N. P. C. 84. Upon the same principle as *Green v. N. R. Comp.*, 4 T. R. 589, and other cases cited in Vol. I.

(3) *Bird v. Thompson*, 1 Esp. N. P. C. 339. And see *De Symonds v. De la Cour*, 2 N. R. 374; *Taylor v. M'Vicar*, 6 Esp. N. P. C. 27.

NOTE 861.—*Case v. Reeve*, 14 John. R. 82. But a stevedore, who was employed by the master to stow the cargo, was held to be competent to prove that it was properly stowed; for in an action by the assured against the underwriters, he gains or loses nothing by the event of the suit, nor can the plaintiffs' recovery release him from his responsibility for any negligence committed by him as the agent of the master. *Rankin v. The Amer. Ins. Co. of N. Y.*, 1 Hall, 619. The master was no party to the suit, and the fact of negligence, in the loading of the cargo, was not directly in issue.

A creditor of the assured, who has received an order for the amount of his debt, to be paid out of the moneys to be recovered on the policies on which suits were brought, was held to be an incompetent witness, although the order was not accepted; but the witness said "he expected to be paid accordingly." *Peyton v. Delafield*, 1 Cal. R. 363.

An agent to procure an insurance, is a competent witness, to prove the order given to the broker, and what representations were made. *Mackay v. Rhinelander*, 1 John. Cas. 408.

The principle of the decision in *Ruan v. Gardner* (1 Wash. C. C. R. 141), cited in last note, is questioned in *Hicks v. Fitzsimmons* (Id. 279, u. b). The former, admitted a part owner of a ship, who effected an insurance in his own name on goods on board, to testify; and the latter admitted the captain to testify that at the request of the plaintiff, he put two of the bags, containing six hundred dollars, in his chest, in the cabin, and the residue in the hold of the vessel, under the ballast; and in the course of the voyage, he was boarded by a French privateer; and went on board the latter; and the privateersmen went on board his ship, returned several times in the boat, to the privateer, with articles from the vessel. On his return the bags of dollars were missing.

(4) *De Symonds v. De la Cour*, 2 New Rep. 374. See Vol. I, Chap. 5, Sects. 4, 5, 6.

(5) *Lock v. Hayton*, Fortes. 246.

(6) *De Symonds v. Shedden*, 2 Bos. & Pul. 155; *Perchard v. Whitmore*, Id. n.

NOTE 862.—A, B, C. and D., employed a broker to effect a policy of insurance on goods on

Captain's protest.

A protest by the captain of the ship is not admissible in chief, as evidence of the facts there stated.(1) Nor can it be received as an admission of those facts, merely on the ground of having been shown by the broker to the defendant, the underwriter.(2) If the protest had been adopted by the plaintiff as his own statement, it will of course be evidence against him on the footing of an admission; or it may be admitted in evidence, for the purpose of contradicting the statement of the captain, and so to discredit his testimony. The certificate of a British vice-consul abroad, under whose inspection damaged goods were sold according to the law of the country, cannot be admitted in evidence to prove the amount of damage.(3) Neither is the certificate of an agent at Lloyd's, resident abroad, admissible for the like purpose, although the defendant be a subscriber to Lloyd's.(4) For

board a certain vessel, and upon a loss happening, an action was brought in the broker's name against the underwriters. A's evidence being necessary to the maintenance of the action, he, in order to render himself competent, executes a release to the broker for a nominal consideration, of all liability to him for the money to be recovered in the action; and after action brought, he conveys all his interest in the policy to L. & R. for a nominal consideration, having, with his co-assured, previously executed a bond of indemnity to the broker for the costs of the action; held, on error, that A. was still liable for costs to the attorney who brought the action, and was therefore an incompetent witness. *Bell v. Smith*, 7 D. & Ry. 846. But where the witness was not the *general agent* of the plaintiff, nor in any way authorized or requested to effect the insurance: held, that he was a competent witness although his name appeared in the policy, which purported to be made by the plaintiff for account of himself or witness, or J. M. and son and the plaintiff; it appearing that his name was inserted in the policy through want of correct information; and he being also released. *Steinback v. Rhinelander*, 3 John. Cas. 269.

(1) NOTE 863.—*Bird v. Hempstead*, 1 Day, 91.

The protest was held to be good evidence of the tempestuous weather which compelled the vessel to deviate. *Campbell v. Williamson*, 2 Bay, 237. Though the master cannot give his own protest in evidence to excuse himself in throwing goods overboard in an action brought against him. *Miller v. Ireland*, 1 Tayl. R. 308.

The protest of the captain and crew, has been held to be inadmissible to prove the *cause* of the loss or damage. *Doherty v. Farris*, 2 Yerg. R. 73. "From what is said in the reports of Pennsylvania upon this subject, it may be collected, that a protest there is evidence for the insurer, if made at the first port recently after arriving there, by the captain and a majority of the crew, before a notary public, or for want of one, before a magistrate." 1 Dall. R. 317; 2 Id. 196. But in the English courts it is no evidence at all for the insurer. 7 T. R. 154. It is to be delivered to the owner of the goods or the insured; hence he may be informed of the circumstances, and be enabled to determine whether he be entitled to his action; and also who were the persons that composed the crew; and also of the place where the vessel first arrived; and may there inquire into the circumstances, and get evidence as well as examine the crew. The owner of the goods must show it to the defendant, if required, whence he too may receive the like information. Per Haywood, J., in *Doherty v. Farris*, *supra*.

By the law merchant, the captain must protest, on arriving at a port, against damages happening in a voyage thereto, but such protest is not evidence to charge the underwriters upon their policy. *Patterson v. Maryland Ins. Co.*, 3 Har. & John. 71. They are not good evidence, unless in the event of the death of the persons making them. *Peck v. Gale*, 3 Miller's R. 324.

(2) *Senat v. Potter*, 7 T. R. 158; *Christian v. Combe*, 2 Esp. 489.

(3) *Waldron v. Coombe*, 3 Taunt. 162.

(4) *Drake v. Marryatt*, 1 B. & C. 473. And see *infra*, p. 291.

the authority of the agent at Lloyd's extends only to the facilitating the settlement of a loss or average, and not the settling of it himself.(1)

CHAPTER III.

OF EVIDENCE IN AN ACTION IN THE NATURE OF ASSUMPSIT FOR USE AND OCCUPATION.

THE action for use and occupation affords the most convenient remedy for the recovery of rents, where the demise is not by deed. At common law, difficulties frequently occurred in recovering in this form of action; for wherever there had been a parol demise, upon which a certain rent was reserved, the courts of law looked upon the contract as one respecting the realty, and held, that the action of assumpsit to recover the reserved rent could not be maintained.(2) But this difficulty has been removed by the statute 11 G. II, c. 19, § 14, which enacts, that, where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the lands or hereditaments held or occupied for the defendant, in an action on the case for the use and occupation; and if on the trial of such action, any parol demise, or agreement not by deed, shall appear in evidence, reserving a certain rent, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of the damages to be recovered.

The statute expressly excepts cases in which there has been a demise or agreement by deed.(3) This has been understood as applying only to

(1) NOTE 864.—Although a plaintiff declares for a total loss and fails to recover; yet he may recover according to his case; and in a case where the usual counts are added, he may have judgment for the premium and interest thereon. *Waddington v. Unit. Ins. Co.*, 17 John. R. 23; *Hendricks v. The Commercial Ins. Co.*, 8 Id. 1; *Robertson v. The Colum. Ins. Co.*, Id. 491.

Consolidation.—Where actions against underwriters have been consolidated by rule of court, and the defendant has obtained a verdict in one, the court will not restrain the plaintiff from trying a second cause, included in the same rule, till the costs of the first are paid. *Doyle v. Douglas*, 4 Barn. & Adol. 544. Though all the defendants are bound to abide by the verdict in that single action, the plaintiff is not so. Id. However, if he proceed in a second action without leave of the court, he will not be allowed the benefit of the terms imposed on the defendants by the consolidation rule.

(2) Roll. Abr. 7, (o) pl. i; *Brett v. Read*, Cro. Car. 343; *Dartnel v. Morgan*, Cro. Jac. 598.

(3) NOTE 865.—*Vide* *Codman v. Jenkins*, 14 Mass. R. 93. The statute giving an action for use and occupation, seems to apply only to the case of a demise, and where there exists the relation of landlord and tenant founded on some agreement creating that relation; and if a person enters under a contract for a deed, that relation does not exist; and on his refusing to perform the contract, he becomes a trespasser, and an action for mesne profits is the proper remedy. *Smith v. Stewart*, 6 John. R. 46. See *Pott v. Leshner*, 1 Yeates' R. 576.

* * Where a tenant under a demise for a year or more, holds over, the landlord may elect to treat him as a trespasser, or sue him for use and occupation: but the tenant has no such elec-

such deeds as operate by way of present demise.(1) The question whether an instrument is to be considered as equivalent to a present demise, or

tion, nor can he make himself a trespasser by a previous notice to the landlord that he will not occupy as *tenant* beyond his term. *Conway v. Starkweather*, 1 Denio, 113. * *

Where there is a covenant to pay rent so long as defendant should occupy the premises, and an express promise made at the same time in writing, not under seal, to pay the rent; held, that the action for use and occupation could not be sustained; the promise was merged in the covenant. *Hawkes v. Younge*, 6 N. Hamp. 300.

* * The New York statute (1 R. S. 748, § 26), like the English, gives an action for use and occupation "on an agreement not made by deed." For a statement of the cases in which it lies at common law, independently of the statute, see n. 1 to Chitty on Contracts (7th Am. ed.) 370. But it seems that the landlord may recover under a count upon an *insimul computassent*, though the evidence be of an accounting concerning rent secured by deed. *Castledge v. West*, in error, 2 Denio, 477; S. C., 5 Hill, 488. Debt, for use and occupation, lies against the assignee of a lease. *M'Keon v. Whitney*, 3 Denio, 452, and the cases there cited. Assumpsit for use and occupation will not lie during the existence of an outstanding lease of the same premises, unless upon evidence that the defendant or occupier went into possession under some new and distinct agreement of letting and hiring between him and the landlord. *Glover v. Wilson*, 2 Barb. Supr. C. R. 264. On the several points embraced in this chapter, consult 3 Kent's C. (6th ed.) 460, 485; 1 Hilliard's Ab. *Lease*, 212, 236; *Rent*, Id. 236, 261; *Estates at Will and Sufferance*, Id. 277, 286; and the notes to the several places cited; Chitty on Contracts, tit. *Landlord and Tenant*; Addison on Contracts, titles, *Use and Occupation*, *Landlord and Tenant*. * *

(A complaint alleging that the defendant is indebted to the plaintiff in the sum of \$300 for the use and occupation of certain premises, describing them, being the property of the plaintiffs, for a term of years particularly specified, claiming judgment, is bad on demurrer, because it does not set forth a contract; and the action for use and occupation is founded upon contract, express or implied, and lies only where the relation of landlord and tenant exists. *Hall v. Southmayd*, 15 Barb. N. Y. R. 32. A wrongful eviction of the tenant by the landlord from a part of the premises, suspends the rent. *Christopher v. Austin*, 1 Kernan R. 216. A contract for the payment of rent may be raised or implied by law; as where a tenant enters into possession of premises under an agreement which is void under the Statute of Frauds, and continues in possession, paying rent from year to year. Though void, the agreement may be referred to for the purpose of ascertaining the amount of rent due (*Lockwood v. Lockwood*, 22 Conn. 425); so where the tenant holds over. *Bacon v. Brown*, 9 Id. 334.

The principle is general; there must be the relation of landlord and tenant, and an agreement, express or implied, for the payment of rent, to sustain an action in the nature of assumpsit for use and occupation. *Rogers v. Libbey*, 35 Maine, 200; *Knowles v. Shapleigh*, 8 Cush. 333; *Cincinnati v. Walls*, 1 Ohio State R. 222; *Weaver v. Jones*, 24 Ala. 420; *Dudding v. Hill*, 15 Ill. 61; *Scales v. Anderson*, 26 Miss. 94; *Mercer v. Mercer*, 12 Geo. 420; *Pendergrast v. Young*, 1 Foster (N. H.) 234. A purchaser of the demised premises, on a sheriff's sale under an execution against the landlord before the commencement of the lease, acquires the reversion and a right to the rents subsequently falling due. *Martin v. Martin*, 7 Md. 368. Where a part of the premises only is sold, the rent will be apportioned. *Linton v. Hart*, 25 Penn. State R. 193.)

(1) *Elliott v. Rogers*, 4 Esp. 59.

NOTE 866.—Assumpsit for use and occupation will lie against a lessee by deed, who holds over after the expiration of the term; and it lies against a tenant holding under a covenant contained in the expired lease for a renewal. *Abeel v. Radcliff*, 13 John. R. 297. Thus, where the lease contained a covenant for a renewal of the lease, at the expiration of the term, but without any stipulation as to the sum to be paid as rent; held, in this action to recover the rent, that the defendant, upon the expiration of the term, must be considered as holding under the covenant for a renewal; the covenant for a new lease never having been executed. Id. The court also

only as an agreement for a future lease, has been previously considered.(1) It does not depend wholly on the use of words of present demise, on the one hand, or on a provision being inserted for a future lease, on the other, though these circumstances are deserving of consideration. Where some material terms of the tenancy, remain to be ascertained, or land is to be purchased by the landlord, without which a lease is not to be made, an inference is raised, that a present demise is not intended. But a contrary presumption will result from a stipulation, that a tenant is to lay out capital upon the premises, before a formal lease is granted. In every case, the question must be decided according to the intention of the parties, and the convenience attending the construction to be adopted.(2)

Remedy by statute.

The statute does not give any remedy to landlords, where an action upon a demise could not formerly have been maintained; and, therefore, in a case where a tenant's rent is payable half-yearly, and the landlord lets the premises to another tenant in the middle of a half-year, who accordingly enters, proof of the eviction will be a good defence to an action for use and occupation during any part of the half year.(3) Neither does the statute appear to afford a remedy, which is in all cases co-extensive with that for rent at common law; as, where a woman, before her marriage, held as tenant from year to year, the rent being payable half-yearly, it was held, that an action for use and occupation could not be maintained against her husband alone, in respect of rent which had accrued at the end of the half year during which the marriage took place.(4)

If the declaration unnecessarily contains an averment of the local description of the premises, the proof must correspond with the description.(5) But it is, in general, sufficient to describe a parish by the name

said that the covenant for renewal was void for uncertainty, on the ground that the term for which the new lease was to be given, was not stated. *Id.*

* * See *ante*, note 865, and *post*, note 869. * *

(1) Vol. I.

(2) *Morgan v. Bissel*, 3 Taunt. 72; *Clayton v. Burtenshaw*, 5 Barn. & Cressw. 41; *Dunk v. Hunter*, 5 Barn. & Ald. 322; *Fenny v. Child*, 2 Maule & Selw. 255; *Poole v. Bentley*, 12 East, 168; *Tempest v. Rawlins*, 13 East, 18; *Goodtitle v. Way*, 1 T. R. 735; *Barry v. Nugent*, 5 T. R. 165; *Doe v. Groves*, 15 East, 244; *Doe v. Clare*, 2 T. R. 739; *Doe v. Ashburner*, 5 T. R. 163; *Doe v. Smith*, 6 East, 530.

(3) *Hall v. Burgess*, 5 Barn. & Cress. 332; *Burn v. Phelps*, 1 Stark. N. P. C. 94; *Smith v. Raleigh*, 3 Campb. 513. It has been said, that after eviction of part, if the tenant continues to occupy the residue, he is liable in this form of action for what he retains. *Stokes v. Cooper*, 3 Campb. 514, n; *Tomlinson v. Day*, 2 Bro. & Biog. 680.

(4) *Richardson v. Hall*, 1 Bro. & Biog. 50. See *Gibson v. Courthope*, *post*, 288, n. 5.

(5) *Guest v. Caumont*, 3 Camp. 255; *Davis v. Edwards*, 3 Maule & Selw. 389; and Vol. I, Chap. 12.

by which it is ordinarily known, unless an ambiguity is thereby occasioned.(1)

Occupation of premises.

The defendant's occupation of the premises must be proved, or an occupation by his permission.(2) It is not necessary to prove actual occupation by the defendant, where he voluntarily abstains from it,(3) and although premises are burned down and continue uninhabited, the tenant is nevertheless liable in this form of action for the rent.(4) It is otherwise

(1) *Rutland v. Pounsett*, 1 Taunt. 570; *Goodtitle v. Walter*, 4 Taunt. 672; *Taylor v. Hooman*, 1 B. Moore, 161; *Taylor v. Williams*, 3 Bing. 449.

(2) *Bull v. Sibbs*, 8 T. R. 327.

(3) *By Gibbs, Ch. J., Whitehead v. Clifford*, 5 Taunt. 519; *Conolly v. Baxter*, 2 Stark. N. P. C. 527.

(4) *Baker v. Holtzaffel*, 4 Taunt. 45.

NOTE 867.—*Salisbury v. Marshall*, 4 Car. & Payne, 65.

The agreement under which the party held the house, stated that he "agrees to become tenant by occupying;" in an action for use and occupation, defendant was allowed to show that the house was not in such a reasonable and decent state of repair as to be fit for a comfortable occupation; and defendant had a verdict accordingly. "If there had been a separate agreement to do these repairs, then the not having done them would furnish no defence. But here it forms a kind of condition precedent, and the defendant was not compellable to enter until the house was put into such a state that a family of such condition could be reasonably expected to occupy it." Per *Tindal, C. J.*, in *Id.*

* * The premises let must exist *in specie*, when the term commences, or use and occupation does not lie. If the tenant can obtain possession of only a part of the premises, the landlord can recover under a *quantum meruit* for a proportionate part. *Lawrence v. French*, 25 Wend. 443. Where intermediate the making of the agreement and the time when the tenancy was to have commenced, the premises were rendered untenable by the wrongful act of the landlord, the tenant's covenant to pay rent was held to be discharged. *Cleves v. Willoughby*, 7 Hill, 83. There is no implied warranty, on the part of a lessor, that the premises are tenantable. *Id.* 83; *Westlake v. Degraw*, 25 Wend. 669; *Sutton v. Temple*, 12 Mees. & Welsb. 52; *Hart v. Windsor*, *Id.* 68. In the last case, the subject was examined in a very learned argument at the bar, and the later cases, which tended to establish the contrary doctrine, were disapproved. See the cases, *pro* and *con*, cited by the counsel, *arguendo*, and in the opinions of the judges. And see 3 Kent's C. (6th ed.) 464, and note. Where the tenant, by himself, or agent, or under-tenant, never went into possession, and occupied the demised premises, *assumpsit* for use and occupation will not lie. *Wood v. Walcox*, 1 Denio, 37; *Beach v. Gray*, 2 *Id.* 84. But having once occupied, it is no defence that he voluntarily abandons the premises. *Westlake v. Degraw*, 25 Wend. 669. And see *post*, note 877. The tenant may avail himself of a breach of his landlord's agreement to repair, by way of *recoupment*, but not as a *set-off*. *Whitbeck v. Skinner*, 7 Hill, 53. See also *Batterman v. Pierce*, 3 Hill, 171; *Van Epps v. Harrison*, 5 *Id.* 63; *Barber v. Rose*, *Id.* 76; *Westlake v. Degraw*, 25 Wend. 672, per *Nelson, Ch. J.* * *

(A destruction of the demised tenement, or the fact that it has ceased to be habitable, does not suspend the rent. *Howard v. Doolittle*, 3 Duer N. Y. 464; *Davis v. Allen*, 2 Gray, Mass. 309.

The statute of New York provides that "any landlord may recover, in an action on the case, a reasonable satisfaction for the use and occupation of any lands or tenements, by any person under any agreement not made by deed." Under this act, the landlord can only recover in an action for use and occupation for the time a tenant has *actually occupied* the premises by himself or his sub-tenant or agent. And where the tenant has not entered into possession at all, *under the lease or agreement*, either in person or by an under-tenant or agent, no recovery can be had

where the premises are rendered unsafe from want of repair, through the landlord's default.(1) Payment of a poor rate assessed on the occupier of a house, is said not to be, of itself, evidence of occupation by the party so paying.(2)

By the late bankrupt act, a bankrupt(3) is not liable for the use and occupation of his assignees, if they accept his lease or agreement; and, if they decline it, he has the option of delivering it up to his lessor within fourteen days.(4) It seems that the assignees of a bankrupt are liable in an action of use and occupation for the rent of a whole year, though the premises have been occupied by the bankrupt, previous to their appointment, during a part of the year.(5) An executor or administrator taking possession of premises occupied by their testator, or intestate, are not liable *de bonis propriis* for the rent, if they can prove that they have derived no benefit from the possession; especially if they have offered to give it up.(6)

Croswell v. Crane, 7 Barb. N. Y. R. 192. See Tancred v. Christy, 12 Mees. & Wels. 316. A parol lease of lands for a year, to commence at a future day, is valid in this state. Young v. Drake, 1 Selden N. Y. R. 463.

Where there is no privity of contract—as where the lessee of a term for years assigns his interest in the lease—the lessor may maintain an action of debt for rent accruing subsequent to the assignment. McKeon v. Whitney, 3 Denio R. 452.

Under a deed from the lessee of premises, the grantee acquires the interest of the original lessee therein, and becomes in law an assignee after the lease. Provost v. Calder, 2 Wend. 517; Armstrong v. Wheeler, 9 Cowen, 88; Acker v. Witherell, 4 Hill R. 112. As such, he is liable on the covenant to pay rent; he is liable on all covenants which run with the land, as covenants to repair, pay rent, &c., though the covenants do not include the "assigns" of either party. Jacques v. Short, 20 Barb. 269; Verplanck v. Wright, 23 Wend. 506; Allen v. Culver, 3 Denio, 284. The action in such cases is founded on privity of estate. Hintze v. Thomas, 7 Md. 346.

Where premises are leased by a writing, not under seal, the lessee is answerable for the rent in an action for use and occupation, though the premises are occupied by a tenant under him; and where the lessor assigns the lease, but not the reversion, his assignee may recover the rent. Allen v. Bryan, 5 Barn. & Cressw. 512; Moffatt v. Smith, 4 Comst. N. Y. 126.

(1) Edwards v. Etherington, 1 Ry. & Mo. 268.

(2) Rex v. Bristow, Woodf. Landl. & Ten. 194.

(3) NOTE 868.—A debtor deposited the title deeds of houses with his creditor as security, and afterwards executed an assignment of his interest in the houses to the same party, but this instrument was never registered, pursuant to the statute 7 Ann. c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt; held, that although this instrument was void, the rents which the defendant, being equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission. Sumpter v. Cooper, 2 Barn. & Adol. 226.

(4) 6 G. IV, c. 16, § 75. For the law before the statute, see Boot v. Wilson, 8 East, 311. As to what shall amount to an acceptance by the assignees, *vide infra*, "Covenant," "Debt for rent."

(5) Gibson v. Courthope, 1 Dow. & Ry. 206; Naish v. Tatlock, 2 H. Bl. 320, *contra*. And see Richardson v. Hall, *ante*, p. 286.

(6) Remnant v. Bremridge, 2 B. Moore, 99.

Permission of plaintiff.

The plaintiff will have further to prove that the defendant occupied the premises by his permission, or the permission of the persons under whom he claims. This may be shown by proof of a demise, or agreement, or of previous payments of rent, or of a submission to a distress.(1) That the defendant has occupied by the plaintiff's permission, is frequently an inference of law founded upon the plaintiff's title; as where a mortgagee or grantee of an annuity, gives notice to a tenant to pay him the rent which was formerly payable to the original landlord.(2) But the rent, in such case, can only be demanded from the time when the legal estate is required.(3) A surviving owner cannot recover for the use and occupation of premises, stated to have been occupied by his own permission, where they were demised jointly by himself and another owner since deceased.(4)

(1) *Panton v. Jones*, 3 Campb. 372; *Townsend v. Davis*, Forrest, 120.

NOTE 869.—This action will not lie to recover rent which accrued subsequent to the demise laid in the declaration in ejectment. So, where a lessor who had distrained for rent, though the distress proved insufficient, he was held, by the act of distraining, to have affirmed the existence of the tenancy at the time when the rent fell due, so as to preclude him from bringing an action of ejectment for the non-payment of the same rent, upon the claim of re-entry. *Jackson v. Sheldon*, 5 Cowen, 448. So, assumpsit for use and occupation was held not to lie against the tenant who held over after the expiration of the term, where proceedings have been instituted against the tenant, to turn him out of possession, under the statute. *Featherstonhaugh v. Bradshaw*, 1 Wend. 134. The plaintiff probably has his remedy by trespass for the mesne profits, or for double rent under the statute.

* * Where a tenant has been dispossessed, by summary proceedings, for the non-payment of rent, the landlord may sue for use and occupation for the rent previously accrued. *Hinsdale v. White*, 6 Hill, 507. And the same doctrine was held as against an assignee of a lease. *McKeon v. Whitney*, 3 Denio, 452. * *

(So where a lessee enters into possession of premises under a written lease, not under seal, for a term of two years, and occupies the premises for one year, and is afterwards ejected by a stranger under a paramount title; he is liable for the year's rent; and cannot dispute his landlord's title. He is answerable for the rent until he is actually evicted. *Vernam v. Smith*, 15 N. Y. State R. 328. See *Fleming v. Gooding*, 10 Bing. 549; *Dolby v. Iles*, 11 Adolph. & Ellis, 335; *Curtis v. Spitty*, 1 Bing. N. C. 15; *Brown v. Sprague*, and *Sharpe v. Kelly*, 5 Denio, 545, 431; *Hall v. Butler*, 10 A. & E. 204. The implied agreement for quiet enjoyment, is a sufficient consideration for the engagement to pay rent. *Mayor of N. Y. v. Mabie*, 3 Kern. 151. See also *Giles v. Comstock*, 4 Comst. 270.)

(An agreement to pay rent may be implied; as where the assignee of a term for years gives notice to a sub-tenant, holding from year to year under the original lessee, that if he remain in possession beyond his term, the rent will be \$—, and also give notice of the assignment to him, the sub-tenant by retaining the premises will be deemed to have accepted the terms specified. *Despard v. Walbridge*, 15 N. Y. State R. 374.)

(2) *Birch v. Wright*, 1 T. R. 378; *Lumley v. Hodgson*, 16 East, 99, in which latter case, notice was given by a *cestui que trust*.

(3) *Cobb v. Carpenter*, 2 Campb. 13, n. In *Hull v. Vaughan* (6 Price 157), the equitable owner was allowed to recover against the legal owner, under peculiar circumstances of fraud.

(4) *Israel v. Simmons*, 2 Stark. N. P. C. 356. See *Richards v. Heather*, 1 Barn. & Ald. 29.

Tenancy by holding over.

If there be a lease for a certain period, and by the consent of both parties, the tenant continues in possession afterwards; or if a person enters under a lease by tenant for life, and continues in possession by the consent of the remainderman; or if a person enters under a parol lease, for more than three years; in these cases, the lease will be evidence of a tenancy from year to year.⁽¹⁾ But where a lessee for years under let the

(1) By Lord Mansfield, *Right v. Darby*, 1 T. R. 162; *Roe v. Bell*, 5 T. R. 471; *Doe v. Watts*, 7 T. R. 83; *Goodtitle v. Herbert*, 4 T. R. 680; *Bishop v. Howard*, 2 Barn. & Cress. 100.

NOTE 870.—*Osgood v. Dewey*, 13 John. R. 240; *Bradley v. Covel*, 4 Cowen, 349; *Everston v. Sawyer*, 2 Wend. 507. Where there is no new stipulation, an implication arises of a tacit consent on both sides, that the tenant shall hold from year to year, at the former rent. But the tenant is not precluded by an agreement to pay a fixed sum for a term less than a year. Thus, where there was an agreement by which the defendant was to pay, and did pay, a certain sum for a period less than a year, the judge, at the trial, admitted proof of the annual value of the premises, although the plaintiff produced in evidence a written agreement between him and defendant, whereby the defendant agreed to pay \$375 for the use and occupation of the premises from 26th June to 1st May, 1821; the annual value being shown to be but \$200. *Everston v. Sawyer*, *supra*. The judge observed, that the written agreement afforded no rule of damages; the jury were to allow such sum by way of rent as the premises were worth.

However, the principle is, that where a tenant holds over, without any new stipulation, the tenant holds from year to year, at the former or first rent. But where the rent is reserved upon the lot, without regard to the buildings, the principle does not apply. Thus, where the rent agreed upon was for the naked lot, and at the expiration of the lease, the plaintiff, by operation of law, acquired a title to the house thereon also, the court held that a different rule must be established; the annual value of both lot and buildings was the rule of damages. *Abel v. Radcliff*, 15 John. R. 505. The new state of things that had arisen, repelled the presumption that the old rent was to be the measure of damages. But where the original contract was merely to pay the ground rent, and no improvements made, the plaintiff cannot claim more. Thus, the defendant went into possession under an agreement made with the plaintiff to pay \$6.25, which was the ground rent, payable to the original landlord. This was paid from September, 1819, to May 1st, 1822; on the 26th October, 1820, the plaintiff gave defendant notice to quit. Plaintiff, at the trial, claimed to recover a rent of from 100 to 140 dollars *per annum*, for the time subsequent to the notice, on the ground that the premises were worth so much, according to his proof; and the jury so found, under the direction of the judge. The court however, for this cause, granted a new trial. *Bradley v. Covel*, *supra*. Where the possession is continued by the tenant, after the expiration of a lease for a year, he holds as a mere tenant at will, according to the opinion of Wilde, J., in *Ellis v. Paige* (1 Pick. 43); but a tenancy at will, with the privilege of holding through the second year, according to the opinion of Putnam, J., in a note subjoined to the case of *Coffin v. Lunt* (2 Pick. 70). But whether of one kind or the other, a tenant at will is bound to do nothing inconsistent with his tenure; and if he does, his tenancy is determined. *Campbell v. Procter*, 6 Greenl. 12.

* * In *Conway v. Starkweather* (1 Denio, 113), it was held, that the landlord had the option to treat a tenant holding over after the expiration of his term, either as a tenant or trespasser; but that the tenant could not elect. The election once made, of course, the rights of the parties become fixed. Where the landlord elected by receiving rent, to treat a person wrongfully in possession, as a tenant, it was held that the tenant could not be dispossessed without such a notice to quit as would terminate the tenancy. *Anderson v. Prindle*, 23 Wend. 616. See *Conway v. Starkweather*, *supra*. * * (22 Conn. 425.)

“Where the tenant holds over after his term has expired, and the lessor assents to it (and even his silence may be construed into an acquiescence or assent), it will be considered as a tacit renewal of the lease, at least for the following year, and the lessee will become tenant from year to

premises from year to year to the defendants, who knew the extent of the lessee's interest, and the plaintiff afterwards took a lease of the same premises, expectant on the determination of the lessee's term, and the defendants, after the determination of that term, continued in possession for a quarter of a year and paid rent; it was held, in an action of use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year.(1) And where payment of rent is relied upon as evidence of a tenancy, it must be shown to have been paid by the party in the capacity of tenant.(2)

Possession under a sale.

Where the defendant has taken possession of premises under a contract of sale, which is not completed, an implied assumpsit for use and occupation cannot be maintained, if the contract is afterwards abandoned in consequence of a defect in the vendor's title; especially, if the defendant has derived no benefit from the premises, or the plaintiff has retained the purchase money during the whole time of the occupation.(3)

Written agreement.

If it appears that the occupation is founded on a written contract, the writing must be produced, as the best evidence; and if, from want of a stamp, it cannot be received, the plaintiff will not be allowed to go into general evidence of the holding.(4) Where parol evidence is offered to

year, and cannot be dispossessed without regular notice. In this the civil and common law both concur. 4 Kent's Com. 110, 114. If the lessor receive rent, or the lessee be permitted to continue on the land for a twelvemonth, a tenancy from year to year will then be implied. Doe v. Stennet, 2 Esp. R. 716." Per Parris, J., in Moshier v. Reding, 3 Fairf. R. 483. (See 1 Smith (15 N. Y. Rep.), 374.)

(1) Freeman v. Jury, Mo. & M. 19.

(2) Strahan v. Smith, 4 Bing. 91.

(3) Hearn v. Tomline, Peake's C. 192; Kirkland v. Pounsett, 2 Taunt. 145. See Hegan v. Johnson, 2 Taunt. 148; Hull v. Vaughan, 6 Price, 169; Keating v. Bulkeley, 2 Stark. N. P. C. 419.

(4) Rex v. St. Paul's, Bedford, 6 T. R. 452; Hodges v. Drakeford, 1 N. R. 271; Brewer v. Palmer, 3 Esp. C. 213.

NOTE 871.—In ejectment, one of the witnesses stated on cross-examination, that he had prepared an agreement or lease in writing, between the plaintiff and A. T., relative to the premises sought to be recovered, and that he had heard the latter say that he held the premises under the plaintiff, but not that he held under an agreement; held, that, nevertheless, the plaintiff was bound to produce the agreement, as its existence was shown by one of his own witnesses. Feun ex dem. Thomas v. Griffith, 6 Bing. 533.

If the action is founded on the written contract, it must be produced, even though it be defective; it being the best evidence. Buell v. Cook, 5 Conn. R. 206. The declaration averred that the defendant used and occupied the premises by the sufferance and permission of plaintiff, on a written agreement for a lease, provided a majority of the County Court should agree thereto, was outstanding in the hands of the plaintiff, at the time of the occupation, covering the period for which the suit was brought; to which agreement the court never assented. The plaintiff offered to prove the defendant's acknowledgment, that he had hired the county-house of the plaintiff, and

prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it should appear that the agreement was between the parties as landlord and tenant, and that it continued in force to the very time to which the parol evidence applies.(1)

If the instrument by which the contract between the plaintiff and the defendant is to be proved, operates as a present demise, it must have a lease stamp, notwithstanding it purports to be only an agreement.(2) Δ .

occupied the same from December 1st to April 10th, agreeing to pay him therefor 250 dollars; but the court rejected the evidence. A new trial, however, was granted, on the ground that it was incumbent upon the objector to the evidence to show that the acknowledgment referred to the written contract; for unless the acknowledgment was founded on the written contract, the evidence was admissible. *Id.* Had there been an outstanding valid agreement in writing, the reference of the acknowledgment, would have been highly probable. But the writing in question was invalid, because not ratified by the court; and hence, it was not to be *presumed* that the acknowledgment had reference to that which was a mere nullity. Per Hosmer, Ch. J., in *Id.*

A writing, in the absence of fraud, mistake, ignorance or latent ambiguity, cannot be varied impaired or explained by parol evidence (per Baldwin, J., in *Tilghman v. Tilghman*, 1 Bald. R. 488, 489; 2 Call, 12; 4 Dessaus. 211; 3 Hen. & Munf. 416, 417); or stating circumstances previously to the writing (8 Whar. 208, 211); if it differs from the terms of the conversation, the writing is a declaration of the original intentions, and an agreement to alter and rescind them. *Id.*

(1) *Doe v. Morris*, 12 East, 237. As to the admission of parol evidence to vary or discharge written agreements, see Vol. II.

NOTE 872.—The plaintiff may recover on proof of work done, on an implied contract, although it appear in the course of the defendant's case, that there was a written agreement relating to the matter, but which cannot be read for the want of a stamp. *Secus*, if the fact come out in the course of the plaintiff's case. *Fielder v. Ray*, 4 Car. & Payne, 61; S. C., 6 Bing. 332. But parol evidence, as to the party to whom a demise has been made, is not admissible where the agreement for the demise was in writing. *Rex v. Rawden*, 3 Mood. & Ryl. 426; 8 Barn. & Cress. 708. Witness was called to prove who were the tenants; he said he let by a written instrument; held, that the instrument must be produced. *Id.* However, occupation and payment of rent is *prima facie* evidence of tenancy; and by keeping out of view a written instrument, a party may make out by parol testimony, a *prima facie* case of tenancy. *Id.*; *Rex v. The Holy Trinity, Hull*, 7 Barn. & Cress. 611. And payment of rent as rent, is evidence of tenancy. *Id.*; (*King v. Woodruff*, 23 Conn. 56.)

Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession. *Doe v. Harvey*, 8 Bing. 239. If nothing had been in issue but the single fact, whether the defendant held or occupied the land, such fact might undoubtedly be proved by the payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appeared that he held under an agreement in writing. But here the question was not merely whether defendant held the premises, but whether he held them as tenant to P.; and of this fact there was no other evidence admissible than the written agreement, which was not produced. Per Tindal, Ch. J., in *Id.*

(2) *Vide ante*, p. 286; 55 G. III, c. 184. Sch. Part I, requires a specific stamp on leases, which is ascertained by the rent. If the instrument contains a lease, and also a contract for goods, not incidental to the lease, a further stamp is necessary. *Clayton v. Burthenshaw*, 5 Barn. & Cress. 45. An *ad valorem* stamp, is in some cases required, which is regulated by the consideration on the face of the deed. *Duck v. Braddyl*, 13 Price, 455; *Roe v. Chenhalls*, 4 M. & Sel. 23; *Boase v. Jackson*, 3 Bro. & Bing. 185. The *ad valorem* duty applies only to consideration between lessor and lessee. *Boone v. Mitchell*, 1 Barn. & Cress. 18. It seems that an agreement respecting the occupation of land, if it is by deed, requires a stamp of £1 15s. 5 B. & Cress. 45. If it is not by deed, and relates to property exceeding £20 in value, a £1 stamp is requisite. A progressive duty is likewise payable, according to the number of words.

lease containing several distinct demises of different tenements, must have a stamp equal in amount to the aggregate of the several duties on the respective demises; but this is not necessary where the whole is manifestly one transaction.(1) And where an instrument contains a contract of demise, general in its terms, but applicable to the several interests of the tenants, who sign, and only one stamp appears upon it; it is matter of evidence to which contract the stamp is to be referred.(2) In an action for the use and occupation of lands which are verbally let on the same terms as are contained in the lease of a former tenant, the lease referred to cannot be received in evidence unless it be properly stamped.(3) But a stamp is not necessary to every writing given in evidence to support an agreement; and, therefore, if a paper contain a mere proposal, which has been accepted by parol, it may be read in evidence without being stamped.(4)

The defendant who has obtained possession from the plaintiff, or occupied by his permission, will not, in general, be allowed to impeach the plaintiff's title.(5) Thus, in an action for the use and occupation of glebe lands, the defendant who had paid rent to the plaintiff, was not allowed to show that the plaintiff's presentation to the living was simoniacal.(6) So the defendant will not be admitted to prove that his landlord was merely tenant at will;(7) or that he has demised the premises to a third person, whose interest has not expired,(8) or had mortgaged them previous to the defendant's lease,(9) or that he had obtained possession by a fraud.(10)

Landlord's title expired.

It has been held, in several cases, that it is competent for a tenant to show that his landlord's title has expired since the commencement of the lease.(11) It seems, however, from the case of *Balls v. Westwood*,(12) that,

(1) *Boase v. Jackson*, 3 Bro. & Bing. 185.

(2) *Doe v. Day*, 13 East 241; *Powell v. Edmonds*, 12 East, 6.

(3) *Turner v. Power*, 2 Ry. & M. 131.

(4) *Drant v. Brown*, 3 Barn. & Cress. 668. And see *Hawkins v. Warre*, 5 D. & R. 412; 3 Barn. & Cress. 690.

(5) *Say. Rep.* 13; *Sullivan v. Stradling*, 2 Wils. 208; *Parker v. Manning*, 7 T. R. 537; *Morgan v. Ambrose, Peake's L. E.* 242; *Bull. N. P.* 139; 2 Ves. jun. 696; 11 Ves. 344; *Palmer v. Ekins*, *Ld. Ray.* 1552.

(6) *Cooke v. Loxley*, 5 T. R. 4; *Brooksby v. Watts*, 6 Taunt. 333.

(7) *Atkinson v. Pierrepont*, *Esp. Dig.* 30.

(8) *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50.

(9) *Alchorn v. Gomme*, 2 Bing. 54, in replevin.

(10) *Parry v. House*, 1 Holt's C. 489.

The general principle is that the tenant cannot deny the title of the lessor, so as to raise a defence to an action for rent that has accrued for use and occupation. See the opinion of the Court of Appeals, per Denio, C. J., in *Vernam v. Smith*, 1 Smith (15 N. Y.) Rep. 238, and the authorities there cited.

(11) *England dem. Syburn v. Slade*, 4 T. R. 682; *Doe v. Ramsbottom*, 3 Maule & Selw. 516.

(12) 2 Camp. 11. And see *Doe v. Smythe*, 4 Maule & Selw. 347.

at least in action of use and occupation, it will be no defence for a tenant, that his landlord's title has expired, unless he has formally renounced his landlord's title, and commenced a fresh holding under another person. And, indeed, in *Rogers v. Pitcher*,⁽¹⁾ Chief Justice Gibbs was of opinion, that a tenant could not dispute the title of the person by whom he was originally let into possession, so long as he continued in possession. But in a later case, it was held, that even the payment of rent to the original landlord, after his title is expired, does not conclude the tenant, if the payment was made in ignorance of the nature of the landlord's title.⁽²⁾ And where the landlord acquiesces in the payment of rent to a stranger for a considerable time, the tenant is not precluded from disputing the continuance of his title.⁽³⁾ If an attornment is made to a person from whom the defendant did not originally obtain possession, through ignorance, or misrepresentation, the tenant is not bound by such attornment.⁽⁴⁾

Assignee of landlord.

In general, a tenant will be estopped from disputing the title of a person to whom his landlord has assigned his interest.⁽⁵⁾ But where land belonged to a parish, and rent was paid to the churchwardens, who granted a lease to the plaintiff, it was held, that the tenant (the defendant) in an action for use and occupation, was not estopped from disputing the plaintiff's title, and that the plaintiff could not derive a valid title from the churchwardens.⁽⁶⁾ In an action for rent, by an assignee of the reversion,

(1) 6 Taunt. 209.

(2) *Fenner v. Duplock*, 2 Bing. 10, in replevin.

(3) *Neave v. Moss*, 1 Bing. 360, in replevin.

(4) By Buller, J., in *Williams v. Bartholemew*, 1 B. & P. 326; *Rogers v. Pitcher*, 6 Taunt. 202; *Gregory v. Dodge*, 3 Bing. 474; *Gravenor v. Woodhouse*, 1 Bing. 38, in replevin.

Where a lease is assigned by the lessor, but the reversion is not transferred with it, and the lessee pays rent to the assignee, the latter may maintain an action for use and occupation for rent accruing subsequently. *Moffat v. Smith*, 4 Comst. 126.

(5) *Rennie v. Robinson*, 1 Bing. 147. (See *Despard v. Walbridge*, 15 N. Y. R. 374.)

NOTE 873.—(*Ingraham v. Baldwin*, 5 Seld. 45.) Where the action is brought by the assignee of the reversion, against the lessee, there is a distinction, founded on the form of the action to be brought, as to whether it is *local* or *transitory*. Assumpsit is founded on privity of contract, not privity of estate. *The Corporation of New York v. Duncan*, 2 John. Cas. 335. If the assignee sue debt *at common law*, the action is local, the privity of contract being destroyed by the assignment of the reversion, the action is founded on privity of estate. *Henwood v. Cheeseman*, 3 Serg. & Rawle, 500. Or, the assignee may bring *covenant* by virtue of the statute, 32 Hen. VIII. c. 34, which transfers the privity of contract from the assignor to the assignee; and this action, not being founded on privity of estate, but of contract, is transitory, and may be brought anywhere. *Id.*

(There is neither privity of estate nor of contract between the lessor and the under tenant of the original lessee, so that the lessor cannot sue the under tenant upon the lessee's covenant to pay rent. *McFarlan v. Watson*, 3 Comst. 286. See *Moffatt v. Smith*, 4 Comst. 126.)

(6) *Phillips v. Pearce*, 5 Barn. & Cress. 433.

it is a good defence, that the defendant has paid the rent to his lessor, before notice of the assignment.(1)

Tenancy determined.

The continuance of a tenancy is presumed, unless the contrary appears.(2) And the defendant must show the legal determination of it, as by a notice to quit or by lapse of time, according to the original agreement. It will, however, be sufficient, if the defendant can show that the occupation has been determined, as where the key is delivered up to the landlord in the middle of a quarter, and he enters and makes a profit of the premises.(3) And the defendant, in answer to the whole of the plaintiff's demand, may show an eviction;(4) at least, if it be of the whole of

(1) *Birch v. Wright*, 1 T. R. 378. And see *Lumley v. Hodgson*, 16 East, 99.

NOTE 874.—Although debt for rent cannot be maintained against a lessee, who has assigned, after acceptance of rent from the assignee; yet if there are covenants in the lease to pay the rent, the covenants remain in force, and an action lies upon them between the lessor and lessee, notwithstanding the assignment and the acceptance of rent from the assignee. *Fletcher v. McFarlane*, 12 Mass. R. 43. Demise by indenture, and the lessee covenanted to pay the rent; afterwards lessee assigned his lease; and his assignee covenanted also to pay the rent to the lessor. A recovery being had upon a writ of formedon subsequent to the original lease; the lessee having been compelled to pay the rent which accrued after the assignment, but before the recovery against the lessor; held, that the assignee must be considered in law to have promised to reimburse and indemnify the plaintiffs; he having accepted an assignment containing a stipulation to pay what the plaintiffs were obliged by their covenants in the indenture to pay. *Id.* * * But see the next note. * *

(2) *Harland v. Broomley*, 1 Stark. N. P. C. 455; *Wood v. Mason*, 9 Price, 291; *Harding v. Crathorne*, 1 Esp. C. 57.

(3) *Whitehead v. Clifford*, 5 Taunt. p. 518. See *Harland v. Broomley*, 1 Stark. N. P. C. 455; *Walls v. Atcheson*, 3 Bing. 462.

NOTE 875.—A. demised rooms of a house to B. for a year, at a rent payable quarterly. During the current quarter, in consequence of disputes, B. told A. that he would leave; A. assented, and on B.'s leaving accepted possession of the rooms; held, that A. could recover neither the whole quarter's rent, nor rent *pro rata* for occupation for any period short of the quarter. *Grimmann v. Legge*, 8 Barn. & Cress. 324; 2 Mood. & Ryl. 438. The plaintiff having destroyed his right to recover the rent according to the contract, has destroyed it altogether; the original contract was rescinded. It is a surrender by operation of law. Per Bayley, J., in *Id.* * * And see *Bailey v. Delaplaine*, 1 Sandf. Super. C. R. 5, as to what will amount to such a surrender. * *

(4) NOTE 876.—Where the tenant is evicted before the first day of payment of rent, no rent can be recovered upon the indenture. *Fitchburg Col. M. Co. v. Melvin*, 15 Mass. R. 268. The circumstance that the person who evicted defendants, was a mortgagee, does not influence the result; it is enough that he entered under a title paramount to that of the lessors. *Id.* If the lessee has derived a substantial benefit from the use of the estate demised, although he does not hold it for the whole term, equity would require that he should pay a *quantum meruit*; but their only remedy must be an action of *assumpsit*; as in the analogous case of a charter party of affreightment. In that case, when the ship is prevented by the perils of the sea from carrying the goods to the destined port, and they are received by the owner at an intermediate place, the latter is not liable in an action of covenant on the charter party; but it was thought (7 T. R. 381), in a case of that kind, that he might be held, in an action of *assumpsit*, to pay a reasonable compensation for the services of the ship owner, as far as they were performed, and so far as he was benefited by them. Per Jackson, J., in *Id.* When a part of the land is evicted, and the

residue is enjoyed by the lessee, it is a discharge only in proportion to the value of the land evicted. *Id.*

Defendant may under the plea of *non assumpsit* give in evidence entry and expulsion by the landlord. Thus, in a action for use and occupation of a farm; and it appearing in evidence that the plaintiff entered and mowed the grass in a particular meadow, part of the premises, and carried the same away: *held*, that the plaintiff in such case could not recover; for *part of the profits of the thing* leased is taken from the lessee. *Briggs v. Hall*, 4 Leigh. R. 484.

Eviction of the whole, or any part of the demised premises, is a good plea in bar, to an action either of debt or covenant, for rent. *Pendleton v. Dyett*, 4 Cowen, 581. To sustain a plea of eviction, in bar of an action for rent, the tenant must show an actual expulsion before, and that it continued till after the rent due. *Id.* An entry without an expulsion of the lessee from at least some part of the demised premises, is insufficient to produce a suspension of the rent. *Bennet v. Bittle*, 4 Rawle, 330. After an entry by the lessor and expulsion of the lessee of part of the premises, the latter may abandon and give up the residue; but if he should continue to possess and enjoy the residue, I will not say but that he may be liable upon a *quantum meruit*. *Stokes v. Cooper*, *Id.* 541, in note per Kennedy, J., in *Id.*

Where the lessor was guilty of habitually bringing lewd women under the same roof with the demised premises, though in an apartment not demised, by which disturbance and noise was made in the night; and, in consequence the lessee quitted the premises and remained away, with his family; *held*, that this was evidence for the jury under a plea of eviction by the landlord, in answer to a declaration for rent; and that the jury might, upon such evidence, find the plea true; and the lessor would be thereby barred of his rent, the same as on an actual or physical entry and expulsion of the tenant. *Dyett v. Pendleton*, 8 Cowen, 727.

Apportionment.—In the case of *Ripply v. Wightman* (4 M'Cord, 447), it was held, that where a house, rented for a year, was rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied. The act of God was held to be a rescission of the contract; and the parties were thereby placed upon the footing, that one was to receive and the other to pay, so much as the rent (from the time the lease commenced, to the time it was ended by the storm) was reasonably worth. See *Smyrl v. Nielson*, 2 Bail. R. 421. But see 3 Kent's Com. 466, *and cases cited*.

* * Where the landlord interfered with and disturbed the tenant's enjoyment of the premises, so as seriously to injure his business, it was held to amount to an eviction. *Cohen v. Dupont*, 1 Sandf. Super. C. R. 260. In *Ogilvy v. Hall* (5 Hill, 52), it was held, that to operate an an eviction, there must be an entry and expulsion of the tenant by the landlord, or some deliberate interference by him with the tenant's possession materially impairing the beneficial enjoyment of the premises. And the court referred to *Dyett v. Pendleton* (*supra*), as an extreme case, which had carried the doctrine of constructive eviction to its utmost limit. As to what will produce a suspension, apportionment or extinguishment of rent, see the reporter's note, *Id.*, p. 56. In *Kerr v. Merchants' Exchange Company* (3 Edw. Ch. R. 315), it was held, that where a tenant hires upper rooms only, his interest, and his consequent liability to pay rent, ceases on the destruction of the building. And to the same point, see *Winton v. Cornish*, 5 Ohio, 477; *Stockwell v. Hunter*, 11 Metc. 448. But the rule is different where the tenancy is of the whole premises destroyed by fire. 3 Kent C. (6th ed.) 465–469, and the notes; and the cases cited in *Hart v. Windsor*, 12 Meeson & Welsby, 85. Under a covenant by the lessor, to keep the premises in *repair*, he is bound to *rebuild* them if destroyed by fire. *Allen v. Culver*, 3 Denio, 284. A provision in a *lease*, that the rent shall cease if the premises become untenable by *fire or other casualty*, does not extend to the destruction of a part of the building to conform to an order of a municipal corporation to widen the street on which it stands. *Mills v. Baehr's Ex'r*, 24 Wend. 254. * *

(A partial eviction of the tenant, through the instrumentality of the landlord, suspends the rent until his interference with the use of the property is terminated. *Peck v. Hilcr*, 24 Barb. N. Y. Sup. Ct. 178. An eviction as to part of the premises suspends the rent of the whole. *Lawrence v. French*, 25 Wend. 443. The landlord cannot recover in such a case, for use and occupation, the value of that part of the premises occupied by him, as upon a *quantum meruit*. *Christopher v. Austin*, 1 Kernan N. Y. R. 216.)

the demised premises, or where the eviction is of part, if the tenant gives up possession of the residue.(1)

The tenancy may also be determined in consequence of a surrender of the demised term. Any words, by which an intention to surrender may appear, will operate as an express surrender; but an agreement to surrender at a future time, will not operate as a surrender when the time arrives.(2) Nor will the canceling of a lease of corporeal hereditaments destroy the continuance of the lease.(3) A surrender must be accepted by the person to whom it is made.(4) And the acceptance of a surrender is not to be presumed from the mere circumstance of rent having been paid to the landlord by a third person.(5)

Written surrender.

By the Statute of Frauds, the surrender of a lease is required to be in writing, and signed by the party surrendering, or his agent duly authorized in writing.(6) The statute has been held to extend to tenancies from year to year.(7) The recital in a second lease of the surrender of a first,

(1) *Vide ante*, p. 286; *Smith v. Raleigh*, 3 Campb. 513; *Burn v. Phelps*, 1 Stark. N. P. C. 94; *Hall v. Burgess*, 5 Barn. & Cress. 332; *Stokes v. Cooper*, 3 Campb. 514, n.; *Tomlinson v. Day*, 2 Bro. & Bing. 680.

(2) *Parson's Case*, Dyer, 374, b. marg.

(3) *Magennis v. McCulloch*, Gilb. R. 235; *Roe v. Abp. York*, 6 East, 90; *Churchwardens of St. Saviour's, Southwark*, 10 Rep. 66.

(4) *Leach v. Thompson*, 1 Show. 296.

(5) *Copeland v. Executors of Gubbins*, 1 Stark. N. P. C. 96.

NOTE 877.—In *New York* (2 R. S. 134, § 6), it is provided that “no estate or interest in lands, other than leases for a term not exceeding one year, &c., shall hereafter be created, granted, assigned, surrendered, &c., unless by act or operation of law, or by deed, or conveyance in writing, &c.” § 8. “Every contract for the leasing for a longer period than one year, &c., shall be void,” unless in writing. Since the English statute, a parol lease for more than three years; and in *New York*, since the above statute for more than one year, is entirely void; though if the tenant enters into possession, he shall be deemed a tenant at will, and for the purpose of notice to quit, from year to year, and notwithstanding the lease be void, it may regulate the terms of holding as to rent, time to quit, &c. Per *Nelson, J.*, in *Schieffelin v. Carpenter*, 16 Wend. 400. A parol agreement between landlord and tenant, that the tenant shall surrender his interest in the demised premises, being for a term of six years, and that the landlord shall execute a new lease for eight years to third persons does not operate as a surrender by operation of law, unless such new lease be executed and pass an interest according to the contract and intention of the parties, although the tenant quits the premises, the third persons enter, remain in possession for the space of a year, and pay rent to the landlord; consequently, the original lease remains in force, and the landlord may sue thereon in covenant to recover the rent subsequently accruing against the original tenant. *Id.*

(An assignment of his term by the lessee with the consent of the lessor, puts an end to such obligations as arise from privity of estate; not to such as arise out of the express terms of the lease, or the positive engagements of the lessee expressed in it. *Ghegan v. Young*, 23 Penn. State R. 18. The lease is a demise of the premises, and the lessee may bring ejectment for the possession. *Trull v. Granger*, 4 Seld. 115.)

(6) 29 Car. II c. 11, § 3.

(7) *Bottinger v. Martin*, 1 Campb. 317.

is not a sufficient note in writing within the statute.(1) A mere parol agreement(2) between landlord and tenant will not determine the tenancy ; and the tenant will be liable in an action for use and occupation subsequent to the time when he has a parol license from his landlord to quit.(3) But it has been before mentioned, that if both the landlord and tenant act upon the agreement, and the landlord takes possession of the premises, the tenant is discharged.(4) It has, however, been held that a tenant who quitted without a regular surrender in writing, continued liable for the rent, notwithstanding his landlord had put a bill in the window for the purpose of having the premises let.(5) Where a written agreement operates as a surrender of a term, it requires a deed stamp, and if it be stamped merely as an agreement, it is not receivable in evidence.(6)

Operation of law.

The Statute of Frauds excepts leases which are surrendered by operation of law. A lease by parol operates as an implied surrender of a lease in writing.(7) But the second lease must be in writing, where it is required by the Statute of Frauds ; for a void lease will not amount to the surrender of a valid lease previously subsisting.(8) Where a third person is led into possession, and is substituted in the place of the tenant, by the consent of all parties, it is not competent for the landlord to make a demand for rent subsequently accruing upon the original tenant, on the ground that the premises have not been surrendered in writing;(9) neither can the person

(1) *Roe v. Archbp. of York*, 6 East, 86. See *Farmer v. Rogers*, 2 Wils. 26.

(2) NOTE 878.—*Lammott v. Gist*, 2 Har. & Gill, 433. The release of the rent, and the surrender of the property form one agreement, they cannot be separated; and to make the agreement available as a surrender, it must be in writing. Id.

* * But see *Bailey v. Delaplaine*, 1 Sandf. Super. C. R. 5. * *

(In *Bailey v. Delaplaine* the tenant under-let the premises and after that delivered up the leases to the under tenant, with this order indorsed upon each, "Pay the within stipulated rent to John F. Delaplaine, he being the owner of the property." Having the leases in his possession, the latter called upon the tenants, and telling them he had taken the premises off from Bailey's hands, collected rent from the under tenants; all of which was deemed inconsistent with the intention to continue the relation of landlord and tenant between the original parties. Where the tenant leaves or vacates the premises, it must be clearly shown that the landlord accepts the surrender of them and discharges the tenant or vacates the lease. *Kerr v. Clark*, 19 Mis. (4 Bennett), 132. As to the effect of a surrender, see *Sperry v. Miller*, 4 Selden R. 336.)

(3) *Mollet v. Brayne*, 2 Campb. N. P. C. 103; *Thompson v. Wilson*, 2 Stark. N. P. C. 379; *Matthews v. Stawell*, 8 Taunt. 270; *Johnstone v. Huddleston*, 4 Barn. & Cress. 922.

(4) *Ante*, p. 295; *Whitehead v. Clifford*, 5 Taunt. 518. And see the observations of the court there on the case of *Mollet v. Brayne*.

(5) *Redpath v. Roberts*, 3 Esp. C. 225.

(6) *Williams v. Sawyer*, 3 Bro. & Bing. 70.

(7) *Chambers on Leases*, 823. See 1 Will. Saund. 236, n.

(8) *Wilson v. Sewell*, 4 Burr. 1980; *Davison v. Stanley*, Id. 2210.

(9) *Stone v. Whiting*, 2 Stark. N. P. C. 235; *Thomas v. Cooke*, 2 B. & Ald. 119; *Walls v. Atcheson*, 3 Bing. 462. See *Matthews v. Sawell*, 2 B. Moore, 263.

let into possession set up the title of the original tenant, as a defence to an action for use and occupation at the suit of the landlord.(1)

Proof of value.

In the absence of any express agreement, the plaintiff must prove the value of the premises occupied. Though a parol agreement for use and occupation be void by the Statute of Frauds, nevertheless, if the tenant take possession of the premises under it, recourse may be had to the agreement, to calculate the amount of rent.(2) Where the tenant has not enjoyed a part of the demised property, in consequence of the plaintiff having failed to fulfill a material part of an agreement for a lease, the jury may ascertain the value of the property which the tenant has enjoyed, without regarding the amount of rent reserved by the agreement.(3) The jury may give damages in an action of use and occupation, after recovery in ejectment against a tenant who was in possession under a demise from year to year, for all rent in his hands to the day of the demise in the ejectment; but not for rent subsequently accruing.(4)

Defence, illegality.

It will be a sufficient defence for the defendant to prove that the premises, for the use and occupation of which damages are sought to be recovered, were let for an illegal purpose. Thus, where a house is let to the defendant for the purposes of prostitution, the plaintiff cannot recover;(5) and, although it may not have been originally let for those purposes, yet if the plaintiff, after he has become acquainted that the house is converted

(1) *Phipps v. Sculthorpe*, 1 B. & Ald. 50.

(2) *De Medina v. Polson*, Holt's C. 47.

NOTE 879.—In an action for use and occupation, the plaintiff may avail himself of an agreement, not under seal, whereby a rent certain is fixed to regulate the amount of recovery; and although the plaintiff does not sue upon the agreement, but claims generally to recover for use and occupation, the defendant cannot be permitted to give evidence of the value of the premises occupied, to reduce the sum below that stipulated in the writing. *Williams v. Sherman*, 7 Wend. 109.

In an action for rent of land verbally let, on the same terms as the former tenant's lease, such lease must be produced, properly stamped. *Turner v. Power*, 7 Barn. & Cress. 625; *Mood. & Malk.* 131.

(Though a tenant enter into possession of premises under a written lease, invalid under the Statute of Frauds; if he continues in possession, paying rent from year to year, the lease and payment of rent under it may be proved to establish a tenancy from year to year, and the terms of such tenancy; *e. g.*, to show the amount of rent due. *Lockwood v. Lockwood*, 22 Conn. 425. A tenancy being shown, parol evidence may be given to fix the sum to be paid for past use of premises. *King v. Woodruff*, 23 Conn. 56.)

(3) *Tomlinson v. Day*, 2 Bro. & Bing. 680. And *vide ante*, p. 286, n. 3.

(4) *Birch v. Wright*, 1 T. R. 378. The bringing of an ejectment in which the demise is laid previous to the time for which damages are sought to be recovered, is no bar to the action, but a ground of special application to the court. *Cobb v. Carpenter*, 2 Campb. 13, n.

(5) *Crisp v. Churchill*, 1 Bos. & Pul. 340; *Girardy v. Richardson*, Id. 341, n.; *Howard v. Hodges*, 1 Sel. N. P. 67; *Appleton v. Campbell*, 2 C. & P. 347.

to such an immoral use, suffers the defendant to reside therein, he cannot claim damages for the use and occupation of it.(1)

Statute of limitations.

The Statute of Limitations is a good defence in an action for use and occupation, if the defendant, who has been tenant from year to year of the premises, can show that he has not occupied them, or paid rent for them, or done any act from which a tenancy might be inferred, within six years, although he might not have given or received a regular notice to quit, or made a formal surrender.(2)

CHAPTER IV.

OF EVIDENCE IN AN ACTION OF ASSUMPSIT, ON AN ATTORNEY'S BILL.(3)

No attorney or solicitor can commence or maintain any suit for the recovery of fees, charges, or disbursements at law or in equity, until the ex-

(1) *Jennings v. Throgmorton*, 1 Ry. & Mo. 251, in the case of a weekly tenancy. *Lloyd v. Johnson*, 1 Bos. & Pul. 340.

(2) *Leigh v. Thornton*, 1 B. & Ald. 625.

* * See *post*, in the text, and the notes; 2 Gr. Ev. §§ 430, 448, and the notes, and also Chitty on Contracts (7th Am. ed.) pp. 805-841, and the notes, for an ample collection of the cases and the Statutes of Limitation in England and the United States.

(3) NOTE 880.—* * For the measure of the attorney's compensation, see the statutes prescribing the fee bills of the several states. In the state of New York, the costs taxed against the adversary party, belong to the client; and the amount of the attorney's compensation depends upon express agreement with his client, or a *quantum meruit*. Laws of New York, 1849. For a large amount of various and useful information, relative to attorneys, their rights, duties and responsibilities, see 1 Selwyn's N. P. pp. 403, 492. And see also Chitty on Contracts, (7th Am. ed.) tit. *Attorneys*, and the same title in Chitty's General Practice; and Warren's Lecture on the Duties of Attorneys and Solicitors, *passim*. The latest constitution of the state of New York (Art. 6, § 8), has provided, that "any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualification of learning and ability, shall be entitled to admission to practice in all the courts of this state." The mode in which the constitutional qualifications of the candidate for admission, must be ascertained, was prescribed by the legislature of 1847. Laws of New York, p. 342, § 75. By a subsequent act of the same legislature (Laws of New York, p. 647, § 46), it was provided, "that any person of good moral character, *although not admitted as an attorney*, may manage, prosecute, or defend a suit for any other person, provided he is specially authorized for that purpose by the person for whom he appears, in writing, or by personal nomination in open court."

The constitutional provision might be harmless, if the qualifications of the candidates for admission were always thoroughly inquired into; but, generally, the examinations are extremely superficial and unsatisfactory. Persons of the narrowest capacity, whose moral character is not so bad as to be publicly notorious, may indulge a confident expectation, that the ordeal of an examination will be safely passed. Whether this easy access to the legal profession will prove beneficial to the commonwealth is a problem, of which the solution does not appear difficult. In *McKoan v. Devries* (3 Barb. Rep. 196), the Supreme Court held, that the last-mentioned statute was unconstitutional; and that, while on the one hand, the court were prohibited from

piration of one month, or more, after he has delivered to the party or parties to be charged therewith, or left for the party or parties at his or their dwelling-house, or last place of abode, a bill of such fees, charges, or disbursements, subscribed with his proper hand.(1)

The statute has received from the courts of law the most liberal construction in favor of the client. Thus, where an attorney has delivered a bill which contains a single item for business done in court, it is necessary to deliver it within due time.(2) And if the business is done at the Court of Quarter Sessions, the Insolvent Court, or the Court of Great Sessions in Wales, it is within the statute.(3) So, if the proceeding is under the au-

excluding any who, upon examination, were found qualified, they, on the other, were prohibited from recognizing any person as qualified, whose qualification had not been so ascertained and declared. * *

(1) Stat. 2 Geo. II, c. 23, § 23.

NOTE 881.—Formerly, in New York, an attorney's bill was to be served eight days before the commencement of an action for costs; but this statute has been repealed. 1 Dunl. Pr. 77.

In assumpsit, by an attorney for his fees, the attorney need not show that a copy of his bill of costs was served on the client before action brought. *Gleason v. Clark*, 9 Cowen, 57.

* * Put if the bill of costs appear to have been taxed without notice to the client, it will not be conclusive that the services enumerated in it were rendered. *Cook v. Stetson*, 3 Barb. Supr. C. R. 337. It is evidence though taxed without notice; and if dissatisfied with it, the client should apply for a retaxation. *Hughes v. Mulvey*, 1 Sandf. Super. C. R. 92. The court will order a retaxation on notice, if it be shown presumptively that there are errors or overcharges in the taxed bill. *Brady v. The City of New York*, Id. 569; *S. P., Stockholm v. Robbins*, 24 Wend. 109. The taxation of costs is a judicial proceeding and cannot be impeached collaterally if the taxing officer had jurisdiction. Id. After proving a retainer, the taxed bill is evidence of the extent of the plaintiff's demand, and the items will not be inquired into on the trial. Id.; *S. P., Platt v. Halen*, 23 Wend. 456; *The Supervisors of Onondaga v. Briggs*, 2 Hill, 135; re-affirmed in *S. C.*, 2 Denio, 26. *Cook v. Stetson* (*supra*) decides that the items may be contested on the trial, where the bill was taxed without notice to the client. * *

The Court of Chancery has no general jurisdiction over its suitors, to compel them to pay costs due to their solicitors or counsel. The proper remedy of the solicitor or counsel to recover his bill of costs, is by an action at law against his client. The client may apply to the court for the taxation of his solicitor's bill, and for the stay of the proceedings at law thereon, upon an undertaking to pay what may be found due; and in such cases the Court of Chancery may compel the client to perform the undertaking. *Lorillard v. Robinson*, 2 Paige's R. 276. But a court of chancery has no jurisdiction to order the taxation of a bill, as between solicitor and client, on the application of the solicitor himself, if there is no fund under the control of the court out of which payment can be made. Id.

The clause of 3 Jac. I, c. 7, § 1, requiring attorneys to deliver a bill to their clients before charging them with any of the "fees or charges" in the act mentioned, is to be confined to business done in the king's courts of record at Westminster. *Reynal v. Smith*, 2 Barn. & Adol. 469. (See recent act 6 & 7 Vict. c. 73, § 37; and *Roberts v. Lucas*, 32 Eng. Law and Eq. 528.)

(2) *Winter v. Payne*, 6 T. R. 645; *Weld v. Crawford*, 2 Stark. N. P. C. 538. It is sufficient if the pendency of a cause can be collected from the nature of the charge. *Watt v. Collins*, 1 Ry. & Mo. 284. Costs out of pocket in a cause are taxable. *Miller v. Towers*, Peake's N. P. C. 102; *Crowder v. Shee*, 1 Campb. N. P. C. 437.

(3) *Clark v. Donovan*, 5 T. R. 694; *Smith v. Wattleworth*, 4 B. & C. 364; *Lloyd v. Maund*, Tidd, 330. As to items for business in the House of Lords, see *Williams v. Odell*, 4 Price, 279.

thority of the court, as the preparing an affidavit to hold to bail, a *cognovit*, or a *dedimus potestatum*, a bill must be delivered.(1) And the statute extends to proceedings in bankruptcy; such as the procuring the chancellor's signature to a bankrupt's certificate.(2) But it is not a proceeding either in law or equity, unless something be done by the authority of a court; and therefore, the preparing of an affidavit which is never sworn, or a bond to the chancellor upon which no commission ever issues, is not a charge within the statute.(3) Nor is a bill for conveyancing alone required to be delivered;(4) nor a bill for searching for judgments;(5) or for payment of money in consequence of an undertaking to pay a debt and costs.(6)

It seems that, where the plaintiff cannot recover a particular item in his bill, because it is not properly set forth according to the statute, he may nevertheless recover the residue of the bill, as to which the provisions of the statute have been complied with.(7) It has, however, been held, that if an attorney introduces into his bill certain items connected with his professional capacity, though not immediately within the terms of the statute 2 G. II, c. 23, and, in an action on the bill, fails, because it was not properly delivered, he will not be allowed to recover for such items only;(8) and it has been intimated that the consequence would be the same as to items included in the bill which are not connected with the profession of an attorney.(9) Where no bill has been delivered, but the

NOTE 882.—*Sylvester v. Webster*, 9 Bing. 388; 2 M. & Scott, 506; *Wardle v. Nicholson*, 4 Barn. & Adol. 469; 3 Har. Dig. 2289, &c., and cases cited.

A bill for business done in the County Court is taxable. *Wardle v. Nicholson*, 1 Nev. & M. 355. Preparing a warrant of attorney is a taxable item. *Wilson v. Gutteridge*, 3 Barn. & Cress. 157; 4 Dowl. & Ryl. 736. So, a charge in the attorney's bill for attending at a lock-up house, and obtaining defendant's release, and filling up the bail bond, is a taxable charge. *Fearne v. Wilson*, 6 Barn. & Cress. 86; 9 Dowl. & Ryl. 157. So, charges by an attorney for attending a defendant, and advising him, he having been served with a writ after paying the amount of the debt; and attending him, and advising on an action that had been brought against him, are taxable items. *Smith v. Taylor*, 5 M. & P. 66; 7 Bing. 259; 1 Dowl. P. C. 212. So, a sum advanced by the attorney to the defendant, to discharge the debt and costs of an action, is a disbursement within the statute. *Id.* (The attorney's right to a compensation for his services rests upon the same foundation as the right of a builder or a bailee for work, labor and services; so of a counselor at law, he may recover for his services on a *quantum meruit*. *Stevens v. Adams*, 23 Wend. 57; 26 Id. 451.)

(1) *Ex parte Prickett*, 1 N. R. 266; *Winter v. Payne*, 6 T. R. 645; *Watt v. Collins*, 1 Ry. & Mo. 284.

(2) *Collins v. Nicholson*, 2 Taunt. 321. See *Ford v. Webb*, 3 Bro. & Bing. 241; and *Hamilton v. Pitt*, 7 Bing. 232.

(3) *Barton v. Chatterton*, 3 B. & Ald. 486, overruling *Sandon v. Bourne*, 4 Camp. 68. And see *Wilson v. Gutteridge*, 3 B. & C. 157.

(4) *Tidd's Practice*, 329.

(5) *Fenton v. Correa*, 1 Ry. & Mo. 262.

(6) *Protheroe v. Thomas*, 6 Taunt. 136. See *Miller v. Towers*, *ante*, p. 301, n. 2.

(7) *Drew v. Clifford*, 1 Ry. & Mo. 280.

(8) *Hill v. Humphreys*, 2 Bos. & Pull. 343.

(9) 2 Bos. & Pull. 345.

whole demand is connected with the plaintiff's character as an attorney, it has been held, that he could not recover for items not immediately within the terms of the statute.(1) Where an attorney has not delivered any bill to his client before action brought, but has delivered a bill of particulars of his demand under a judge's order, he will be allowed to recover items which have no reference to his business of an attorney, although other items in the bill of particulars might be taxable.(2)

The executor or administrator of an attorney need not deliver a bill for which they sue in their representative capacity;(3) nor does the statute extend to actions between one attorney or solicitor and another,(4) although the defendant became an attorney after the business was done.(5)

As to proof of the delivery of the bill. The intention of the legislature, in requiring a delivery of the bill, was, that the client should have due time to examine the charges, and, if necessary, to take advice upon them.(6) If the bill is delivered to the client himself, it should regularly be *left* with him: the attorney ought not to take it back again, though the client should acknowledge the debt, and promise to pay.(7) Nor would it be sufficient to prove, that a copy of the bill was shown to the client, and the several charges explained, upon which he admitted the debt; the words of the statute are imperative.(8) If the attorney's clerk, who is supposed to have delivered the bill, is dead, proof of an indorsement on the bill, in the handwriting of the clerk, stating that a copy was on a certain day delivered to the defendant, corroborated by proof that it was the clerk's duty to deliver the bill, and that such an indorsement would regularly be made according to the common course of business in the office, has been very reasonably held to be *prima facie* evidence of the due delivery of the bill.(9)

When the delivery is not to the party, the bill must be left for the party at his dwelling-house or last place of abode; leaving it at the counting-house of the party is not sufficient.(10) The meaning of the words "last place of abode," is, the place which appears from the evidence to

(1) *Bent v. Garcia*, 3 Esp. C. 149; 11 East, 286, n.

(2) *Mowbray v. Fleming*, 11 East, 285.

(3) 1 *Barnard. K. B.* 433; *Barrett v. Moss*, 1 Car. & P. 2. See *Penson v. Johnson*, 4 Taunt. 724.

(4) 12 G. II, c. 13, § 6.

(5) *Ford v. Maxwell*, 2 H. Bl. 589; *Bridges v. Francis*, 1 Peake's N. P. C. 1. See *Wildbore v. Brian*, 8 Price, 677.

(6) 1 H. Bl. 290.

(7) *Brooks v. Mason*, 1 H. Bl. 290.

(8) *Crowder v. Shee*, 1 Campb. 437.

(9) *Champneys v. Peck*, 1 Stark. N. P. C. 404. The later are not so strict as were the early decisions; proving an account by way of set-off, is a waiver of the objection that the bill was not delivered. *Harrison v. Turner*, 59 Com. Law, 481.

(10) *Hill v. Humphreys*, 3 Esp. N. P. C. 254; S. C., 2 Bos. & Pul. 343.

have been the last apparent abode of the party at the time of the delivery.(1)

The statute requires the bill to be delivered to the party, or left for the party at his dwelling-house or last place of abode. It does not expressly require a delivery to the client in person. A personal service, therefore, is not indispensably necessary. But a delivery of the bill to an agent, appointed by the party to receive it,(2) or to a person appointed to be his attorney in the conduct of the business, in the place of the plaintiff, whom he had dismissed,(3) is a delivery to the party within the meaning of the statute. Or if there are several persons, jointly liable in a suit or other matter, and one of them is authorized to act for the others, proof of the delivery of a bill to such acting person will be sufficient as against the rest of the party;(4) or if they all jointly employ the same attorney, and act together in the business, it seems to be sufficient to prove a delivery to any one of them, in an action against any other of the parties.(5) But though they may be jointly liable, yet if one of them did not in any manner interfere in the business, and the other undertook the entire direction of it, a delivery to the one who took no part, would not be sufficient as against the others.(6)

The bill, properly signed, is to be delivered at least one complete month, that is, one lunar month,(7) before the commencement of the action. It will not be necessary, for the purpose of showing the commencement of the suit, to prove the issuing of the writ; the *Nisi Prius* record, which is made up of the term in which the issue is joined, will be *prima facie* evidence of the commencement; and the defendant may, if he can, contradict such evidence by producing a copy of the writ,(8) or by proving when the declaration was delivered by the plaintiff.(9) When the record is of a term generally, it relates back to the first day of the term: and if that day would be within a month of the day of the delivery of the bill, a special

(1) *Wadson v. Smith*, 1 Starkie N. P. C. 324. The bill was delivered at a place where the defendant had lodged, but he had quitted the lodgings about three months before the delivery, and then went to a shopkeeper's in another street. Here the evidence closed; it did not appear why he went to the latter place, whether he went on a visit, or as to a place of abode, or in what manner: so that the evidence just fell short of the mark, and the objection failed.

(2) By *Ld. Ellenborough*, 2 Campb. 277. See also 12 East, 374. If the defendant attends the taxation, it is a recognition of the agency. *Warren v. Conningham*, 1 Gow, 71.

(3) *Vincent v. Slaymaker*, 12 East, 372, 378.

(4) *Finchett v. How and Jarratt*, 2 Campb. 277.

(5) *Crowder v. Shee*, 1 Campb. 437; *Oxenham v. Lemon*, 2 D. & R. 461.

(6) *Finchett v. How and Jarratt*, 2 Campb. 277.

(7) *Hurd v. Leach*, 5 Esp. N. P. C. 168. An attorney may set off his bill in an action against him, without delivering it a month before; but he should deliver it early enough to enable the plaintiff to have it taxed before the trial. *Martin v. Winder*, 1 Doug. 198, in note. And see *Bulman v. Beckett*, 1 Esp. 449; *Murphy v. Cuningham*, 1 Aust. 198.

(8) *Webb v. Prickett*, 1 Bos. & Pull. 263.

(9) *Harris v. Orme*, 2 Campb. 497, n.

memorandum may be inserted, stating the precise day when the bill was filed.(1)

Where a bill, duly signed, has been delivered to the defendant, a copy of it, not signed by the attorney, is admissible in evidence, without proof of notice to produce the original; because the delivery of a bill is in the nature of a notice to the defendant of the amount of the plaintiff's demand, and that he will enforce that demand by action, unless the defendant proceeds to tax his bill under the statute, and, besides, from the nature of the suit, the defendant must know that he is charged with the possession of the instrument.(2) Nor is it necessary that the writing produced should be contemporaneous with that delivered, but it may be copied from the plaintiff's books after the delivery of the original bill.(3) Palpable errors in the bill, as well as errors in the particulars delivered under a judge's order, may be rectified.(4)

The defendant's liability may be proved by his retainer to the plaintiff, or by his undertaking to pay, or his admission.(5) Where one attorney

(1) *Dodsworth v. Bowen*, 5 T. R. 325. The record in all the courts is entitled of the term in which issue is joined, but in the King's Bench in actions by bill, and in the Exchequer, a memorandum is added of the term in which the declaration is filed, see 2 Will. Saund. 1, n. 1.

(2) *Colling v. Treweek*, 6 Barn. & Cressw. 394.

(3) 6 Barn. & Cressw. 400. And see the observations of the court on the cases of *Anderson v. May*, 2 Boss. & Pull. 237; *Philipson v. Chace*, 2 Campb. 110.

(4) *Williams v. Barber*, 4 Taunt. 806. The error was in the date of the items.

(5) NOTE 883.—In an action by an attorney for his costs, although the original retainer need not be proved, yet some recognition of the attorney in the progress of the suit ought to be shown to make the party liable for costs. *Hotchkiss v. Le Roy*, 9 John. R. 142. * * *Burchart v. Gardner*, 3 Barb. S. C. R. 64. * * The answer of the client in a court of chancery in the handwriting of the attorney, and signed by such attorney, has been held to be the best evidence of the retainer and employment, the answer being sworn to. *Harper v. Williamson*, 1 M'Cord, 156. It matters not that there were other defendants also in the same suit, if it appears that their names were added *pro forma*; and this defendant was the only one really interested in the case. *Id.*

An insolvent cannot employ counsel after his failure, at the charge of his estate. An acknowledgment of one of the syndics, that the person so employed was counsel, is not evidence that they agreed to compensate him for his services. *Seghers v. Moulon's Syndics*, 2 Martin (N. S.) 608.

Where a party employs two attorneys, partners, to manage a cause for him in the palace court, an action in the common form lies against him at the suit of both, for the bill of costs, though one only was an attorney of the court, and actually did the business there. *Arden v. Tucker*, 4 Barn. & Adol. 815; 5 Car. & Payne, 248. Although the client gave a written retainer to the latter attorney only, and he only was mentioned in the rule for taxing costs, these facts were held not conclusive, there being evidence *aliunde* of a contract with both. *Id.* But where one of the partners is only a nominal partner and a clerk to his father, it is different. 10 Barn. & Adol. 20. Where two attorneys transact business together as partners, and a suit is brought in the name of one of them against a client (or a person standing in the place of a client) for the recovery of the taxable costs of a suit prosecuted in the name of one of the attorneys alone *as the attorney on record*, the other is a competent witness for the plaintiff, on executing to him a release. *Ward v. Lee*, 13 Wend. 41. "A party with whom the contract is actually made may

does business for another, it is presumed to be done on the credit of the attorney who employs him, and not of the client.(1) Proof of the judge's order, referring the bill to be taxed, with proof of the defendant's undertaking to pay what should be due, and of the master's allocatur, proves the whole of the plaintiff's case.(2) The judge's order, and the master's allocatur, prove the work done, and the amount of the charges; the undertaking proves the liability of the defendant.

Where the bill, though duly delivered, has not been taxed, general evidence of the existence of the cause, and the business in respect of which the charges are made, is sufficient, where the items are taxable, without proving the bill item by item.(3)

sue without joining others with whom it is apparently made." "Although he (one) may have appeared to the defendant to have been a partner, unless he were a party to the contract, for the breach of which the action was brought, he need not join in such action." Park, J., in *Kell v. Nailby*, 10 Barn. & Cressw. 20.

For a proceeding in the Orphan's Court, the law having made no provision as to fees for attorneys at law, acting in such cases, they can only recover upon their contract made with the party, or having performed the services at defendant's special instance and request. And where the evidence negatives such request, the plaintiff cannot recover. *Newbaker v. Alricks*, 5 Watts, 183. And unless there is some evidence tending to prove the fact of retainer or employment, it is error to refer the matter of fact to the jury under such circumstances. *Id.*

* * The statute regulating the fees of attorneys applies only to suits in courts of record; and such fees are not allowable for conducting *summary* proceedings before particular officers. *Van Hovenburgh v. Case*, 4 Hill, 54. * *

(Where an attorney, in an action, substitutes another in his stead, and the client, aware of the substitution, makes no objection to it; this is a sufficient retainer. *Smith v. Lipscomb*, 13 Texas, 532. As to the proper mode of substitution in New York, see *Roy v. Harley*, 1 Duer R. 637. A retainer or a request must be shown to establish a right of recovery for legal, as for any other services; and where there is a special agreement between the attorney and client, the same rules of pleading and evidence apply as in other cases. *Schermerhorn v. Van Allen*, 18 Barb. 29. And under the code of New York, the measure of the attorney's compensation is left to the agreement, express or implied, between him and his client. § 303. The client may agree to give the attorney a portion of the demand, when recovered, as his compensation. *Satterlee v. Frazer*, 2 Sand. 141. So, an agreement between an attorney and client, that the latter shall give the former a certain retainer to begin with, his taxable costs, and twenty per cent. of the amount recovered in the action, is valid. *Benedict v. Stuart*, 23 Barb. 420.

Where a person is restrained of his liberty for alleged insanity, an attorney retained by him and acting in good faith, is entitled to compensation for his services, in prosecuting a writ of *habeas corpus* for the purpose of testing the question of his client's insanity. *Hallett v. Oakes*, 1 Cush. 296.)

(1) *Scrace v. Whittington*, 2 Barn. & Cressw. 11.

(2) *Ley v. Jones*, 2 Campb. 496. By the practice of the King's Bench and Common Pleas, the undertaking is signed by the defendant, or his attorney in the judge's book previous to an order for taxation. *Tidd's Practice*, 326. As to the form in the Exchequer, see *Tidd's Ap.* 184.

(3) *Phillips v. Roach*, Esp. C. N. P. 10.

NOTE 884.—Agreements not to tax attorneys' bills are discountenanced. *Woosnam v. Price*, 3 Tyr. 375; 1 Crompt. & Meson, 352.

A court has no power to order the bill of an attorney to be taxed, unless it appear that some part of the business was done in the court to which application for the order is made. *Ex parte King*, 3 Nev. & Man. 437. Although the master, on taxation, has not jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary. *Heald*

Reasonableness of charges.

But, if the bill is not taxable, as where it is entirely for conveyancing or entirely for payments by the plaintiff without the slightest reference to his character as an attorney, or if any particular items in the bill are not taxable, there the payments, and the reasonableness of the charges, must be proved as in other cases. The plaintiff need not produce evidence at the trial, as to the reasonableness of his charges on any taxable items in the bill; the bill having been delivered a full month before the commencement of the action, and the defendant having delayed all that time to get it taxed, he will not afterwards be allowed to dispute the amount of the items at the trial of the cause;(1) though he may inquire whether the par-

v. Hall, 2 Dowl. P. C. 163. Though the court will not grant a rule for taxation at the instance of a third party, who makes the application for the collateral purpose of reducing the bill so low as to make the attorney a bad petitioning creditor (*Clutterbuck v. Coombs*, 2 Nev. & Man. 209; 5 Barn. & Adol. 400); yet several persons having to share with a plaintiff the expenses of an action, and he, having paid the attorney's bill, brought an action for contribution against one of those persons; the court, on his application, ordered the attorney's bill to be taxed, though it had been paid, and the defendant in the action had paid his full share of the money into court. *Grover v. Heath*, 2 Dowl. P. C. 285. An agreement to pay costs, is an agreement to pay taxed costs; and a third party paying a solicitor's bill of costs, in order to compromise a suit, stands in the same situation with respect to the right of claiming taxation as the solicitor's client. *Vincent v. Venner*, 1 Mylne's R. 212.

If an attorney does business of a taxable nature, and other business clearly not so, he is bound to include the whole in one bill, which is taxable; and he cannot bring an action for the non-taxable business alone, but must deliver his whole bill under the statute. *Thwaites v. Mackerson*, 3 Car. & Payne, 341; *Benton v. Garcia*, 3 Esp. 149. But where there are matters in the bill which have no relation to business as an attorney, as money advanced to the defendant, the master, upon reference to him, should strike those items out, and proceed to tax the rest. *Wardle v. Nicholson*, 1 Nev. & Man. 355. (See also *Beekman v. Platner*, 15 Barb. 550.)

(1) *Williams v. Frith*, and *Hooper v. Till*, 1 Doug. 198; *Anderson v. May*, 2 Bos. & Full. 237. See *Lee v. Wilson*, 2 Chitty R. 65.

NOTE 885.—*Scott v. Elmendorf*, 12 John. R. 315. But when the objection is to the principle on which the bill was taxed, as where the plaintiffs insisted that they were entitled to recover fees allowed by law, in cases where the recovery is above \$250, in the Supreme Court, when the recovery was under \$250, held, that the defendant was not concluded from making the objection at the trial. *Id.* There was no agreement on the part of the defendant to pay the plaintiff any costs at all, other than an implied *assumpsit* resulting from their retainer; and the court observed: "When the law has marked out the costs which are recoverable, there cannot be a doubt that no other costs are recoverable." *Id.*

The rule is, that the costs recovered and taxable in the cause, as between party and party, are the measure of compensation to an attorney, as between him and the party recovering. *M'Farland v. Crary*, 8 Cow. 253:

An attorney, who defends for a public officer, is entitled to the double costs given by the statute, and not the defendant himself. *Id.*

* * But now, the double costs belong to the defendant, to whom they are awarded. 2 N. Y. R. S. 512, § 26. If the officer, sued for acts done, by him under process, is indemnified by the party under whose process he acted, and who undertakes the defence of the suit, such party is entitled to the double costs. 6 Wend. 297.

Where a plaintiff fails to recover a sum sufficient to entitle him to costs, he is liable to pay his attorney full supreme court costs, if the demand put in the attorney's hands for collection exceeded \$250. *Trustees of Salina v. Gilbert*, 18 Wend. 571. A solicitor or counselor of the Court of Chan-

particulars of the business have been done, or, if done, on what specific terms. The delivery of a former bill is conclusive evidence against an increase of charge on any of the same items contained in a subsequent bill, and strong presumptive evidence against the liability of the defendant, for any additional items.(1) The declarations of an attorney's clerk in attending the master to tax the costs in an action, are evidence against the attorney to prove that he undertook to conduct the action without reward.(2)

Defence.

The defendant may prove, in answer to the plaintiff's demand for his costs, that the plaintiff has neglected to take out his certificate, by which his admission has become void.(3) But where the plaintiff has acted as an attorney, and been retained by the defendant in that capacity, it will not be sufficient to show that, in some previous years, the plaintiff did not take out his certificate.(4) It is no defence to an action for fees due for suing out a commission of bankruptcy, that the plaintiff is only an attorney of the King's Bench, and not a solicitor in chancery.(5)

The defendant may also discharge himself, by showing that he has derived no advantage from the professional skill of the plaintiff, and that, in fact, the business was managed by an articulated clerk, the plaintiff residing at a considerable distance from the spot.(6) And he will be entitled

cery is not permitted to contract with his client for a part of the subject matter of the litigation, as a compensation for his services, but a counselor may stipulate with his client for a reasonable reward for his services, beyond the fee bill, though he act as solicitor or attorney in the same cause. *Merritt v. Lambert*, 10 Paige, 352; S. C. affirmed in error, 2 Denio, 607. That a counselor may recover a *quantum meruit*, beyond the taxed bill, see *Stevens v. Adams*, 23 Wend. 57; S. C. affirmed in error, 26 Wend. 451. The law implies a promise on the part of the client, to pay his attorney the statute rate of compensation for his services; and the burden rests upon the client, to show that the attorney undertook to perform the services at a lower rate, or gratuitously. *Brady v. The City of New York*, 1 Sandf. Super. C. R. 569. And as between the attorney and client, costs are to be taxed according to the fee bill in force when the services were rendered. *Brooklyn Bank v. Willoughby*, Id. 669. But as between party and party, costs are to be taxed according to the fee bill in existence, at the time of the rendition of the judgment (Id.), or at the time when the suit terminated in a compromise. *Supervisors of Onondaga v. Briggs*, 2 Denio, 173. * *

(Under the former statute requiring previous service of a copy, a bill of costs taxed *ex parte* might be given in evidence in an action for the services rendered. *Scott v. Elmendorf*, 12 John. R. 315; *Hughes v. Mulvey*, 1 Sand. 92, 569. Not so where the defendant has had no opportunity to get the bill retaxed. *Mumford v. Hawkins*, 5 Denio R. 357. When the bill is taxed on regular notice, it is admissible evidence. *Platt v. Halen*, 23 Wend. 456.)

(1) *Loveridge v. Botham*, 1 Bos. & Pull. 49. But errors and real omissions will be allowed for. Id.

(2) *Ashford v. Price*, 3 Stark. N. P. C. 185.

(3) St. 37 G. III, c. 90, § 31.

(4) *Pearce v. Whale*, 5 B. & C. 38. After a neglect to take out a certificate for a year, re-admission is necessary. The proof of admission is either by the roll, or the book of admissions in the master's office. *Rex v. Crossley*, 2 Esp. 526, 4 T. R. 366.

(5) *Wilkinson v. Diggles*, 1 Barn. & Cress. 158.

(6) *Taylor v. Glassbrook*, 3 Stk. N. P. C. 75; *Hopkinson v. Smith*, 1 Bing. 13.

to a verdict, if he can prove to the satisfaction of the jury, that the costs have been incurred through inadvertence and want of proper caution on the part of the plaintiff, and that he has derived no benefit whatever from the plaintiff's services.(1) But it has been considered, in several cases, that, where the defendant has received some benefit from the plaintiff's assistance as an attorney, his only remedy is an action for negligence.(2) And it has been held, that if other causes conduce to the loss of the benefit, independent of the conduct of the plaintiff, the plaintiff's negligence is no defence in action for his costs.(3) An attorney is not to lose his fair remuneration.

(1) *Montrieu v. Jeffreys*, 1 Ry. & Mo. 320. And see *Duncan v. Blundell*, 3 Stark. N. P. C. 6; *Denew v. Daverell*, 3 Campb. 451.

NOTE 886.—*Hill v. Featherstonhaugh*, 7 Bing. 569; 5 M. & Scott, 341; *Hopping v. Queen*, 12 Wend. 517; *Gleason v. Clark*, 9 Cowen, 57; *Graham's Pr.*, p. 59, and cases cited.

Where, on the taxation of an attorney's bill, a sum was deducted, being the costs occasioned by the commencing an action in an improper form, which was afterwards brought in a proper form; and, in consequence of that deduction, a little more than a sixth was taxed off; held, that the client was entitled to the costs of taxation. 2 H. Bl. 358; 3 Nev. & M. 767; 5 Barn. & Cress. 760; 1 Dowl. P. C. 251; 2 Id. 382; *Morris v. Parkinson*, 3 Id. 744.

(2) *Templar v. McLachlan*, 2 N. R. 136; *Passmore v. Birnie*, 2 Stk. N. P. C. 59. This seems, however, contrary to the general rule in the case of *indebitatus assumpsit*; for it has been held, that the defendant may prove without giving notice, that work performed by the plaintiff is not of the value claimed; and that he cannot resort to a cross action. *Basten v. Butter*, 7 East, 484; *Fisher v. Samuda*, 1 Campb. 190; *Farnsworth v. Garrard*, 1 Campb. 39.

NOTE 887.—Where there appears to be negligence or ignorance of the law on the part of the attorney, which creates unnecessary costs, the court will order the costs to be disallowed on taxation, without prejudicing his right to bring an action for them. *Cliffe v. Prosser*, 2 Dowl. P. C. 21. In considering an attorney's bill, the jury may discard an item for work entirely useless; though, upon an item partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross action. *Shaw v. Arden*, 9 Bing. 287; 2 Maule & Selw. 341. And the jury have authority to discriminate between the items, and decide which constitute charges for useful work, and which for useless; except an entire item be for work, partly useful, the jury would be precluded from reducing that item, in an action to recover the amount of the bill; in the latter case, the client must resort to his cross action. Id.

An attorney having brought an action for his bill of costs, which was defended by the client on the ground of negligence, was ordered to give the defendant a copy of the case, with the opinion of the counsel thereon (which had been procured for the defendant by the plaintiff, as his attorney), at the defendant's expense, or to deliver up the case itself, on being paid the costs which he claimed in respect of such case and opinion. *Evans v. Delegal*, 4 Dowl. P. C. 374.

(Where the services rendered prove of no value to the client by reason of the ignorance and unskillfulness of the attorney, he is not entitled to any compensation therefor. *Grant v. Button*, 14 John. R. 377; 4 Cowen, 564; *Gleason v. Clark*, 9 Id. 57. The standing of counsel may be shown as a means of estimating the value of services rendered. *Vilas v. Downer*, 21 Vt. 419.

In an action by an attorney for services rendered, if the defendant alleges his negligence by way of defence, the fact so alleged must be distinctly found, or it will not form a bar to a recovery: to constitute a perfect defence, it must, in other words, be shown that the services were of no value. *Maynard v. Briggs*. 26 Vt. 94.)

(3) *Dax v. Ward*, 1 Stark. N. P. C. 409.

NOTE 888.—The defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action in which the plaintiff had retained him to defend; the negligence being proved, held, it was for the attorney to defend himself by showing, if he could, that the plaintiff had no defence in that action, and not for the plaintiff to begin by showing he had a good de-

neration, because he has committed such an error as a cautious or prudent man might make, nor is he bound to know the law in all cases, but he is to bring to the exercise of his profession reasonable skill and diligence.(1)

fence, and so had been damaged by the judgment by default. *Godefroy v. Jay*, 7 Bing. 413. A neglect to obey the lawful instructions of a client and a loss ensuing, will make the attorney responsible for the loss. *Gilbert v. Williams*, 8 Mass. R. 51.

* * An attorney cannot recover of his client the costs of a suit, in which the judgment recovered by him was set aside for irregularity, nor a sum paid by him to set aside a judgment, of discontinuance suffered by his negligence or ignorance. *Hopping v. Quin*, 12 Wend. 517. And, on the subject of negligence and unskillfulness, generally, see *Lynch v. The Commonwealth*, 16 S. & R. 368; *Purves v. Landell*, 12 Clark & Fin. 91 *et seq.*; *Hart v. Frame*, 6 Clark & Fin. 193; *Davies v. Jenkins*, 11 Mees. & Welsb. 745. And consult the places cited *ante*, note 880. See, also, 2 Gr. Ev. §§ 143-145, and the notes. * *

(The attorney must have and use ordinary skill in the business he undertakes. *Holmes v. Peck*, 1 R. I. 242. If guilty of gross negligence, he is answerable in an action therefor. *Wilson v. Coffin*, 2 Cush. 316.)

(1) By Lord Teunterden, Ch. J., in *Montrieu v. Jeffreys*, 1 Ry. & Mo. 320. And see *Baikie v. Chandless*, 3 Campb. 17; *Compton v. Chandless*, 3 Campb. 19; *Reece v. Rigby*, 4 B. & Ald. 202; *Laidler v. Elliott*, 3 B. & C. 738; *Ireson v. Pearman*, 3 B. & C. 799; *Russell v. Palmer*, 2 Wils. 325.

NOTE 889.—An attorney is liable only for gross negligence. *Evans v. Watrous*, 2 Porter, 205. Where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in court, the court refused to set aside the nonsuit except on the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try. *White v. Sandall*, 3 Dowl. P. C. 798. But an attorney is not liable for the consequence of a mistake in a point of law, upon which a reasonable doubt may be entertained. *Kemp v. Burt*, 1 Nev. & Man. 262. An attorney, with the advice of counsel, produced, in an action against J. B. for negligence in the conduct of the plaintiff's defence to another action, the prothonotary's book to prove an allegation "that, in consequence of the negligence of J. B., judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed, and execution issued," whereupon plaintiff was nonsuited for not producing the record of that judgment, or a proper copy; held, that this was not such negligence as rendered the attorney liable to an action. *Godefroy v. Dalton*, 6 Bing. 460; 4 M. & P. 149.

An attorney in a cause is not answerable for the absence, neglect, or want of attention in the counsel engaged in it. *Lowry v. Guilford*, 5 Car. & Payne, 234.

The retainer of an attorney only implies the use of diligence in the usual course of proceeding. *Gallaher v. Thompson*, *Wright*, 466.

When attorney receives a note to collect or put in suit, as an attorney of the court, he is not to be considered as a mere agent to receive the money; but also as having authority to discharge it: and if the attorney having received money in part payment of such note proceed to take judgment for the full amount of the note, without deducting such payment, he is guilty of a breach of trust, and for this breach he ought to refund the money to the person paying, although such attorney has paid the money over to his client, his principal, before such judgment was recovered. Per *Parsons, C. J.*, in *Fowler v. Shearer*, 7 Mass. R. 14. The money was not paid by mistake, and the client had a right, when he received it, to retain it, as it was then due. In such case, the jury may legally calculate interest from the time the payment was made to the time of the verdict. *Id.* The same court, in a subsequent case, applied the same principle to a creditor, who, by his own fault, recovered judgment for his whole debt, when a part of it had been paid. *Rowe v. Smith*, 16 Mass. R. 306. * * See the next preceding note. * *

(There is a presumption in favor of an attorney that he has discharged his legal duty; and though he is answerable for either gross ignorance or gross neglect, both the cause of action and the damages must be proved affirmatively against him. *Pennington v. Yell*, 6 Eng. 212. See *Walker v. Goodman*, 21 Ala. 647.)

CHAPTER V.

OF THE ACTION OF ASSUMPSIT AGAINST CARRIERS.

Contract with carrier.

IN actions of this description it is, in the first place, necessary to prove the contract made with the carrier, master of the vessel, or other bailee.(1) In the absence of any express agreement, there is an implied promise in law, that a carrier will convey the property delivered to him safely;(2)

(1) NOTE 890.—One who carries goods for hire, as a casual occupation, *pro hac vice*, is not a common carrier. *Satterlee v. Groat*, 1 Wend. 272. All engaged in the transportation of goods generally for hire, on water, whether inland or on the ocean, are considered as common carriers. *Richards v. Gilbert*, 5 Day's R. 415; *Emery v. Hersey*, 4 Greenl. R. 407. The freight or compensation paid by the shipper, is a remuneration not only for the carriage, but for all the care and labor bestowed upon it by the master, until his trust is fulfilled. The owner is liable for the faithful performance of every duty, undertaken by the master, within the scope of his employment, in regard to the property, according to usage proved. *Emery v. Hersey*, *supra*; *Kemp v. Coughtry*, 11 John. R. 107. The hirer of a vessel is owner only when he has the possession and entire control and direction thereof; so that the general owner for the time being, would have no right to interfere with her management. *Id.*; *Reynolds v. Tappan*, 15 Mass. R. 370; *Taggard v. Loring*, 16 Id. 336.

There is no distinction between carriers by land, and carriers by water. Per Kent, Ch. J., in *Elliott v. Rossell*, 10 John. R. 1. The marine law, and almost the universal law of nations, holds the carrier to losses not arising from inevitable accident. *Id.* See *Riley v. Horne*, 5 Bing. 217; *Aymar v. Astor*, 6 Cowen, 266, seems *contra*; but the report of that case is doubted.

* * And it was overruled in *Allen v. Sewall*, 2 Wend. 327. The last case was reversed in the Court of Errors (S. C., 6 Wend. 335), but on another point. And see 2 Kent C., 609, and note.

(The common carrier is bound, on his implied contract, to carry and deliver safely, and he can only excuse himself by showing that the goods were lost or injured through the act of God, or of public enemies. *Edwards on Bailm.* 454.)

On the general subject of the liabilities of common carriers, consult Story on Bailment; Angell on the Law of Carriers; Smith's Mercantile Law, book 3, ch. 2; Contracts with Carriers; Stephen's N. P., tit. Carriers, pp. 961–1001; Chitty on Contracts, title Carriers; Addison on Contracts, pp. 791–828; 2 Kent C. 597–611, and notes; 2 Gr. Ev. §§ 208–222, and notes. And see *post*, note 908. * *

(2) NOTE 891.—A bailment of money to be delivered by the bailee without reward, will render the bailee liable for gross negligence, which consists in the omission of that care which bailees, without hire of common prudence, are accustomed to take of property of the like description. *Graves v. Ticknor*, 6 N. Hamp. R. 537; *Tracy v. Wood*, 3 Mason, 132. The undertaking in such case is to pay over the money in a reasonable time, or to refund it, or to account for it. *Id.* The undertaking being gratuitous, performance cannot be compelled by the common law; yet, assumpsit will lie where the unreasonableness of the delay is apparent, and without excuse although there has been no demand. *Id.*

* * And see *Beauchamp v. Powley*, 1 M. & Rob. 38; *Doorman v. Jenkins*, 2 Adol. & Ell. 250; *Foster v. Essex Bank*, 17 Mass. R. 479; *Beardslee v. Richardson*, 14 Wend. 25. * *

(In respect to a gratuitous carrier of a package of money, the presumptions are in his favor; and he may show his own acts and declarations immediately before and after the loss, as a part of the *res geste*, to exonerate himself from liability. *Tompkins v. Saltmarsh*, 14 Serg. & Rawle

and by the common law, a greater obligation is imposed upon carriers than upon ordinary bailees, namely, that they are liable for every loss and injury to goods, except such as are occasioned by the act of God or the king's enemies.(1) A loss occasioned by the act of God, must have arisen

275. Where there is a failure to deliver, and a demand shown before suit, the burden is on the bailee. *Beardslee v. Richardson, supra.*)

Where a creditor, or an attorney receives a payment in money, in part of a larger demand, and by his own fault, neglects to apply the same, and proceeds to take judgment for the whole debt, without deducting the payment, he will be considered as retaining the money for the use of the debtor. *Rowe v. Smith*, 16 Mass. R. 306; *Fowler v. Shearer*, 7 Id. 14. It is a breach of trust; for the money was paid on the trust that the creditor or attorney would discharge the debtor, either by indorsing it, or by crediting it when he entered judgment; and for such breach of trust he is liable to refund the money.

(1) *Forward v. Pittard*, by Lord Mansfield, 1 T. R. 33. So of ship owners, hoymen, and barge-men. *Dale v. Hall*, 1 Wils. 281; *Rich v. Kneeland*, Cro. Jac. 330; *Morse v. Slue*, 2 Lev. 69; *Wardell v. Mourellyan*, 2 Esp. 693.

NOTE 892.—The hirer of a thing is answerable for ordinary neglect, viz: the omission of that care which every man of common prudence takes of his own concerns. Thus, where the owner of a ship hired a steamboat for a stipulated reward to be used in towing the vessel, the latter being under the control of a regular licensed pilot, and a disaster happens to the boat by coming in collision with a schooner: held, that if no blame was imputable to the pilot, and the disaster was not occasioned by his neglecting to do what every man of common prudence would have done in the same circumstances, the owner was not liable. *Reeves v. The Constitution*, 1 Gilpin, 579. "It was a case of very close calculation, in which an error might have happened to any man. If the ship and steamboat had been half a minute more in advance, they could have passed the schooner untouched; if half a minute later, the schooner would have passed them without injury. We should have a rule of negligence much more strict than Lord Holt's, if we were to apply it to such a case. Even a borrower would hardly be liable in such a case, as may be inferred from the examples put by Sir Wm. Jones, in which the articles loaned were undeniably exposed to greater danger than usage, or prudence, or the reasonable expectation of the lender, would justify. The owner of a thing let out to hire, must not suppose that he is to be indemnified for every injury it may sustain in the service it is upon. The reward paid for it is presumed to include not merely a compensation for it to the hirer, but also for the ordinary wear of it, and the risk attending the employment, unless it be produced by an abuse of it, or by such negligence as brings responsibility upon the hirer. The owner of a ship, who lets her to hire, knows she is to encounter the perils of the sea, injuries from tempests, various accidents and losses, that belong to the service in which he has hired her, and that must be borne by himself. So the man who hires to another a carriage or horse, knows that he exposes them to certain dangers; that the one may be broken, and the other become lame, without any fault or abuse on the part of the hirer; and the owner is his own insurer for such losses. In fixing his compensation, he is presumed to take them into consideration, and probably does so. A hired carriage may come into collision with another, and be broken, without any culpable negligence in the driver; a horse may be ridden moderately, and be judiciously taken care of, but he may fall lame, or be foundered." Per *Hopkinson, J.*, in *Id.*

An innkeeper on a fair day, upon being asked by a traveler, then driving a gig, of which he was the owner, "whether he had room for the horse?" put the horse into the stable of the inn, received the traveler, with some goods, into the inn, and placed the gig in the open street, without the inn yard, where he was accustomed to place the carriages of his guests on fair days. The gig having been stolen from thence, held, that the innkeeper was answerable. *Jones v. Tyler*, 1 Adol. & Ellis, 522. Though the judges admitted that the case was on the extreme limit; the place was a part of the inn, and, therefore, defendant was liable, as innkeeper, for its safe custody.

from some natural accident, such as lightning, earthquake, and tempest; and must have been the immediate and not the remote consequence of such accident.(1) A carrier of goods will not be discharged, although the

(1) By Heath, J., *Scott v. Shepherd*; Lord Tenterden on Shipping (5th ed.) 253.

NOTE 893.—Gould, J., in *Williams v. Grant*, 1 Conn. R. 487. "It is very clear that a common carrier is liable, under a general acceptance, for all losses, except such as are occasioned by inevitable accident, the act of public enemies, or the act, or default of the bailor himself."

The rule of diligence which measures the liability of common bailees for hire, is not that by which the engagements of common carriers are to be tested. The latter cannot be excused for the non-performance of their contracts, by nothing short of the act of God, or of the public enemy. *Harrel v. Owens*, 1 Dev. & Bat. R. 273. The true question is not one of *actual blame*, but of *legal obligation*.

If an injury be occasioned partly by the negligence of the plaintiff, and partly by that of the defendant, the plaintiff cannot maintain any action. *Williams v. Holland*, 6 Car. & Payne, 23. If the plaintiff's negligence *in any way concurred* in producing the injury, the defendant would be entitled to the verdict. *Pluckwell v. Wilson*, 5 Car. & Payne, 375. See the observations of Hopkinson, J., in the last note.

The *onus probandi* is on the common carrier. *Murphy v. Staton*, 3 Munf. R. 239; *Bell v. Reed*, 4 Binn. R. 127. In an action against the defendants, as common carriers, the vessel met with a violent gale of wind, and was lost. The cause turned on the point of seaworthiness. Tilghman, C. J., observed: "The man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned, and furnished with sails, anchors, and all necessary furniture. If a loss happens through defect in any of these respects, the carrier must make it good." *Id.* But it is for the jury to judge, under the circumstances of the case.

How far a carrier is liable for unavoidable accident, not coming within the description of accidents happening from the act of God, or the king's enemies, see *Trenton Navigation Co. v. Wood*, 3 Esp. 127; *Abbot on Ship*. 256; 4 Doug. 287. The carrier by water is liable for running against an anchor to which no buoy appeared to be fastened. *Id.*

Where damage was done to the cargo of a steam vessel, by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost; held, that it was not an act of God, but negligence in the captain in filling his boiler before the time for heating it, although it was the practice to fill over night, when the vessel started in the morning. *Siordet v. Hall*, 4 Bing. 607; 1 Mood. & Malk. 561.

Independent of actual negligence, the carrier is liable for every loss which happens from any other cause than an act of providence or the public enemy; and to make due provision for the transportation of the goods is asserted to be his concern, because, by the general principle of his responsibility, he is to bear the consequences if he omit it. *Hart v. Allen*, 2 Watts, 114. *Gibson, J.*, held that mere want of skill in the carrier, or defect in the vehicle or ship, was not sufficient; it must appear, that such want of skill or defect contributed to the loss; otherwise the plaintiff is not entitled to recover. *Id.* A delinquency which might have contributed to the disaster, such, for instance, as is imputable to the owner of a ship driven on a lee shore, for a defect in the rigging or sails; in such case, the loss would have to be borne by the delinquent, on a very common principle, by which any one whose carelessness has increased the danger of injury from a sudden commotion of the elements, is chargeable with all the mischief that may ensue. *Id.* As in *Turberville v. Stamp* (Skin. 681), where it was adjudged that the negligent keeping of fire in a close would subject the party to all the consequences, though proximately produced by a sudden storm; and the same principle was held in *Thé Leigh Bridge Company v. The Leigh Navigation* (4 Rawle, 9). But it would be too much to require of the carrier to make good a loss from shipwreck, for having omitted to provide the ship with proper papers, which are a constituent part of seaworthiness, and the omission of them an undoubted negligence" (per *Gibson, C. J.*, in *Hart v. Allen*, *supra*); "the owner of a ship being liable as a common carrier, on strict common-law principles, for damage occasioned by any defect of seaworthiness (3 Kent,

204, 206), just as a carrier by land is liable for any damages occasioned by any defect in his wagon. The assertion that the carrier is bound to provide a sufficient vessel, or bear the consequences of a default, is nothing more than an application of the general principle of his responsibility to a specific case; and not the designation of a superadded liability, as might be supposed from the particularity with which it is repeated by elementary writers on the subject of freight; and hence, perhaps, the origin of the impression that there is one rule for the water and another for the land."

The hoy of a carrier with goods on board was sunk, coming through a bridge, by a sudden gust of wind. The owner of the goods, insisting that the carrier was chargeable with negligence in going through at such a time, offered evidence to show that if the hoy had been in good order, it would not have sunk with the strokes it received, and thence inferred, the carrier was liable for all accidents that might have been prevented by putting the goods into another hoy. But Chief Justice Pratt held the carrier not liable, the damage having been occasioned by the act of God. *Amies v. Stevens*, 1 Str. 128. For though the carrier ought not to have ventured to shoot the bridge if the bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had entirely differed the case. And no carrier, he said, is obliged to have a new carriage for every journey, it being sufficient if he provides one which, without any extraordinary accident, such as this was, will probably perform the journey. *Id.* "It seems (observes Chief Justice Gibson, in *Hart v. Allen*, *supra*), to have been the opinion of the chief justice, that to render a carrier liable for an act of providence, it is necessary that his own carelessness should have co-operated with it to precipitate the event. But the case is of greater value in ascertaining the requisite degree of ability and skill in the captain and crew; which, according to the principle just stated, is not to be measured by the exigencies of a crisis, but by its sufficiency to conduct the vessel safely to the place of destination in the absence of extraordinary accident. Nor is the carrier bound to provide a captain who has already made a voyage as such, if he has acquired a competent share of skill in any other station. The first question, therefore, will be, whether the captain and crew of the boat had the degree of ability and skill thus indicated; and if it be found that they had not, then the second question will be, whether the want of it contributed in any degree to the actual disaster; but if either of these be found for the carrier, it will be a decision of the cause." See *post*, note 907.

In an action on the case against the defendants, as common carriers, the plaintiffs claimed, and attempted to prove at the trial, that the master unnecessarily deviated from the ordinary course; that he was ignorant of the navigation of the river; and that it was usual in that navigation to have a pilot (whom he confessedly had not); held, that as this misconduct, deficiency, and neglect, contributed to occasion the loss, by bringing the property on board within the reach of the peril; the existence of the facts, on which the claim was founded, should have been left to the jury, and the legal effect of them, upon the supposition of their existence, explained; as this was not done, the court granted a new trial. *Williams v. Grant*, 1 Conn. R. 487. Such a deviation is misconduct; the alleged ignorance (there being no pilot on board) is a species of deficiency, in the nature of a want of seaworthiness; and the want of a pilot, where one is by common usage employed, and the master ignorant of the navigation, is manifestly a culpable neglect. Per Gould, J., in *Id.*

* * It seems where horses are left at an *inn* to be kept, it is not necessary to the creation of the innkeeper's lien that the person leaving them should be a *guest*. *Peet v. McGraw*, 25 Wend. 653. But see *Grinnell v. Cook*, 3 Hill, 485, *contra*, where *Peet v. McGraw*, *supra*, is commented on and explained. An innkeeper is not liable in that character, if sheep be put to pasture under the direction of the guest, and they are injured by eating poisonous plants; but if the injuries are attributable to his want of due care, he is responsible in damages. *Hawley v. Smith*, 25 Wend. 642. * *

(In an action against the master or owners of a vessel, or against a railroad corporation as a common carrier, the plaintiff must show that the defendants were common carriers, that the goods were delivered to them for transportation, and that they were not delivered at the place of destination; this is sufficient to throw the burden of accounting for the loss or non-delivery upon the defendants. *Fuller v. Bradley*, 25 Penn. State R. 120; *Alden v. Pearson*, 3 Gray, 342; *Ringgold v. Haven*, 1 Cal. 108, 213; *Trowbridge v. Chapin*, 23 Conn. 595. Slight evidence of

jury expressly negative any negligence on his part;(1) but a carrier of passengers is only liable for negligence.(2)

Parties to the action.

Where the vendor of goods delivers them to a carrier to be conveyed to the vendee, at whose risk they are sent, the vendor will be nonsuited, if the action is brought in his name, for he is, in that case, the mere agent of the vendee.(3) But, where the vendor agrees with the carrier, and is answerable for the price of the carriage, he may bring the action in his

non-delivery is sufficient. *Woodbury v. Frink*, 14 Ill. 275. Railroads deliver at their depot, by giving notice of arrival. *M. C. R. Co. v. Ward*, 2 Mich. 538.)

(1) *Forward v. Pittard*, 1 T. R. 33. And see *Hyde v. Trent Navigation Co.*, 5 T. R. 389; 3 Esp. 131. It is no excuse that the property continued under the plaintiff's inspection. *Robinson v. Dunmore*, 2 Bos. & Pull. 419; *Middleton v. Fowler*, 2 Salk. 282.

(2) *Crofts v. Waterhouse*, 3 Bing. 321; *Aspen v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Campb. 79.

(3) *Dawes v. Peck*, 8 T. R. 330, in which case, the vendor paid for the booking of the goods; *Dutton v. Solomonson*, 3 Bos. & Pul. 582. *Vide infra*, "Bill of Lading," p. 319.

NOTE 894.—*Sanderson v. Lambertson*, 6 Binn. R. 129. The bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence. *Freeman v. Birch*, 1 Nev. & Man. 421. When goods are forwarded for sale on approval, the consignor is the party to sue the carrier. *Swain v. Shepperd*, 1 Mood. & Rob. 223, Parke, J.

In questions between *vendor* and *vendee*, the bill of lading, the symbol of property, may be material, but as against a wharfinger it is immaterial whether the admission of title be written or oral. If a wharfinger, therefore, acknowledge the title of the person for whom he holds, he cannot afterwards dispute it; thus, defendant acknowledged certain timber on his wharf to be the property of the plaintiff; held, that he could not dispute the plaintiff's title in an action of trover, brought against him by the plaintiff. *Gosling v. Bierne*, 7 Bing. 337. A bailee can never be in a better situation than the bailor; for the bailor can give no better title than he has; the right to property has been repeatedly tried in actions against warehousemen; and it may be tried in an action against the bailee. *Wilson v. Anderton*, 1 Barn. & Adol. 450, Tenterden, J. The captain of a ship who had taken goods on freight, and claimed to have a lien upon them, delivered them to the bailee. The real owner demanded them of the latter, and he refused to deliver them without the directions of the bailor; held, that the bailor not having any lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion. *Id.* "The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that method of proceeding, must stand or fall by his title, if he make himself a party by retaining the goods." *Tenterden, Ch. J., in Id.* See *Bissell v. Price*, 16 Ill. 408.

In *Dawes v. Peck*, cited in the text, it was held, that the contract respecting the carriage of the goods, must be governed by the consideration, in whom the legal property is vested; he being the person who has sustained the loss, and who, therefore, is the proper party to call for compensation; but a learned writer observes in the case alluded to, the goods were directed to be sent by a certain carrier, and they were delivered to that carrier accordingly. It was admitted that the action might be brought by the consignor, where he is to be answerable for the price of the carriage, by special agreement between him and the carrier. But the mere booking of the goods by the consignor, was considered to have been done by him as the agent of the consignee; and it was observed that, generally speaking, the carrier knows nothing of the consignor, but only of the person for whom the goods are directed, and to whom he looks for the price of the carriage on delivery. However, this decision, says a learned writer, seems to proceed in a great measure, upon the assumption that the delivery to a carrier, specially named by the consignee, is a delivery under his special order. *Laws on Ass.* p. 112.

own name.(1) The action cannot be brought against a mere servant of the carrier, as a driver or a porter, unless he has undertaken to carry for hire on his own account.(2) The proprietors of a coach may be sued jointly, though they appoint the drivers and horses for distinct stages.(3)

(1) By Lord Kenyon, 8 T. R. 333; *Davis v. James*, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 659. See *Jacobs v. Nelson*, 3 Taunt. 423; *Duff v. Budd*, 3 Bro. & Bing. 184. Although the carriage is paid by the vendor, the goods are at the risk of the vendee. *King v. Meredith*, 2 Campb. 639.

NOTE 895.—“In the case of the vendor and vendee, if the goods, whilst the carrier has the care of them, are to be at the risk of the vendor, he must bring the action against the carrier. In ordinary cases the vendor employs the carrier as the agent of the vendee. See *Davis v. James*, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 659.” Per Parke, J., in *Freeman v. Birch*, 1 Nev. & Man. 421. The question who is the proper party to bring the action against the carrier, does not always depend upon the vesting of the property, which may vary in different cases, for where the agreement is between the plaintiff and the carrier, who is to be paid by the plaintiff, the action is properly brought. *Davis v. James*, 5 Burr. 2680; *Fleming v. Simpson*, 1 Campb. 40, 41.

Where the consignor of goods shipped for transportation, sued the carrier, held, that he was entitled to maintain the action, although the bill of lading stipulated for the delivery to Mr. Hollingsworth, or at the head of Elk. *Moore v. Sheridine*, 2 Har. & M'Hen. 453. A person who ships goods in an English port, as the agent of the owner of the goods resident abroad, and pays the freight for them, taking a bill of lading stating the goods were shipped by the plaintiffs, to be delivered to L. D. or his assigns in Surinam, may maintain the action in his own name for not delivering the goods; the plaintiffs in such case, will hold the sum recovered as trustees for the real owner. *Joseph v. Knox*, 3 Campb. 520. However, the owner may maintain the action though consigned to a third person, “he paying freight.” *Turney v. Wilson*, 7 Yerger, 340. (See *Edwards on Bailm.* 561–565; *Green v. Clark*, 13 Barb. 57; *Hinsdell v. Weed*, 5 Denio, 172; *Price v. Powell*, 3 Comst. 322; *Elkins v. Boston & Maine R.*, 19 N. H. 337; *Bingham v. Lamping*, 26 Penn. State R. 340.)

(2) *Williams v. Cranston*, 2 Stark. N. P. C. 82; *Cavenagh v. Such*, 1 Price, 328.

NOTE 896.—If a parcel be given to a wagoner for hire, to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. *Butler v. Basing*, 2 Car. & Payne, 613.

Although the owner make a particular contract with a carrier of his own choosing, he may relinquish that contract by bringing his action against another. Thus, L. having a barrel of castor hats, which he wished to be conveyed to C., the place of his residence, agreed with S., a common carrier, for the carriage of them. S. contracted with C. to carry them. C. having received the barrel from the house where it was deposited, delivered it to R. S., who was also a common carrier, and engaged that plaintiff (L.) should pay R. S. two dollars on its safe delivery at C.; held, that L., the owner, may bring his action directly against R. S. *Tilghman*, Chief Justice, saying: “Supposing that the plaintiff might have looked to S. in the first instance, yet he cannot do so now, because he has elected to adopt the contract made with R. S.” *Sanderson v. Lamberton*, 6 Binn. R. 129.

(3) *Waland v. Elkins*, 1 Stark. N. P. C. 272; *Barton v. Hansom*, 2 Taunt. 49; *Fromont v. Coupland*, 2 Bing. 170. And see *Helsby v. Mears*, 5 B. & C. 504.

NOTE 897.—The inscription on a stage coach of the name of the party licensed to use it, is evidence against him of ownership, as well in an action as on summary proceedings. *Barford v. Nelson*, 1 Barn. & Adol. 571.

A common carrier of passengers for hire, such as a steamboat, is bound to take a traveler as a passenger, if he has suitable accommodations, and there be no sufficient objection to the character or conduct of the person. But he is not bound to admit an agent of a line of coaches which is in opposition to another line, which had entered into a contract with the steamboat for the conveyance of passengers. *Jencks v. Coleman*, 3 Sum. R. 221.

An omission, in the declaration, of stipulations contained in a carrier's notice, limiting his responsibility, will not be material as a variance.(1)

Different rules have been applied to the transportation of *persons*, and the transportation of *goods*. *Christie v. Griggs*, 2 Camp. 80. So far as personal injury is concerned in respect to the former, the question is one of negligence. *Sharp v. Gray*, 9 Bing. 457. But in respect to the *baggage* of passengers it is different; they are responsible as common carriers. Thus, in *The Camden R. R. and T. Co. v. Burke* (13 Wend. 611), it was held, that a company, using steam-boats and railroads for the transportation of their baggage, were liable as common carriers for injury to such baggage from a defect in the vehicle or machinery used. And for such losses the usual notice does not excuse.

* * On the subject of *passenger* carriers, see Angell on Law of Carriers, 485—647, where the cases are fully collected, and the most important of them stated. See particularly, *Ingalls v. Bills*, 7 Metc. 1; *Commonwealth v. Power*, 7 Id. 596; *Bennet v. Dutton*, 10 N. Hamp. R. 481; *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. 626; *Hawkins v. Hoffman*, 6 Hill, 586; *McKinney v. Neil*, 1 McLean C. C. R. 540; *Peck v. Neil*, 3 Id. 22; *Hollister v. Nowlan*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; *Bremner v. Williams*, 1 C. & Payne, 114; *Ware v. Gay*, 11 Pick. 106; *Hall v. Connecticut R. S. B. Co.*, 13 Conn. 319; *Stokes v. Saltonstall*, 13 Peters, 181; *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Cole*, 21 Id. 188; *Hartfield v. Roper*, Id. 615; *Brownell v. Flagler*, 5 Hill, 282; *Monroe v. Leach*, 7 Metc. 274; *Winterbottom v. Wright*, 10 Mees. & Welsb. 109. * *

(1) *Clarke v. Gray*, 6 East, 564; *Smith v. Horne*, 2 B. Moore, 22, where it was held, that the common form of declaration admitted proof being given of gross negligence.

NOTE 898.—Where injury is occasioned by the carelessness and negligence of defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act be immediate, so long as it is not a willful act. *Williams v. Holland*, 10 Bing. 112. The master who is present, is not made liable to a different form of action than he otherwise would have been if the servant of the other proprietors had not been there. Thus, in *Moreton v. Hardern* (4 Barn. & Cress. 223), case against three defendants, proprietors of a stage coach. The declaration stated that the defendants so carelessly managed their coach and horses, and the coach ran against the plaintiff and broke his leg. It appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his negligent driving; held, that the plaintiff might maintain case against all the proprietors, although he might perhaps have been entitled to bring trespass against the one who drove the coach.

Two persons contracted to assist defendant with their respective horses, but to give in their accounts separately; held, to be separate contracts. *Smith v. Taylor*, 2 Chitty, 142. A. B., &c., were common carriers from L. to F., a separate portion of the road being allotted to each, and it having been stipulated that no partnership could exist between them. A., for himself and the other parties, agrees with the mint to carry coin from L. to F., and afterwards makes another agreement with the mint to carry other coin to places on the road; held that the parties were entitled to share in the profits of the agreement. *Russell v. Austwick*, 1 Sim. 54. Plaintiff agreed with defendant to convey by horse and cart, the mail between N. and B., at £9 a mile per annum, and to pay his proportion of the expenses of the cart, &c.; money received for the carriage of parcels to be divided between the parties, and the damage occasioned by the loss of parcels, &c., to be borne in equal portions; held, that this agreement constituted a partnership, and not a mere measure of wages, and consequently that plaintiff could not sue defendant for the £9 per mile. *Green v. Beesley*, 2 Bing. N. C. 108.

Seemle, that in an action against stage coach proprietors for an injury done by mismanagement of the coach, whereby a person was struck by the luggage on the coach, the proprietors and the coachman may be sued jointly. *Whitmore v. Waterhouse*, 4 Car. & Payne, 383.

Although it is the principal business of stage coach owners to carry the mail and passengers, yet they may be common carriers of merchandise also; and the practice of taking such packages for hire, will make them common carriers. And in such case defendants may be jointly charged as partners. *Dwight v. Brewster*, 1 Pick. 50.

But if a stipulation be made, that, under certain circumstances, as in case of fire and robbery, the carrier shall not be liable at all, that must be stated.(1) The plaintiff will be nonsuited, if the termini of the journey are not correctly set forth.(2) But a trifling variance in the name of one of the places will not be material, if it is not calculated to mislead.(3) It will be sufficient if the property is described with the same certainty as in trover.(4) The plaintiff will have to prove the liability of all the defendants; if the verdict passes against some of them only, the judgment will be erroneous.(5)

The strict rule applicable to common carriers does not apply to the conveyance of slaves; the carrier of slaves is answerable only for ordinary neglect. *Boyce v. Andrews*, 2 Peters' R. 150.

(1) *Latham v. Rutley*, 2 B. & C. 20.

NOTE 899.—If a bill of lading contains an exception "of the damages of the seas," such exception must be stated in the declaration; otherwise the contract proved would vary from that declared upon, and the variance be fatal. *Ferguson v. Cappeau*, 6 Harr. & John. 394. (The question of variance is not now so important.)

Where a declaration stated an undertaking to carry safely, certain goods by water, with an exception of all accidents from the act of God, the king's enemies, fire, pirates, and all other dangers and accidents of seas, rivers, and navigation, of what nature and kind soever; held, that this exception being beyond the common law, exception must be specially proved. *Richardson v. Sewell*, 2 Smith, 205.

(2) *Tucker v. Cracklin*, 2 Stark. N. P. C. 385; *Max v. Roberts*, 12 East, 89. (If the carrier agree to carry and deliver to a given place, or within a given time, he must do so though his conveyance do not go there, or his journey be interrupted by inevitable accident. *Noyes v. R. and B. R. Co.*, 1 Wms. Vt. 110; *Harmony v. Bingham*, 2 Kern. 99.)

NOTE 900.—In an action against a carrier, for the loss of a trunk, held, that the *terminus a quo* was immaterial, as the gist of the action was the non-delivery at the place it ought to have gone to. *Woodward v. Booth*, 7 Barn. & Cress. 303. In this case, the declaration stated that plaintiff delivered a trunk to defendant, to be put in a coach at C., in the county of C., to wit, at, &c. Proof that it was delivered at the city of C., held, no variance, there being no other place of the same name. *Id.* The declaration alleged that defendant was the owner of a coach from London to Blackheath; and the evidence was that the words "London and Blackheath" were painted on the coach door; that the coach was licensed to run from Charing Cross only, and that the plaintiff was taken up at the Elephant and Castle, in St. George's Fields; held, that as Charing Cross and St. George's Fields are both, in common parlance, styled "London," the variance was immaterial, and the allegation sufficiently proved. *Duttham v. Chivis*, 1 M. & P. 735; 4 Bing. 706. So, an averment of a contract to carry goods from London to Bath, is supported by evidence of a contract to carry from Westminster to Bath; London must be taken in the enlarged and popular sense of a collective name, and not in a limited sense, applicable to the city only. *Beckford v. Crutwell*, 1 M. & Rob. 187; 5 Carr. & Payne, 242. See *Davis v. Garrett*, 4 M. & P. 540.

(Where the carrier, the owner of a vessel, engaging to carry a passenger, gives him no opportunity to get aboard and carries off his baggage, the latter may maintain against him an action of tort (*Holmes v. Doane*, 3 Gray, 328); but the carrier cannot ordinarily be rendered liable in an action of trover, unless the goods be demanded before suit. *Rome Railroad Co. v. Sullivan*, 14 Geo. 277; *Scovill v. Griffith*, 2 Kernan (N. Y.), 509; *Robinson v. Austin*, 2 Gray, 564.)

(3) *Woodward v. Booth*, 7 B. & C. 304.

(4) *Chamberlain v. Cooke*, 2 Vent. 78.

(5) This is otherwise where the action is in tort. *Bretherton v. Wood*, 3 Bro. & Bing. 62.

NOTE 901.—*Orange Bank v. Brown*, 3 Wend. 158. But where the action is founded on a

Where the price of the carriage does not exceed £20, an agreement stamp is not necessary by the Stamp Act, 55 Geo. III, c. 184, which requires a stamp only "where the matter of the agreement is of the value of £20 or upwards;" the value of the goods agreed to be carried is immaterial.(1)

Bill of lading.

The action upon a bill of lading for the loss of goods carried by sea, may be brought either against the owner or the master of the vessel, but not against them jointly.(2) As to the proper person in whose name the action is to be brought, it may be brought either in the name of the party by whom the contract was made, or of the party for whom the contract was made.(3) The situation of the parties will, in general, appear from the terms of the bill of lading, as showing on whose account the shipment is made, and who is answerable for the freight.(4) If the person to whom the delivery is ordered, is only an agent for the shipper on whose account and risk the goods are consigned, the action cannot be brought in his name.(5) It seems that the analogy which exists between bills of lading and bills of exchange, in respect of the effect of an indorsement does not hold for every purpose; and that a mere indorsement of a bill of lading to an agent, in order that he may receive the goods on account of his principal, without any consideration, will not enable such agent to maintain an action against the captain or owner upon the bill of lading.(6)

Delivery of goods.

It is sufficient evidence to charge the defendant with delivery of goods, to prove that they were delivered to his agent, as to the driver of a stage

breach of duty depending on the common law, on a tort or misfeasance, the action is several as well as joint. "The action against a carrier solely upon the custom, is an action of tort." Per Savage, C. J., in *Id.* Any, or all of the owners of a vessel or coach may be sued in an action upon the custom; in such case, also, the judgment may be against all, or a part only, of the defendants joined in the action. *Id.* The plaintiff has an election of remedies; either *assumpsit* or *case*. *Id.* But if the plaintiff states the custom, and also relies on an undertaking, general or special, then the action may be said to be *ex delicto quasi ex contractu*, but, in reality, is founded on the contract. *Id.* For form of declaration in the latter case, see *Boson v. Sandford*, 2 Show. 478, which was recognized in the case from Wendell.

(1) *Latham v. Rutley*, 1 Ry. & Mo. 13; *Chadwick v. Sills*, 1 Ry. & Mo. 15.

(2) *Boson v. Sandford*, Carth. 58; *Dewell v. Moxon*, 1 Taunt. 391. The charterer and not the registered owner is liable. *Mackenzie v. Rowe*, 2 Campb. 483; *James v. Jones*, 3 Esp. C. 27. *Vide supra*, p. 315.

(3) By *Bailey, J.*, in *Sargent v. Morris*, 3 Barn. & Ald. 281.

(4) *Brown v. Hodgson*, 2 Campb. 36; *Joseph v. Knox*, 3 Campb. 320.

(5) *Waring v. Cox*, Lord Tenterden on Shipping (5th ed.) 216; *Sargent v. Morris*, 3 Barn. & Ald. 277. And see *Evans v. Martlett*, 1 Lord Ray. 271; 3 Salk. 290; 12 Mod. 166.

(6) *Waring v. Cox*, 1 Campb. 370; *Cox v. Harden*, 4 East, 212.

NOTE 902.—In *assumpsit* by the shipper against the ship owners for not delivering pursuant to the plaintiffs' orders, it was contended that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B., who was informed by

coach;(1) but it is not enough merely to leave them at an inn yard or wharf, without a communication with some person authorized to receive them on the part of the defendant.(2)

Loss of goods.

Slight evidence of the loss of goods will be sufficient on the part of the plaintiff; as by calling the plaintiff's shopman, who can state that he did not know of the arrival of the parcel, and that he would have known, if it had arrived.(3) Where goods are brought from abroad, a delivery at the usual wharf is sufficient.(4) But inland carriers are, in general, bound to

letter from plaintiffs, that they shipped the wheat on his account, and had forwarded a bill of lading to H. & Co., drawing upon them for part of the price and upon B. for the residue, inclosing at the same time an undorsed bill of lading, together with an invoice of the wheat to B., in which it was stated that it was bought for his order and on his account; held, however, that the property did not vest absolutely in B. by the shipment, but only subject to a condition that the bills were accepted, and that, in default of acceptance, it never did vest in him; and consequently, that the plaintiffs were entitled to recover the value of the wheat at the time when it was delivered to B.'s order. *Brandt v. Bowlby*, 2 Barn. & Adol. 932.

As to the bill of lading being evidence of the condition of goods on delivery; and when or not it shall conclude the master, see *ante*, under the title *Admissions*. * * It is in the nature of a receipt, and may be explained. But the *onus* rests upon the carrier. See *Chitty on Contracts*, p. 6, n. α (7th Am. ed.); *Abbot on Shipping*, tit. *Bill of Lading*. * *

(1) *Williams v. Cranston*, 2 Stark. N. P. C. 82; *Gouger v. Jolly*, Holt's C. 317.

(2) *Selway v. Holloway*, 1 Ld. Ray. 46; *Buckman v. Levy*, 3 Campb. N. P. C. 414. See *Cobban v. Downe*, 5 Esp. N. P. C. 41.

(3) *Tucker v. Cracklin*, 2 Stark. N. P. 485; *Griffith v. Lee*, 1 C. & P. 110.

NOTE 903.—If it be a sufficient delivery, according to the usages of business, to leave goods on the dock by or near a canal boat, yet this must be accompanied with express notice to the master of the boat. *Packard v. Getman*, 6 Cowen, 757. A forwarding merchant, who receives goods into his store, though upon a wharf, for the purpose of being forwarded, subject to the bailor's order, is liable only as a warehouseman, and not as a common carrier or wharfinger; he is bound only to ordinary care. *Platt v. Hibbard*, 7 Id. 497.

(Placing goods on a steamboat, without giving them in charge of a person authorized to receive them, is not a good delivery (*Trowbridge v. Chapin*, 23 Conn. 595); but a deposit of goods in the carrier's warehouse which is used to facilitate his business of transportation, and his reception of the goods, constitutes a delivery to him as carrier. *Clarke v. Needles*, 25 Penn. State R. 338. See *Wright v. Caldwell*, 3 Mich. 51.)

* * The charge of the circuit judge in *Platt v. Hibbard* (*supra*), that the *onus* lay upon the bailee to show, affirmatively, the absence of fault or negligence on his part, was disproved in *Foot v. Storrs* (2 Barb. Supr. C. R. 326; which held, that the *onus* was upon the plaintiff to show want of care in the defendant, who was a wharfinger. * *

The invoice accompanying the bill of lading is not *per se* evidence of the quantity and value of the goods. *Watson v. Yates*, 10 Martin R. 687. Although the plaintiff fails in proving the value of the goods, he shall recover nominal damages if it satisfactorily appears that a box was delivered and the contract not performed. *Id.*

* * See the cases cited in the next note. * *

(4) By *Buller J.*, *Hyde v. Trent*, and *Mersey Navigation*, 5 T. R. 389.

NOTE 904.—Where the consignee is a transient person, having neither residence nor agent at the place of delivery, and sailing in a different vessel from the one which carried his goods; held, that it was sufficient if the carriers disposed of the goods according to the usage of that particular trade by sending them to a person there established, against whose respectability nothing is alleged, to be delivered to the consignee. *Mayell v. Potter*, 2 John. Cas. 371. Thus, the bill of

deliver goods sent by them at the residence of the consignee.(1) A promise made by the bookkeeper of a carrier, at the office, to make compensation for the loss of a parcel, is not binding on the carrier, unless the bookkeeper be shown to be his general agent.(2)

Injury to passengers.

It seems to be conclusive evidence to charge the proprietor of a coach with an injury to a passenger, occasioned by its being overturned, to

lading was to deliver four cases of goods to N. T. at Norfolk; and the master made inquiry and could find no such person. He disposed of the goods according to the usage of that trade, by sending the goods from City Point to Norfolk, to a respectable person there established, for N. T.; but this person through mistake delivered them to a different person; held, nevertheless, that the master was not liable to the consignor. *Id.* Being obliged to deliver them to a third person, he was only bound to see that such person was a responsible character; and, on such delivery the bailee or carrier must be considered as the agent for the plaintiff.

(Railroads are not bound to make a personal delivery; notice of arrival takes the place of an actual delivery. *Michigan C. R. Co. v. Ward*, 2 Mich. 538. See *Chicago & R. I. Co. v. Warren*, 16 Ill. 502.)

Goods were shipped to be carried to Albany, and delivered to M. and O. of that place; a cartman who "had often carted for M. and O." carried one load, and the residue being left over night on the wharf, and one box of tea was lost; held, that the master was liable in trover. *Ostrander v. Brown*, 15 John. R. 39. Platt, J., in delivering the opinion of the court, said: "Admitting, then, that the wharf was the place of delivery, a mere landing the goods on the wharf was *no delivery*. A delivery, in this case, implies mutual acts of the *carrier* and the *consignees*." "Because a merchant usually selects a cartman, and employs him exclusively in carrying goods, according to his orders, it by no means follows that such cartman is his general agent for receiving goods, without orders."

The clause "they paying freight," &c., was introduced for the benefit of the carrier of the goods only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad before he should make delivery of the goods: but he has a right to waive the benefit of the provision in his favor, and to deliver, without first receiving payment, and is not precluded, by such delivery, from afterwards maintaining an action against the consignor. *Barker v. Havens*, 17 John. R. 234. Spencer, C. J., said: "That if it appeared that the goods were not owned by the consignor, and were not shipped on his account, and for his benefit, the carrier, in his opinion, would not be entitled to call on the consignor for freight; and in all cases, the captain should endeavor to get the freight of the consignee."

If the consignee of goods refuses to receive them, the master is bound to see them safely deposited for the owner, unless the consignee is under an obligation to receive them. *Chickering v. Fowler*, 4 Pick. 371. But a vessel arriving from a foreign port may leave the goods at some usual place of unloading, although he has promised to deliver them to the consignee; the engagement is not to deliver them personally to the consignee, or at any particular wharf. *Id.*; *Cope v. Cordova*, 1 Rawle, 203.

* * The general rule is, that the carrier is bound to make an *actual* delivery to the person for whom the goods were intended. Angell on Carriers, § 297, *et seq.* As to the rule, and its modifications, by *usage*, see *Gibson v. Culver*, 17 Wend. 305; *Blin v. Mayo*, 10 Vt. R. 56; *Hemphill v. Cheney*, 6 Watts & Serg. 62; *Chickering v. Fowler*, 4 Pick. 371; *Van Santvord v. St. John*, 6 Hill, 158. * *

(1) By *Dallas, J.*, *Duff v. Budd*, 3 Bro. & Bing. 182; by *Wood, B.*, *Bodenham v. Bennett*, 4 Price, 31; *Stoer v. Crawley*, 1 M'Cl. & Y. 129; *Golden v. Manning*, 2 Bl. 916; by *Ashurst, J.*, 5 T. R. 396. Where the goods are delivered to a wrong person, trover lies; not where they are lost or stolen. *Stephenson v. Hart*, 4 Bing. 482.

(2) *Olive v. Eames*, 2 Stark. N. P. C. 181.

prove that, at the time of the accident, it was carrying more passengers than was allowed by act of Parliament.(1) A coach proprietor will not be discharged, on the ground that the passengers might with caution have prevented the accident, if the danger was of a nature to require that they should have warning;(2) and he may be liable for an accident in leaping off a coach, though not actually overturned, if it can be proved to have been prudent for the passenger to have so done, in order to extricate himself from the apparent danger of his situation.(3)

Defence. Responsibility limited.

The responsibility of ship owners(4) is, in certain cases, limited by act

(1) *Israel v. Clark*, 4 Esp. C. 259. The overturning of a coach is *prima facie* evidence of negligence. *Christie v. Griggs*, 2 Campb. C. 79.

(2) *Dudley v. Smith*, 1 Campb. N. P. C. 167.

(3) *Jones v. Boyce*, 1 Stark. N. P. C. 493. For the general duties of the proprietor, see by Best, Ch. J., *Crofts v. Waterhouse*, 3 Bing. 319.

NOTE 905.—The malconstruction of the coach, or improper position of the luggage, may amount to negligence in the defendant or his servants. *Curtis v. Drinkwater*, 2 Barn. & Adol. 169. So, if an accident happen from a defect in the original construction of the stage coach, the proprietor is liable, although the defect be out of sight, and not discoverable upon ordinary examination. *Sharp v. Grey*, 9 Bing. 457. But if the declaration states that the servants of the defendant “drove, conducted, and managed the coach,” the plaintiff cannot recover, if it appear that the injury to the passenger arose from the negligence in the sending out an insufficient coach. *Mayor v. Humphries*, 1 Car. & Payne, 251. To carry safely for a certain hire, does not mean to carry safely at all events; but the allegation is supported by proof of the want of due care. *Harris v. Costar*, 1 Id. 636. Where an accident is occasioned by the deviation of the driver, the jury should be directed to consider whether the deviation was the effect of negligence. *Crofts v. Waterhouse*, 3 Bing. 319; 11 Moore, 133.

* * See the authorities cited *ante*, note 897. * *

(The carrier of passengers, a railroad corporation, is answerable for a latent defect in the construction of an axle, for the right position of the rails, and, in general, for the utmost skill and diligence. “He is bound to use all precautions, as far as human care and foresight will go, for the safety of his passengers.” *Hegeman v. The Western Railroad Corporation*, 3 Kernan (N. Y.), 9; *Curtis v. R. & S. Railroad Co.*, 20 Barb. 283; *Galena & Chicago R. R. Co. v. Fay*, 16 Ill. 558.)

(4) NOTE 906.—The law implies a duty on the owner of a vessel, whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual course. *Davis v. Garrett*, 6 Bing. 716. Plaintiff put on board defendant's barge lime, to be conveyed from Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire thereby, the whole was lost; held, that the defendant was liable, and the cause of loss sufficiently proximate, to entitle the plaintiff to recover, under a declaration alleging the defendant's duty to carry the lime without unnecessary deviation. *Id.*

(Where the contract is to carry by a given route, the carrier cannot excuse a departure from that route by showing an interruption of the navigation (*Hand v. Baynes*, 4 Wharton R. 204), unless in the event of such interruption there is a general usage to go by another route. *Crosby v. Fitch*, 12 Conn. R. 410.)

In an action against a ship owner, for the loss of goods which he had engaged to transport for freight, it is not necessary to aver, in the declaration, the payment of the freight, or the tender of it. *Ferguson v. Chappeau*, 5 Harr. & John. 394. A contract made by the master of a general ship, is, in law, the contract of the owner; and a bill of lading signed by the master, for goods delivered on board his vessel for transportation, is the contract of the owner of the vessel. *Id.*

of Parliament to the value of the ship, and the freight payable in respect of the voyage,(1) which has been held to include money paid in advance;(2) but not to extend to the amount of freight estimated at the commencement of the voyage which may have been diminished by jettison or other accidents before the time of the loss.(3) Certain perils are also excepted by the express terms of the bill of lading. The old form of this instrument contains an exception of the perils of the seas;(4) and, of late, a more extensive clause of exception has been usually adopted.(5)

(1) 7 G. II, c. 15; 26 G. III, c. 86. The last act does not extend to vessels used solely in inland navigation; and neither of them extend to lighters. For a particular account of these statutes, see Lord Tenterden on Shipping, part 3, ch. 5.

(2) *Wilson v. Dickson*, 2 Barn. & Ald. 2.

(3) *Cannon v. Meaburn*, 1 Bing. 465.

(4) On the import of this exception, see *Ld. Tenterden on Ship*. part 3, chap. 4.

NOTE 907.—*Vide ante*, note 893.

By "dangers of the sea," are meant no other than *inevitable* perils, or accidents upon that element; and by *such* perils or accidents, common carriers are *prima facie* excused, whether there is any such express exception or not. Per Gould, J., in *Williams v. Grant*, 1 Conn. R. 487. In either case, however, it is a condition precedent to their exoneration, that they should have been in no *default*; or, in other words, that the goods of the bailor should not have been *exposed* to the peril, or accident, which occasioned the loss, by their own misconduct, neglect or ignorance. *Id.* For, though the immediate or proximate cause of a loss, in any given instance, may have been what is termed *the act of God*, or inevitable accident; yet, if the carrier unnecessarily exposed the property to such accident, by any culpable act or omission of his own, he is not excused. *Id.* If a common hoyman unnecessarily puts to sea, under circumstances which render a loss of the goods on board probable—as in very tempestuous weather—he is liable, in the event of a loss, though it were immediately *occasioned* by the element, over which he had no control. *Id.*

"Dangers of the river only excepted," were held to embrace such dangers as that no human skill or foresight could have guarded against. *Johnson v. Friar*, 4 Yerg. R. 48; 5 *Id.* 82. But it is incumbent on the defendant to prove that the loss did occur from such cause. *Turney v. Wilson*, 7 *Id.* 340; *Peck's R.* 271, S. P.; 3 *Munf. R.* 239. No proof is relevant, except such as conduces to show that the loss was occasioned by the act of God, or the enemies of the country, or the "dangers of the river." *Turner v. Wilson*, *supra*. Proof that the loss happened from an unknown cause, will not excuse. *Id.* (See also *Fairchild v. Slocum*, 19 *Wend.* 329; 7 *Hill R.* 292; *Plaisted v. Boston and K. Steam Nav. Co.*, 27 *Maine*, 132; 1 *Kernan R.* 9.)

Damages.—The general doctrine is, that the master must make good the loss or damage accruing to the goods which he undertakes to carry safely for hire; and it applies to all cases in which the master is responsible for missing goods. *Watkinson v. Laughton*, 8 *John. R.* 213. And the rule is in furtherance of the general policy of the marine law, which holds the master responsible, as common carrier, for accidents, and all causes of loss; not coming within the exception of the bill of lading. *Id.* Where the goods were stated to be embezzled or lost during the voyage, without the fraud of the master; held, that the rule of damages was the value of the goods, according to the net value of goods of like kind and quality, at the port of delivery. The question of interest depends upon circumstances. If the conduct of the master was improper, the jury may give interest by way of damages. But where no bad conduct is to be imputed to him, interest ought not to be allowed. *Id.*

* * For a discussion of the meaning of "inevitable accident," see *Coggs v. Bernard*, and the English and American notes, 1 *Smith's Leading Cases*. * *

(5) Upon this subject, see *Lord Tenterden on Shipping*, part 3, chap. 2.

Carriers' notice.

A very common defence, in actions against carriers, is, that the defendant has limited his responsibility by means of a notice.⁽¹⁾ In cases where

(1) *Kenrick v. Egglestone*, Aleyn, 93; *Forward v. Pittard*, 1 T. R. 27, are two of the earliest decisions. As to the different forms, see *Clay v. Willan*, 1 H. Bl. 298; *Clarke v. Gray*, 6 East, 564.

NOTE 908.—Where carriers run a coach from A. to B., and back, notice that they limit their responsibility on the carriage of parcels from A. to B., is notice that they limit it likewise from B. to A. *Riley v. Horne*, 5 Bing. 217; 2 M. & P. 331.

In *Kenrick v. Eggleston*, cited in the text, it was held that the owner was not required to state all the contents of his parcel, but that it was for the carrier to make a special acceptance. In *Riley v. Horne* (*supra*), Chief Justice Best observes: "It may be collected from the authorities, that it is the duty of the carrier to inquire of the owner as to the value of his goods, and that, if he neglect to make such inquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is answerable for the full value of the goods, however great it may be." Again, he says, in S. C., pp. 341, 342: "We have established these points—that a carrier is an insurer of the goods that he carries—that he is obliged, for a reasonable reward, to carry any goods that are offered him, to the place to which he professes to carry goods, if his carriage will hold them, and he is informed of their quality and value—that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are—that if he does not ask for this information, or if, when he asks, and is not answered, he still takes the goods, he is answerable for their amount, whatever that may be—that he may limit his responsibility as an insurer, by notice; but that a notice will not protect him against the consequence of a loss by gross negligence." *Id.*

If a notice, touching the responsibility of the carrier, be given, it matters not by whom it is given, or in what form, if it inform the owner of the goods that the carrier, by whom he proposes to send them, will not undertake for their safe conveyance unless paid a premium proportionate to their value. *Id.*

As to a notice under the act 11 George IV, and 1 William IV, chap. 68, see *Owen v. Burnett*, 2 Crompt. & Meeson, 353; 4 Tyr. 133; *Mayhew v. Nelson*, 6 Carr. & Payne, 58.

* * The 1 William IV, chap. 68, commonly called the Carrier's Act, is well abridged by Mr. Addison (*Add. on Contr.* pp. 820 to 824), and by Mr. Smith in his brief but comprehensive and valuable Treatise on Mercantile Law (*Sm. Merc. L.* 235 to 237).

How, and how far, the carrier's liability at common law may be limited, are questions which have greatly embarrassed the courts, and as to which there is considerable apparent and some real conflict among the decisions. The learned and elaborate judgments of the Supreme Court of New York, pronounced by Mr. Justice Bronson, in *Hollister v. Nowlen* (19 Wend. 234), and by Mr. Justice Cowen in *Cole v. Goodwin* (*Id.* 251), exhaust the anterior learning on the subject. The policy, and the prevalence, of the strict rule of the common law, holding the carrier liable for all losses not occasioned by the act of God or public enemies, were powerfully upheld by Mr. Justice Bronson in his learned and admirably reasoned opinion. The question, in both cases, was whether the carrier could restrict his liability by a general notice, in any form, brought home to the opposite party; and both decisions were that he could not.

The common law makes the common carrier an insurer of the goods intrusted to him for transportation, against all losses not occasioned by the act of God or public enemies. The Carrier's Act, above cited, relieves him from his extraordinary liability, unless, at the time of the delivery to him, the value and nature of the articles (enumerated in the statute) shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel. *Smith's Merc. Law*, p. 236. But the statute leaves the carrier liable, first, as to the enumerated articles, for want of ordinary care and skill, and for the felonious acts of his servants, even where the bailor does not comply with its conditions; second, as to all other articles, to his common law responsibility, any notice which he may have given to the contrary notwithstanding. *Id.*; *Chitty on Contracts*, pp. 487 to 494; *Addison on Contracts*, pp. 820 to 826; *And*

gell on Carriers, pp. 256 to 277; Smith's L. Cas. in the English and American notes to Coggs v. Bernard. In England, then, the carrier cannot limit his liability, in *any case*, by *notice*; and Mr. Justice Bronson expresses the opinion, that, in this, the Carrier's Act has substantially asserted the common law. 19 Wend. 234. Can the limitation of his liability by the Carrier's Act be extended by express contract? A special acceptance stands on the ground of contract, and in numerous cases has been assumed to be valid and operative. In *Hollister v. Nowlen* (Id.), Mr. Justice Bronson said: "I shall not deny that the carrier may, by express contract, restrict his liability; for though it has never been expressly adjudged, it has often been assumed as good law. *Aleyn*, 93; 4 Co. 84, note to *Southcote's Case*; 4 Burr, 2301, per *Yates, J.*: 1 Vent. 190, 238; *Peake's Nisi Prius Cases*, 150; 2 Taunt. 271; 1 Stark. R. 186. *If the doctrine be well founded*, it must, I think, proceed on the ground, that the person intrusted with the goods, although he usually exercised that employment, does not in the particular case act as a common carrier. The parties agree that, *in relation to that transaction*, he shall throw off his public character, and like other bailees for hire, only be answerable for negligence or misconduct. If he act as a carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law." Mr. Justice Nelson, in pronouncing the judgment of the Supreme Court of the United States in the *New Jersey Navigation Company v. Merchants' Bank* (6 Howard S. C. R. 344), says, in accordance with the above view of Mr. Justice Bronson, that "the owner by entering into the contract" (to narrow the limit of the carrier's liability), "virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence." In the case just cited, the United States Supreme Court followed the doctrine of the two cases from *Wendell's Reports*—that even if it were competent for a carrier to narrow his liability by a special contract, such a contract could not be implied from a mere notice brought home to the owner, because the owner's assent was not to be presumed. The question before the court was as to the effect of a notice, and did not call for the decision of the question whether the carrier could narrow his liability by an express contract. The conclusion of *Cowen, J.*, in *Cole v. Goodwin* (*supra*), as the result of the authorities, was, first, that a contract was not to be implied from a notice; and second, "admitting that the plaintiff acceded in the clearest manner to the proposition in the notice, that his baggage should be carried on the terms mentioned, I think the contract thus made was void on his part, as contrary to the plainest principles of public policy." In *Gould v. Hill* (2 Hill, 623), where the carrier made a special acceptance in writing of the goods (and which was held to be as effectual as if it had been reduced to writing and signed by the parties), and the goods were lost by a peril within the exception, and without the carrier's fault, it was held that the carrier was liable, on the ground that a contract narrowing his liability was void, as against public policy; *Nelson, Ch. J., dissentiente*. The invalidity of such a contract must therefore be regarded as the law in the state of New York. In *The New Jersey Steam Navigation Company v. The Merchants' Bank* (*supra*), Mr. Justice Nelson, who (as Chief Justice of the Supreme Court of New York) had dissented from the decision in *Gould v. Hill*, adhered to the opinion that such a contract was valid, saying: "We are unable to receive any well founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other *insurer of goods*, to which his obligation is analogous, and which depends altogether upon the contract between the parties." It is respectfully submitted, that Mr. Justice Nelson, in thus assuming the substantial identity of the character in which an ordinary insurer, and a carrier *qua* insurer, are held, has failed to advert to a most material distinction. For weighty reasons of public policy, as all the cases, ancient and modern, agree, the carrier is held because of the *peculiar nature of his employment*, whereas the insurer's liability depends, not upon any special employment, or any controlling public policy, but, as the learned judge himself expressed it, "altogether upon the contract between the parties." No trust is reposed in the insurer, but a very special confidence is reposed in the carrier. The insurer has not the possession of the goods for whose safety he is responsible, and has neither the temptation nor the opportunity to increase the risk of their loss; but the carrier has such possession, and with the possession, the temptation and the opportunity—a powerful temptation and an extraordinary opportunity—to use that possession for his own advantage and to the disadvantage of the owner. In the case of an insurance, the difficulties of proof and of guarding against fraud are on the side

this defence is relied on, it is necessary to show that the plaintiff was acquainted with the terms of the notice, either from former dealings between the parties, or a communication made in the particular instance.(1) If the notice is contained in a newspaper, or the Gazette, proof must be given that the defendant takes it in;(2) though such proof is not conclusive.(3) Any deception in the form of the notice will vitiate it.(4) And the

of the insurer; but in the case of the bailment, the difficulties are all on the side of the owner. The carrier has extraordinary facilities to commit, and extraordinary facilities to conceal a wrong; the insurer has no such facilities whatever.

That contracts against public policy are void, is one of the most familiar doctrines of the law. A condition in a marriage contract, that it should only bind the parties during their mutual pleasure, would be void on that ground, and as being utterly inconsistent with the relation it created between the parties. The books abound with similar illustrations. And the cases, which hold the extraordinary liability of the carrier, do not place it on the terms of his contract, but the nature of his employment and the policy, the urgent necessity of holding him to so rigorous a responsibility. Indeed, it is submitted that when, in another part of his opinion, Mr. Justice Nelson says, that when such a contract is made "in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person," in other words, is not to be regarded as a COMMON CARRIER, he concedes the whole point in controversy.

The subject is not free from difficulty, and the doctrine cannot be considered as settled in the United States, but the tendency seems to be to hold, in conformity with what is believed to be the better and sounder opinion, that such contracts are void. The English courts seem to be inclined to the opposite doctrine. See *Wyld v. Pickford*, 8 Mees. & Welsby, 443. For a collection of the English and American cases, see the English and American notes to *Coggs v. Bernard*, 1 Sm. L. Cases; *Chitty on Contr.* (7th Am. ed.); *Selwyn's N. P. title Carriers*; *Angell on Carriers*; 2 Kent C. (6th ed.) 597 to 611, and notes. * *

(It is now well settled that the common carrier may restrict his common-law liability by an express contract. *Moore v. Evans*, 14 Barb. 524; *Brown v. Clayton*, 12 Geo. 564; 4 Sand. 143. But he cannot limit his liability by publishing a notice of the extent to which he is willing to hold himself liable. *Jones v. Voorhees*, 10 Ohio R. 145; 6 How. U. S. 344; *Dorr v. The N. J. Steam Nav. Co.*, 1 Kernan R. 485. To bind the party delivering the goods, it must be brought home to his knowledge and distinctly assented to. 6 How. U. S. 344.)

(1) *Roskell v. Waterhouse*, 2 Stark. N. P. C. 461.

(2) *Leeson v. Holt*, 1 Stark. N. P. C. 186; *Clayton v. Hunt*, 3 Campb. 27; *Mann v. Baker*, 2 Stark. N. P. C. 255; *Jenkins v. Blizzard*, 1 Stark. N. P. C. 418.

(3) *Rowley v. Horne*, 3 Bing. 2.

(4) *Butler v. Hearn*, 2 Campb. 415.

NOTE 909.—Where the advertisement was in doubtful and ambiguous language, held, that the stage coach proprietors were as responsible as if no advertisement had been published. *Barney v. Prentiss*, 4 Har. & John. 317. The agent of the carrier told the owner's servant, who delivered a parcel above the value of £5, that it ought to be insured, held, that this was no notice of the carrier's limit to his responsibility. *Macklin v. Waterhouse*, 5 Bing. 212. The notice was in these words: "Take notice. The proprietor of *this office* will not be accountable for any parcel or package exceeding the value of *five pounds*, unless entered as such and paid for accordingly." A Mr. Weeks was the keeper of this office, at which parcels were received and booked for several coaches, belonging to different proprietors. No evidence was given, that Weeks, the proprietor of the office, was the same Weeks who was one of the defendants, or that the plaintiff or his agent knew that the office keeper had any interest in this coach; held, that this was not a sufficient notice, and that the defendants were still subject to the unlimited responsibility of common carriers. *Id.* In delivering the judgment of the court, Best, C. J., observed: "The persons who carry parcels to coach officers, are generally servants and other

notice should be stuck up in large characters, and in a conspicuous place in the carrier's office.(1) Nor will the notice, even in that case, suffice, if the plaintiff's agent or servant did not, in fact, read it;(2) or if the goods have been delivered to a carter, or at an intermediate place of the journey, and not at the carrier's office.(3) And if the carrier circulate bills which differ from the notice in his office, he will be bound by the terms least beneficial to himself.(4) To prove the contents of a notice painted on a board inlaid in a wall, an examined copy is sufficient.(5)

A carrier cannot avail himself of his notice as a defence to an action brought against him, if he has been guilty of gross negligence;(6) which

persons who cannot have much knowledge of matters of this sort. The notice should be plain and easily understood by such persons." *Id.*

(1) *Clayton v. Hunt*, 3 Campb. 27; *Leeson v. Holt*, 1 Stark. N. P. C. 186.

(2) *Davis v. Willan*, 2 Stark. N. P. C. 279; *Kerr v. Willan*, 2 Stark. N. P. C. 53.

NOTE 910.—Notice to the porter, messenger or agent, by whom the parcel or package is sent by the owner, is notice to him. But where the proprietor of a line of stages posted notices "that he would not be accountable for any baggage, unless the fare was paid and the same was entered on the way bill;" held, that the owner of the stage was liable; it not appearing that the owner of the trunk which was lost had any knowledge of such notice, *Weston, C. J.*, saying: "The judge below, therefore, was right in declining to instruct the jury, that the knowledge of the postmaster was constructive notice to the plaintiff." *Bean v. Green*, 3 Fairf. R. 422.

(3) *Clayton v. Hunt*, 3 Campb. 27; *Gouger v. Jolly*, 1 Holt's C. 317.

(4) *Munn v. Baker*, 2 Stark. N. P. C. 255; *Cobden v. Bolton*, 2 Campb. 108.

(5) *Cobden v. Bolton*, 2 Campb. 108.

(6) *Smith v. Horne*, 2 B. Moore, 18; *Beck v. Evans*, 16 East, 247; *Bodenham v. Bennett*, 4 Price, 31; *Ellis v. Turner*, 8 T. R. 531; *Duff v. Budd*, 3 Bro. & Bing. 177; *Birkett v. Willan*, 2 Barn. & Ald. 356. The case of *Nicholson v. Willan* (5 East, 506), is considerably shaken by the later authorities. See 5 Barn. & Ald. 63. A ship owner is not protected by a notice if his ship is not seaworthy. *Lyon v. Wells*, 5 East, 427.

NOTE 911.—*Riley v. Horne, Moore & Payne*, 331, 341.

A booking office keeper, who also keeps wine vaults, is guilty of negligence, if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be conveniently taken into the bar behind the counter. *Dover v. Mills*, 5 Car. & Payne, 175. If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the booking office keeper. *Colepepper v. Good*, 5 Car. & Payne 380. But, in an action against the carrier, the person at the booking office who delivered the goods to the carrier, is a competent witness to prove the state in which they were delivered. *Id.*

A stage coachman is responsible for the loss of a parcel which he insures to carry without reward, if it is lost through gross negligence on his part. *Beauchamp v. Powley*, 1 M. & Rob. 38, *Tenterden, J.* If a carrier leaves his wagon in the street over night, it will amount to gross negligence, and consequently render him liable for the loss. *Longley v. Brown*, 1 Moore & Payne, 583. So, in an action against a carrier for the loss of a painting, it appeared that the stage wagon in which it was sent had seven horses, but there was only one wagoner. The court left it to the jury to say, whether the sending but one wagoner was gross negligence; and they found that was so. *Beckford v. Crutwell*, 5 Car. & Payne, 242; 1 M. & Rob. 187, *Tenterden, J.*

The jury are to decide what is gross negligence. The notice will protect him, unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of. *Per Best, C. J.*, in *Riley v. Horne, supra*.

(The carrier cannot stipulate for the privilege of being negligent, that is to say, he cannot

has been explained to mean a neglect to take the same care of the property as a prudent man would have taken of his own.(1) But as the degree of care that a man may be reasonably required to take of anything, must, in some measure, depend on the quality and value of the thing, any concealment from the carrier of these circumstances may have the effect of exculpating him from the charge of gross negligence.(2) A disclosure, however, of the value of property to be conveyed, does not appear necessary, unless where the compass in which the property is contained is likely to deceive the carrier.(3) It will be an answer to the action,

exempt himself by contract from liability for injury or losses caused by his neglect. *Riley v. Horne*, 5 Bing. R. 217; *Sleat v. Fagg*, 5 Barn. & Ald. 342; *Wright v. Snell*, Id. 350; *Dorr v. N. J. Steam Nav. Co.*, 4 Sand. 136; S. C., 1 Kernan R. 485; *Wild v. Pickford*, 8 Mees. & Welsb. 442; *Merchants' Bank v. New Jersey Steam Nav. Co.*, 6 How. U. S. 344. And where the carrier agrees to carry by a particular conveyance, and exempts himself from a part of his common-law liability in the same contract, he cannot derive any advantage from the exemption if he send the goods by another conveyance; as if he agree to carry by a sail vessel on the lake, and sends by steam. *Merrick v. Webster*, 3 Mich. (Gibbs), 268. By making a special contract, he assumes all the responsibility for which he stipulates, without any respect to the impediments that may lie in the way of a strict fulfillment of his contract; if he engage to carry and deliver by a given day, he cannot excuse a performance on the ground of inevitable accidents. *Harmony v. Bingham*, 1 Duer R. 209; S. C., 2 Kernan R. 99.)

(1) By *Dallas*, Ch. J., 3 Bro. & Bing. 180.

(2) *Batson v. Donovan*, 4 Barn. & Ald. 42.

NOTE 912.—It is not competent to a carrier to dispute the title of a party who delivers goods to him. But where the plaintiff conducts himself amiss towards the defendants, and the loss is occasioned by his own misfeasance, he cannot recover. Thus, plaintiff received a parcel from G. to book for London, at the office of the defendants, common carriers. Instead of obeying his instructions, plaintiff put the parcel into his bag, intending to take it to London himself. The defendants having lost the bag, held, that the plaintiff could not recover damages from them in respect of the parcel. *Miles v. Cattle*, 6 Bing. 743.

If a box of clothes, packed by the party's own hand, be sent by a carrier, and lost, the judge will recommend to the jury to give the fair value, although what particular articles the box contained cannot be proved. *Butler v. Basing*, 2 Carr. & Payne, 613.

In an action against carriers, upon an issue that the plaintiff's goods were stolen by the defendant's porter, the plaintiff proved only circumstances of suspicion, which probably would not have insured conviction on an indictment for a felony; but the defendants having omitted to call the porter as a witness, and the jury having found for the plaintiff, the court refused to grant a new trial. *Boyce v. Chapman*, 2 Bing. N. C. 222. Although the carrier has given notice that he will not be answerable for money sent by him, he is nevertheless responsible if it be stolen by his servants, unless the party sending the parcel has attempted to disguise it, so as to prevent the carrier from taking particular care of it, yet not sufficiently to conceal its nature from the carrier's servants. *Bradley v. Waterhouse*, 3 Car. & Payne, 318.

(3) By *Richardson*, J., 3 Bro. & Bing. 184; *Brooke v. Pickwick*, 4 Bing. 222.

NOTE 913.—Stage coach proprietors advertised that all baggage was at the risk of the owners; held, that this applied to the baggage of passengers, it being in the same advertisement which stated the route, the fare, &c.; it did not extend to packages usually taken in the stage coach for transportation. Thus, in case, charging defendants as common carriers, it appeared that a sealed package containing money was delivered to the driver, who was a proprietor of the coach; the jury were instructed that if they were satisfied that defendants were in the practice of carrying such packages, containing money, for hire, this would constitute them common carriers. The jury found a verdict for the plaintiff, and the court refused to set it aside. *Dwight*

to prove any fraud or misrepresentation used on the part of the plaintiff.(1)

Misfeasance.

A notice uncomplied with, will be no defence to the action, if the defendant has been guilty of a misfeasance, as by misdelivering the goods;(2) or has divested himself of his character as a carrier, and sent the goods by another conveyance belonging to different proprietors.(3)

A carrier is entitled to avail himself of non-compliance with his notice, in the case of a loss, although, from the apparent bulk of the goods or otherwise, he knows that they exceed in value the sum beyond which he stipulates not to be responsible, unless they are insured;(4) provided there is no understanding between himself and the plaintiff respecting the

v. Brewster, 1 Pick. 50. It was objected, that defendants carried the mail, and the law of the United States made it unlawful for the carrier of the mail to take any letter or packet, and that no action would lie for not performing an unlawful contract; held, that the carrying of any parcel or bundle of merchandise was not a breach of the law; and there was no difference between such a parcel and one containing bank notes. *Id.* The case of *Bennett v. Clough* (1 Barn. & Adol. 461) was similar. There a parcel containing bank notes, stamps, and a letter, was sent by a common carrier, and there being no evidence of the contents of the letter, the presumption of law was, that it related to the parcel sent. "A letter is a message in writing; a packet is two or more letters under one cover. The merely covering a parcel of gloves, silk hose, or other merchandise with paper, and directing it to whom it is sent, would not make such a parcel a letter; nor is there any difference between such a parcel and one containing bank notes." Per Parker, Ch. J., in *Dwight v. Brewster*, *supra*.

Though as a general rule, the carrier is bound to inquire; yet, where notice has been given that unless a premium of insurance is paid at the time of the delivery, the carrier will not be liable; and the notice comes to the knowledge of the owner, the owner must disclose the value and pay the premium; otherwise, the carrier will only be liable according to the terms of the notice. *Orange County Bank v. Brown*, 9 Wend. 85. However, a common carrier who carries passengers and their baggage, is responsible for the baggage if lost, although no distinct price be paid for its transportation; the compensation for the conveyance of baggage, in contemplation of law, is included in the fare of the passenger. *Id.* But if the baggage consists of an ordinary traveling trunk, in which there is a *large sum of money*, the money will not be considered as baggage, so as to render the carrier liable. *Id.* He might, perhaps, be liable to an amount not exceeding ordinary traveling expenses. See also 19 Wend. 234, 251, 534.

The owner need not inform of the value, if notice has not been given by defendant of any limitation of his liability; the carrier might have inquired, and if he had a false answer, it would have excused him. Or if there is any concealment or deception, the same consequence will follow. *Phillipps v. Earl*, 8 Pick. 182.

* * See the authorities cited in the preceding note. * *

(1) *Gibbon v. Paynton*, 4 Burr. 2298; *Tyler v. Morrice*, Carth. 485; *Edwards v. Sherrat*, 1 East, 604; *Mayhew v. Eames*, 1 C. & P. 550; 1 Bac. Ab. 556; Bull. N. P. 71.

(2) *Bodenham v. Bennett*, 4 Price, 31; *Duff v. Budd*, 3 Bro. & Bing. 177.

(3) *Garnett v. Willan*, 5 Barn. & Ald. 57; *Sleat v. Fagg*, 5 Barn. & Ald. 342, which cases are distinguishable from *Nicholson v. Willan*, 5 East, 506, on the ground that, in that case, both conveyances belonged to the defendant. *Vide supra*, p. 327, n. 6.

(4) *Marsh v. Horne*, 5 Barn. & Cressw. 322; *Levi v. Waterhouse*, 1 Price, 280; *Harris v. Packwood*, 2 Taunt, 264, overruling some earlier cases to a contrary effect.

charge for insurance.(1) And the effect of his notice will not be avoided by proof that, on the occasion of other losses, when the notice has not been complied with, the defendant has made allowances to the plaintiff.(2)

Payment into court.

If the defendant has restricted his liability by a notice, that he will not be accountable for more than a certain sum, unless the goods to be conveyed are entered and paid for accordingly, the payment of that sum into court does not admit a liability beyond the amount paid in. But when the effect of the notice is, that the carrier will not be answerable at all, if goods exceeding a certain value are not insured, there the payment of money into court, will preclude the defendant from giving in evidence and relying upon such restrictive stipulation.(3)

CHAPTER VI.

OF THE EVIDENCE IN AN ACTION ON AN AWARD.

THE general proofs, in an action upon an award, relate to the submission of the parties to the reference, the award of the arbitrator, and the non-performance by the defendant.

(1) *Wilson v. Freeman*, 3 Campb. 527. The question whether the plaintiffs have been guilty of an unfair concealment, is proper for the determination of the jury. See the last note.

(2) *Evans v. Soule*, 2 Maule & Selw. 1.

(3) *Clarke v. Gray*, 6 East, 570; *Yate v. Willan*, 2 East, 128; *Clay v. Willian*, 1 H. Bl. 298.

NOTE 914.—If a carrier having the lawful possession of the goods, take the goods on the route, it is an unlawful conversion and not a felony; yet, if goods consisting of several packages are delivered to the carrier as one mass or body, and he takes away one of the packages of which the load was composed, it is separating a part from the whole, and determines the privity of contract; the contract being to carry the load in the state in which it was delivered, and not to carry the several packages of which the load was composed. Per Parsons, Ch. J., in *Commonwealth v. Brown*, 4 Mass. R. 580.

But every driver of a team, employed by a common carrier, has not a special property in the load, so that if he drives elsewhere than he was engaged to drive, and takes the whole load, he will be chargeable for a felony, and not for an unlawful conversion only. *Id.* The driver in this case took a whole package, which was placed at the bottom of the wagon, between a cask containing liquor and another package; the package was taken without breaking it, held, that such taking was felony. *Id.*

(The common carrier has a special property, or possessory interest in the goods intrusted to him for carriage; but where he undertakes to sell them, he conveys no title (*Bailey v. Shaw*, 4 Foster (N. H.) 297); he has no title to convey. As a general rule, the carrier cannot dispute the title of his bailor; but, among other exceptions to this rule, he may show a delivery of the goods to the true owner, before suit, and prove in a case of shipment that the plaintiff had obtained the possession of the goods by force or fraud. The carrier's receipt, or the bill of lading, admits the bailor's right of property; but does not operate by way of an estoppel. *Bates v. Stanton*, 1 Duer R. 80, and cases there cited.)

The general plea of non-assumpsit puts every material averment in issue. First, the submission,(1) not only of the defendant, but of all the parties to the reference, is to be proved.(2) An order of reference made by a judge, in a cause tried before him, may be proved by the original order, or if the order has been made a rule of court, by the office copy of

(1) NOTE 915.—An award under a verbal submission is good, and may be made the foundation of an action. *Parris, J.*, in *Norton v. Savage*, 1 Fairf. R. 457; *Wells v. Lane*, 15 Wend. 99. But no agreement to refer, can be made the foundation of an action; as where there has been an award of partition more than forty years since, but there being no proof of any submission, it was held, that it was not binding as an award. *Burghardt v. Turner*, 12 Pick. 534.

There is a distinction between the reference of a collateral or incidental matter of appraisement or calculation, and the submission of matters in controversy for the purpose of a final determination; the latter only is a submission to arbitration. *Garr v. Gomez*, 9 Wend. 649; S. C., 6 Id. 583. See 6 Cowen, 106, and also p. 81, n.

In all actions not referable under the statute, if the parties refer the cause to referees by stipulation or rule, or both, and merely provide that the referees report, such reference is an arbitration, and operates as a discontinuance (*Parker v. Walrod*, 13 Wend. 293), unless it is stipulated in the instrument of submission that a judgment shall be entered upon the award; in such case judgment may be entered and the parties will be concluded by their agreement. *Id.*; *Yates v. Russell*, 17 John. R. 461; *Ex parte Wright*, 8 Cowen, 399; *Camp v. Root*, 18 John. R. 22. See also 8 Cowen, 136; 2 Wend. 595; 9 Id. 480. A submission to arbitration is not merely an agreement to discontinue, but is *eo acto*, a discontinuance of a suit; and a parol submission is as effectual as one under seal; it requires no aid from the court to give it effect. *Wells v. Lane*, 15 Wend. 99; *Camp v. Root*, 18 John. R. 22.

(A general denial to a complaint on an award would be equivalent to the general issue, under the former practice; but if the defendant intends to set it up as a defence, he must plead it specially, under the Code. *Brazill v. Isham*, 2 Kernan N. Y. R. 9.)

(2) *Antram v. Chase*, 15 East, 209; *Ferrer v. Oven*, 7 B. & C. 427. And the award will be void, if the reference on behalf of any party was without authority. *Biddell v. Dowse*, 6 B. & C. 255. Partners must have express authority, or their submission does not bind the firm. *Stead v. Salt*, 3 Bing. 656; *McBride v. Hagan*, 1 Wend. 320.

NOTE 916.—“By declaring on the award, the plaintiff takes upon himself the onus of proving a mutual submission. By declaring on the bond, he transfers the burden of proof to the defendant; for it lies on the latter to discharge himself from the penalty by showing a performance of the conditions.” *Per Bayley, J.*, in *Ferrer v. Oven*, 1 Man. & Ryl. 222. It was necessary to allege a mutual submission; and that being a material averment, it must be proved. *Id.* See also *Brazier v. Jones*, 8 Barn. & Cressw. 124.

Where the submission is by parol, the plaintiff must show not only that the parties promised to be bound by the award, but that their promises were concurrent. *Keep v. Goodrich*, 12 John. R. 39; *Livingston v. Rogers*, 1 Caines' R. 583. And the promises must be at one instant; for else they will be both *nuda pacta*. And so stated in the declaration. In *Livingston v. Rogers* (*supra*), the promise was stated, “and that in consideration the plaintiffs had, at the defendant's request, promised to perform his part, the defendant afterwards, to wit, the same day, promised,” &c.; held, that the judgment ought to be arrested; but there being a good count, leave was given to amend. It being necessary to lay the promise as concurrent acts, the proof should support the allegation in the declaration, and show that, in point of fact, the promises were considerations reciprocally for the parties. *Keep v. Goodrich*, *supra*. In *Kingston v. Phelps* (Peake's N. P. 227), the plaintiff proved that the defendant consented to be bound by an award to be made on a submission by other underwriters on the same policy, but the witness proved no agreement on the part of the plaintiff to be bound by the award; held, that there was no mutuality, and, therefore, the defendant's agreement was *nudum pactum*.

such rule;(1) the rule, by reciting the order, shows that the court has adopted and acted upon it, and is, therefore, to be accredited as proof of the original order.

Authority of umpire.

If the award is made by an umpire, it must be shown that he had competent authority to make it. The recital of the award signed by the arbitrators and the umpire, is not sufficient proof of the umpire's appointment.(2) The appointment must be in a proper manner, and ought not to be decided by lot.(3) But the arbitrators may elect an umpire, before they enter on the matters referred to them;(4) and they may join with him in making the award.(5) An award by an umpire has been sus-

(1) *Still v. Halford*, 4 Campb. 17, by Lord Ellenborough. An office copy is sufficient proof of the rule, at least in the same court.

(2) *Still v. Halford*, 4 Campb. 19. (See *Schultz v. Halsey*, 3 Sand. 405.)

(3) *Young v. Miller*, 3 B. & C. 407; *Wells v. Cooke*, 2 B. & Ald. 218. The appointment was held good in a case where the arbitrators tossed up which of two nominees should be selected. *Neale v. Ledger*, 16 East, 51.

NOTE 917.—*Ford v. Jones*, 3 Barn. & Adol. 248; *In re Cassel*, 4 Mood. & Rob. 455; 9 Barn. & Cress. 624. An umpire may be appointed by lot, with the assent of the parties. 5 Barn. & Adol. 488. Such assent sufficiently appears by each party presenting three names, from which that of the umpire is to be drawn. Id. Or, by the parties signing the memorandum, by which the person whose name is drawn is appointed umpire. Id.

(4) *Roe d. Wood v. Doe*, 2 T. R. 644; *Harding v. Watts*, 15 East, 556.

NOTE 918.—*Bates v. Cooke*, 9 Barn. & Cress. 407; *M'Kinstry v. Solomons*, 2 John. R. 57; S. C., 13 Id. 27; *Van Cortland v. Underhill*, 17 John. R. 405. The instrument of submission stipulated that the arbitrators should make their award by a certain day, and if they should not agree, they were to choose an umpire; the arbitrators, not agreeing, made choice of an umpire, who, before the day appointed for the arbitrators to make their award, made his award, and held good. *Richards v. Brockenbrough's Adm'r*, 1 Rand. R. 449.

* * And if the submission authorize an umpire to be appointed on the disagreement of the arbitrators, they may appoint such umpire immediately, without waiting until a disagreement has arisen between them. *The Mayor, &c., of New York v. Butler*, 1 Barb. S. C. 325. * *

(5) *Soulshy v. Hodgson*, 3 Burr. 1474; *Beck v. Sargent*, 4 Taunt. 232.

NOTE 919.—The parties agreed to submit their matters in difference to two arbitrators, and an umpire to be chosen by them. The award was signed by the two arbitrators, and another person as umpire; but it did not appear on the face of the award that the umpire was chosen by the referees. The court held the award good, notwithstanding. *Rison v. Berry*, 4 Rand. 275. So, where the parties agreed that the subject in controversy between them, should be referred to F. and A., for their determination, and in case they should not agree, that they might choose one or more persons to act with them. The referees not having agreed, did, by consent of parties, as they certify, select three other persons to act with them. The whole five met, and both parties were present, and were heard. Held, that their award was as binding as if the whole five had been originally named in the instrument of submission. *Norton v. Savage*, 1 Fairf. R. 455. In this case, the parties consented to opening their award without having it returned to court, and each paid a moiety of the costs; and upon assumpsit being sued on the demand submitted, held, that such an award was admissible in evidence, in bar of the action; the arbitrators having decided that the demand now in suit had been paid, the court saying: "If the award had been in favor of the plaintiff, it would, unquestionably, have been a good ground of action." Id.

A declaration upon an award, made under a submission to the award of two persons, who were authorized to appoint an umpire, if they should disagree, after stating the choice of an umpire,

tained, where the arbitrators had no authority to appoint one, where it appeared that the parties had recognized his authority, by submitting to be examined.(1) The appointment of an umpire, made in writing, by two arbitrators, required no stamp.(2)

Award and notice of.

The award is then to be proved.(3) This must be properly stamped,(4) and ought to agree with the statement on the record in all its qualifications and conditions. But the day of making the award, or the day to which the time for making the award is enlarged, provided the enlargement be within the scope of the arbitrator's authority, is immaterial; especially if it be laid under a *videlicet*.(5) And though the words of the

alleged that the arbitrators and umpire made the award; held, that taking the whole together, it was substantially an allegation that the umpire made the award. *Bates v. Cook*, 9 Barn. & Cress. 407.

* * The award is the act of the umpire. Upon his appointment, the authority of the other arbitrators ceases, and their signatures subsequently made to the award are a mere nullity and do not prejudice it. *The Mayor, &c. v. Butler*, 1 Barb. S. C. R. 325. * *

(The award of an umpire is not the same thing as an award to be made by two arbitrators, or, in case they disagree, by them with a third, to be chosen by them; so that if the plaintiff alleges an award made by an umpire chosen by the two, he cannot prove an award made by the two who agree. *Lyon v. Blossom*, 4 Duer. R. 319.)

The agreement of the parties in the submission is to be closely observed, respecting the person or persons authorized to decide. It has been held in case of a parol submission to three, who all hear the parties, that an award made by two only, the third dissenting, was not valid. *Towne v. Jaquith*, 6 Mass. R. 46. An authority of this kind is not to be inferred; there is no adjustment where there is no consent of the parties, unless in the course of judicial proceedings.

(1) *Matson v. Trower*, 1 Ry. & Mo. 18.

(2) *Routledge v. Thornton*, 4 Taunt. 704.

(3) *Antram v. Chase*, 15 East, 209.

(4) By 55 Geo. III, c. 184, Sch. Part I, an award must be stamped with a £1 15s. stamp. And a progressive duty is imposed, according to the number of words.

(5) *Skinner v. Andrews*, 1 Saund. 165; *Lord Ray*, 1076; *Swinford v. Burn*, Gow, 7.

NOTE 920.—Where months are named in the instrument of submission, it means lunar and not calendar months. In *re Swinford and Horn*, 6 Maule & Selw. 559.

Where the submission is, by agreement, without suit, the time may be enlarged simply by the consent of parties. *Teasdale v. Atkins*, 2 Tidd's Prac. 880.

It is clear that parties may confer a sufficient authority by consent; as by attending meetings. Thus, in *Leggett v. Finlay* (6 Bing. 255), by a judge's order, an award was to be made by the first day of term, or such further day as the arbitrator should appoint, by indorsement on the order, the arbitrator enlarged the time by indorsement, and before the expiration of the enlarged time, one of the parties, at his request, procured a judge's order for a further enlargement, which was acted on by all parties, and the arbitrator made his award beyond the time of the first enlargement, and within the time so further enlarged, but made no further indorsement on the original order; held, that he had authority for making his award. *Leggett v. Finlay*, 6 Bing. 255.

When it appears that the award is not made within the time specified in the bond, and when it appears that the parties, by an agreement under their hands and seals, indorsed on the bond, had enlarged the time, and that the award was made within such enlarged time; held, that a suit will not lie upon the bond. *Brown v. Goodman*, 3 T. R. 592; *Freeman v. Adams*, 9 John. R. 115. The party has another remedy upon the submission implied in the agreement, to enlarge the time. The principle is, that if a contract be subsequently changed, you must declare

instrument are not formal or technical, yet, if they amount in substance to an award, it is sufficient; as where the award is in the form of an opinion.(1) The award must be pursuant to the submission, certain,(2)

otherwise than on the contract itself. *Phillips v. Rose*, 3 John. R. 392; 2 Hall, 456. In *Keating v. Price* (1 John. Cas. 23), the court allowed evidence of a parol agreement to enlarge the time of performance of a written contract. The time of the performance of the condition of a bond, also, may be enlarged by a *parol* agreement of the parties; and where certain acts were done by the obligor, amounting to a substantial, though not to a literal performance of the condition, it was held, that evidence of a parol agreement of the obligee, to waive any further performance, was admissible. *Fleming v. Gilbert*, 3 John. R. 528. However, there is a wide difference between a suit to enforce the bond, in consequence of such agreement, and a plea of a discharge by the obligee, from a strict and literal compliance with the obligation. *Id.* See also 9 *Id.* 115.

(1) *Matson v. Trower*, 1 Ry. & Mo. 17.

NOTE 921.—An award that “nothing was due to the plaintiff,” was held good. *Dickins v. Smith*, 8 Dowl. & Ry. 285; S. C., 5 Barn. & Cress. 528. A letter from an arbitrator to A. and B., the parties, in which he says, “to meet the circumstances of the case in a liberal manner, I propose that B shall pay £10,” is not an award. *Lock v. Vulliamy*, 2 Nev. & M. 336. The payment of the £10 cannot, therefore, be enforced by A., nor, in an action by A. upon the antecedent cause of action, can B., paying the £10 into court, avail himself of the award, as a bar to any further demand. *Id.*

The court will not look into the affidavits of referees, for the purpose of seeing the referee's construction of their report; especially after the court has decided upon the report. *Ward v. Gould*, 5 Pick. 291.

* * But see the cases cited *post*, notes 922 and 931. * *

(2) NOTE 922.—An award contrary to law may be impeached, for that is excess of power. *Morgan v. Mather*, 2 Ves. jun. 15. But not unless the law be clear upon the subject. *Richardson v. Nourse*, 3 Barn. & Adol. 237. * * Affidavits may be received, on a motion to vacate a statute reward, to show what took place at the hearing, and that the arbitrators exceeded their powers, or the award was not final. In the *Matter of Williams*, 4 Denio, 194. * * If the arbitrator, under a general reference, meaning to decide according to law, make a mistake, the court will set that right. *Young v. Walter*, 9 Ves. jun. 364. Where matters of law, and not of fact, are referred to a barrister, the court will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award itself. *Cramp v. Simons*, 7 Moore, 434; 1 Bing. 104. Nor, on the ground of his having decided contrary to law. *Wade v. Malpas*, 2 Dowl. P. C. 638. An award made on a reference of a point of law, is binding, though the arbitrator mistakes the law. *Steff v. Andrews*, 2 Mad. 6, S. P.; *Ching v. Ching*, 6 Ves. jun. 282.

A cause was referred to an arbitrator, with liberty to him to state upon the award any point of law raised by either party, in reference to the matters therein referred. Certain points of law were accordingly submitted to the arbitrator, which he set upon his award, but without reference to any particular state of facts, and certified that he had overruled them. The arbitrator's decision upon these points, as abstract propositions, being correct, the court refused either to refer it back to him to amend his award by setting forth the facts upon which the question of law arose, or to set aside the award. *Jay v. Byles*, 3 Moore & Scott, 86. Matters in difference referred to a legal arbitrator; the court will not review his decision, either upon the law or the facts. *Ashton v. Pointer*, 2 Dowl. P. C. 651; (*Lunsford v. Smith*, 12 Gratt. 554.) The award of a non-legal arbitrator may be reviewed as to a point of law, but not upon the facts, unless his award is so glaringly wrong as to induce a suspicion of misconduct. *Id.* A cause was referred to an attorney and another person, the court granted a rule for setting aside the award upon a point of law. *Id.*

In *Jones v. Boston Mill Corporation* (6 Pick. 148), after a review of the English cases upon this subject, Chief Justice Parker observes: “It is pretty clear, then, that there is no definite

reasonable, not contrary to law, and it must finally settle the differences of the parties.(1)

rule on the subject, in the English books, and yet there ought to be, and must be, some principle by which questions of this kind are to be settled. We take one principle to be very clear, which is, that where it manifestly appears by the submission, that the parties intended to leave the whole matter, law and fact, to the decision of arbitrators or referees, the award is conclusive, although they should have mistaken the law, unless the award itself refers such question to the consideration of the court."

According to the act in Pennsylvania, referees cannot find the facts, and refer the law to the court. *Sutton v. Horn*, 7 Serg. & Rawle, 228. The award must be good, *per se*; and perfect as an award, or the court cannot enter judgment upon it.

(1) NOTE 923.—*Cox v. Jagger*, 2 Cowen, 638.

It must appear by the award that the action is finally determined in favor of one of the parties, or else it cannot be ascertained how the costs are to go. * * See In the Matter of Williams, 4 Denio, 144. * * In the matter between Leeming and Fearnley (5 Barnewell & Adolphus, 409), it is not competent to an arbitrator, unless where the costs are in his discretion, to omit deciding on the whole of the matters referred to him, so as to give them such a legal event as shall authorize the officer of the court to tax costs. Thus, where the costs of the action were to abide the event of the award, and the arbitrators found that the plaintiff had good cause of action on five out of eight counts; that defendant should pay £5 damages, and that no further proceedings should be had in the action; held that there was no award as to three counts; no event to authorize the taxation of costs on those counts; and consequently that no part of the award could stand. *Norris v. Daniel*, 10 Bing. 507. But a cause referred to an arbitrator, costs to abide the event; arbitrator awards for defendants on the general issue in trespass, and disposes of the rights contested in the pleas of justification, but does not in his award decide on or notice the issues upon those justifications, the court refused to set aside the award. "Any inquiry into the truth of the special pleas, could only have been material with reference to the costs; if either party wished a decision on the pleas with that view, he should have requested it." *Anglesey v. Dibben*, Id. 568.

An award of arbitrators, that one party pay the other a certain proportion of a prize drawn in a lottery, after deducting the usual per centage, with the amount then already paid, where nothing appears in the award, showing the amount paid or from which it can be ascertained by calculation, is bad for want of certainty, and for not making a final disposition of the matters submitted. *Waite v. Barry*, 12 Wend. 377.

By an award of general releases, the arbitrator must be deemed to have taken into consideration all matters brought to his notice by the parties; an award of general releases puts an end to all claims and demands both at law and in equity. *Wharton v. King*, 2 Barn. & Adol. 528.

Awards are as conclusive as the judgments of courts. Choosing arbitrators, and they acting within the pale of their authority, the award becomes the act of the parties, and they are estopped by it. *Dougherty v. M'Whorter*, 7 Yerg. 239.

(The parties to it cannot show that the arbitrators meant something different from what they have declared in the award. *Doke v. James*, 4 Comst. 568.)

Where an action is referred to arbitrators, it is sufficient if they award that the defendants shall recover the costs of the action; because, by necessary implication, it must be considered as a determination upon the point in controversy. *Buckland v. Conway*, 16 Mass. R. 396. This makes a final determination of the action; for the judgment of the court will be, that the plaintiffs take nothing by their writ, and that the defendants recover their costs.

The practice in Connecticut has been, where the submission was general, without restriction on the power of the arbitrators respecting costs, to consider the arbitrators as vested with a discretionary authority to decide whether costs should be allowed or not. *Alling v. Munson*, 2 Conn. R. 691.

"I admit the law to be that the award must comprehend everything submitted, and must not

be of parcel only." Per Spencer, J., in *Jackson v. Ambler*, 14 John. R. 96. If the award is certain to a common intent, that is sufficient. *Purdy v. Delavan*, 1 Caines' R. 314.

An award, however, need not contain statements of all the points decided by the arbitrators. To be evidence of any particular fact, the award should, no doubt, be sufficiently comprehensive to imply a decision of it; but that which may be fairly implied, is equivalent to an express allegation of it. *Shackelford v. Purket*, 2 Marsh. R. 439. To sustain a general submission of all matters in dispute, parol evidence is admissible.

Where an act of Parliament directed commissioners to fix and ascertain the boundaries of a parish, and then the boundaries shall be advertised and then set forth and described in the awards, and having advertised one set of boundaries, which varied from those described in the award; held, that their award was not conclusive. *The King v. The Inhab. of Washbrooke*, 7 Dowl. & Ry. 221. * * And see *Nichols v. Rensselaer Co. M. Ins.*, 22 Wend. 125. * *

NOTE 924.—*The King v. The Inhab. of Washbrooke*, 4 Barn. & Cress. 732; *Carnochan v. Christie*, 11 Wheat. R. 446.

The whole authority of referees (arbitrators) is derived from the act of the parties in their submission, and if they do not conform to it, they act without authority. *Bigelow v. Newell*, 10 Pick. 348, Shaw, J. But, if parties select their own judges and submit their respective rights depending upon considerations of law and fact, and the referees decide accordingly, such award is conclusive as well of the law as the fact; and the court upon the return of such award, will not inquire whether the referees have decided correctly upon principles of law or not. *Id.* "Always having regard to the legal rights of the parties," though inserted in the submission, will not deprive the referees of deciding the questions of law; and in such a case their award is conclusive as to the law as well as fact. *Id.* Defendant pleaded *non assumpsit* to an action for the board and lodging of his wife; an arbitrator, to whom the case was referred, admitted evidence of the wife's adultery, and decided against the plaintiff. The court refused to set aside the award. *Symes v. Goodfellow*, 2 Bing. N. C. 532. It was objected in this case, that the arbitrator exceeded his authority by admitting evidence of the adultery of the wife; he could not inquire into the fact of adultery unless it were pleaded; but *Tindal, C. J.*: "Put it as you please, it is only that an inadmissible witness has been called. His admissibility was a question of law; you must take his law for better and for worse." * * But see *Butler v. The Mayor, &c., of N. Y.*, 7 Hill, 329; In the Matter of *Williams*, 4 Denio, 194. * * (The fact that the arbitrator has exceeded his powers will not necessarily vitiate the whole award. *Doke v. James*, *supra*.)

A cause pending in court, was referred, by a judge's order, with all matters in difference between plaintiff and defendant; but the order contained no power to order a verdict to be entered, and the arbitrator did not award that any sum was due or to be paid to the plaintiff by the defendant; but as to the matters in difference, nothing was due to either party, yet, the arbitrator awarded that a verdict should be entered for the plaintiff for a sum named; but the court refused an attachment for not paying the sum named. *Dowlan v. Brett*, 2 Adol. & Ellis, 344.

* * And see *Rule v. Bryde*, 1 Welsby, Harlstone & Gordon, 151. * *

A direction in the award that some of the parties to the reference pay a sum of money to the arbitrator, to be applied to certain specified demands, is bad, and vitiates the award, although it appear by the award to be for the benefit of the party submitting. In the Matter of *J. Mackay*, 2 Adol. & Ellis, 356. So, where all matters in difference in the cause between the parties were referred to the arbitrator, and there were matters in difference so referred upon which he had not decided; and this appearing by affidavit, the court set the award aside. *Samuel v. Cooper*, 2 Adol. & Ellis, 752.

So, where arbitrators determined five points in dispute, and referred a sixth to an umpire, whom they were authorized to choose, the award made by the arbitrators and umpire was held bad; it was not within the terms of the submission, to make the award in this manner. *Tollott v. Saunders*, 9 Price, 612.

The question as to amount of damages by reason of the working of a mine, was referred to an arbitrator, who was to make his award as to the damage already sustained on or before the 20th of December, 1830; and as to the damages to be thereafter sustained at the expiration of every two months from the said 20th December. The first award was made in time; but the second was not made until the 13th July, 1831, and it included the damages from the 20th De-

cember, 1830, to the 20th April, 1831; held, that this was not an award made in pursuance of the submission. *Stephens v. Lowe*, 9 Bing. 32.

Where a cause and all matters in dispute are referred to, a recital in the award that the action was referred, without mentioning other matters in difference, does not constitute an objection to the award on the face of it. *Paull v. Paull*, 2 Dowl. P. C. 340; 2 Crompt. & Meeson, 235; 4 Tyr. 72. Such an objection should be made the ground of a separate application to set aside the award, supported by affidavits showing what were the others matter in difference. *Id.*

If the arbitrators take into consideration matters not submitted, that is a good objection to the award; and the objection may be taken by pleading to an action on the award. *Bean v. Farnam*, 6 Pick. 269; *Fisher v. Pimbley*, 11 East, 193.

In some cases where an award embraces matters not submitted, if the different matters considered and decided by the arbitrators, are set out separately in the award, the award is held to be void only as to the matters not submitted. *Thrasher v. Haynes, jun.*, 2 N. Hamp. R. 429, and cases cited. But where matters not submitted are considered by the arbitrators, and a gross sum is awarded, the whole award is void. *Id.*

Where cross actions and all matters in difference are referred, and the award decides the actions only, it is no objection to the award that a claim not included in either action was brought before the arbitrator upon which he has not adjudicated, unless it be also averred that he did not take such claim into his consideration. *Rex v. St. Catherine Dock Co.*, 1 Nev. & Man. 121.

On a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party; no evidence was therefore given concerning it, nor any adjudication upon it requested. The arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money (without saying on what account) to the party against whom the above claim had been made, with costs; upon a rule to set aside the award, on the ground, among others, that it was not final, and that it did not decide all matters in difference; and it was proved that they left that claim out of consideration in making their award, as a matter not in dispute; held, that the award was bad; the claim having once been presented to the arbitrators, it was a matter in difference. In the matter of arbitration between *Robson v. Railston* (1 Barn. & Adol. 723), Lord Tenterden said: "There would be great difficulty in recovering that debt by any subsequent proceeding."

Demands made by one party only were submitted; and the arbitrators awarded that the plaintiffs, on whom the demand was made, but who made no demand on their part, should recover of the defendant a sum of money, and that one of the plaintiffs should recover of him a cow; held, that the arbitrators having exceeded their powers, the plaintiff was not entitled to recover. The award was not warranted by the submission. *Worthen v. Stevens*, 4 Mass. 448.

The rule cannot embrace demands between different parties; but exists where the parties were the same, although acting in different rights. Thus, a rule may be made between A. and the administrator of B. and C., who were partners in trade, and whom C. survived, submitting all demands between A. and the deceased partners or either of them; if in such case a sum of money is awarded as due from the estate of C., the surviving partner, and that the administrator shall pay the costs of the reference; held, that these costs were a charge upon the partnership fund. *Whitney v. Cook*, 5 Mass. R. 139. *Parsons, Ch. J.*, observed: "The demands of the defendant annexed to the rule, were against the partnership, and which he could substantiate against the administrator of the surviving partner. But each partner might have made payments or advances on the partnership account, as well as on his own; to meet which, defendant in error might have several demands. It was, therefore, most convenient that the same amicable adjustment should adjust all these demands; and we are of opinion that the parties in the rule might give them authority for these purposes by the submission. It appears by the report that these separate demands were not supported on either side, or were balanced; for a report is made for a sum due from the surviving partner, which, it is stated, is in full of all the matters submitted." Held, also, that costs follow the damages awarded.

* * See *Fidler v. Cooper*, 19 Wend. 288, *et seq.*, and the cases there cited by *Bronson, J.*; *Dater v. Wellington*, 1 Hill, 319. * *

(Where the arbitrators order a sum of money paid to a third person, such third person cannot sue upon the award. *Millard v. Baldwin*, 3 Gray (Mass.) 484.)

The averment that the defendant had notice of the award though commonly made, is entirely unnecessary, the fact of the making of the award being as much within the knowledge of the one party as the other,(1) consequently this averment need not be proved, unless it is expressly provided that the award should be notified to the parties, in which case notice must appear to have been regularly given.(2) Nor is proof of a demand of payment necessary, except where the payment is of a collateral sum upon request; as, where the defendant promised to pay a sum of money on request, in case he did not perform the award on his part, for which sum the action was brought;(3) there it was held that the aver-

(1) 8 Rep. 92; Cro. Car. 131; 2 Saund. 62 a, n. 4.

(2) Child v. Hordon, 2 Bulstr. 144.

NOTE 925.—However, in *Kingsley v. Bill* (9 Mass. R. 198), in action of assumpsit on an award, held, that a declaration containing no allegation that the award was ever published or made to the defendant, except by the commencement of the action, was a fatal defect; for an award, without publication or notice, was no foundation for an action.

* * And see *Buck v. Wadsworth*, 1 Hill, 321; *Ott v. Schroepel*, 3 Barb. 56; and index to the notes to Volumes I and II of the text, title *Arbitrators*. * *

It is said by Lord Tindal, Ch. J., in *Musselbrook v. Dunkin* (9 Bing. 605), that an award is published when the parties have notice that it is within their reach on payment of such expenses as are just and reasonable. However, in *Macarthur v. Campbell* (5 Barn. & Adol. 518), Denman, Ch. J., said: "But I think these last words need not form part of the definition." Accordingly, it was held, that an award is published when the arbitrator gives the parties notice that it may be had on payment of his charges; whether they are reasonable or not.

Where one interested in an award, though not nominally a party, is present when it is submitted, and privy to it, it is to be presumed that it was referred with his approbation. Thus, parties claiming the right to let an estate, interplead, as it were, in the presence of a third person, and agree to refer the question to arbitrators, and such third person entering into possession with the knowledge of such arbitration; held, that he was bound to take notice of the award at his peril. *Humphreys v. Gardner*, 11 John. R. 61.

The submission contained a provision that the award should be ready to be delivered to the parties in difference on or before a stated day. Although such a stipulation entitles the party to a delivery of the original award, yet, if he accepts a copy from the arbitrators without objection, this will be deemed a waiver. *Sellick v. Adams*, 15 John. R. 197. Where the award was duly executed and produced to the parties, and it was twice read over by the arbitrators, and the defendants appeared to be satisfied with it, and promised to perform it, and did in fact make a part performance, by paying sixty-three dollars, which was part of the sum awarded to be paid, and they did not require a copy of the award, or a duplicate original, and the arbitrators then finally separated; but afterwards demanded the award, or a copy, which was refused; in an action on the bond, and no award pleaded, held, that demand and refusal was not admissible under the issue on that plea. Held, also, that the conduct of the defendants amounted to a waiver of a delivery. *Perkins v. Wing*, 10 John. R. 143. (See *French v. New*, 20 Barb. N. Y. 481.)

(3) *Birks v. Trippet*, 1 Saund. 33.

NOTE 926.—*Gibbs v. Southam*, 5 Barn. & Adol. 911. See *Wharton v. King*, 2 Id. 528.

"*Indebitatus assumpsit*, is not a proper form of declaring on mutual promises to pay a sum of money on the non-performance of an award made in the plaintiff's favor; for the money in such case is a collateral sum, and a penalty, and not a debt or duty precedent; for which reason there must be a demand of it before the commencement of the action. *Birks v. Trippet*, 1 Saund. 33. But see Cro. Car. 384. But it is not unusual to add a count in *indebitatus assumpsit*, for a sum of money due on an award, made under a mutual reference by the plaintiff and defendant of certain matters in difference between them; for such a sum is a debt, and may be made the subject of

ment of demand must be specially made and proved. The rule is different in the proceedings by attachment; where, as the process is for a contempt, personal notice of the award, as well as a demand of the money, is always necessary.

If the award direct some act to be done by the plaintiff, previous to that which is required of the defendant, a performance of this precedent act, on the part of the plaintiff, ought to be averred and proved. As to the proof of the defendant's default in not performing the award, where the alleged breach is for not paying a sum of money awarded to the plaintiff, the burden of proof is with the defendant, who ought to prove the payment, if he can, in discharge of himself.(1)

Effect of an award.

A submission and award(2) have in some cases been admitted in evi-

an action of debt. And there are several precedents to be found of such declarations. However it is, in general unnecessary to declare specially on an award for the payment of money, made under a parol submission merely; for where there are no arbitration bonds, but an award appears in evidence to have been made under a parol submission, the reference and arbitration may be given in evidence, as statement of accounts between the parties, and an admission of the balance, under the common counts of the declaration adapted to the nature of the debt, particularly on the account stated. * * And see *Brady v. The Mayor, &c. of Brooklyn*, S. P., 1 Barb. S. C. R. 584. * * And this may be done, though the plaintiff, under a summons for particulars, give in the sum awarded as his claim, by that description." *Lawes' Assump.* 453, 454.

(1) See *Rodham v. Stroher*, 3 Keb. 830; *Birks v. Trippet*, 1 Saund. 33 a; *Philips v. Knightley*, 1 Bernard. 151.

NOTE 927.—An award of arbitrators decides the rights of parties as effectually as a judgment at law, or a decree in chancery. *Bulkley v. Stewart*, 1 Day's R. 130. Arbitrament is *res judicata*, and is an end of differences. *Jones v. —*, 1 Ro. 380. A party to an award can never leap over it, treating it as void, and litigate his right anew, by commencing an action, as if the award had not been made; and in a collateral manner, attack its validity. *Bulkley v. Stewart, supra*. If the award is acquiesced in, and the money voluntarily paid by the plaintiffs, an action cannot be maintained to recover it back. *Id.* A plea of an award in pursuance of a parol submission, is good without averring performance. *Jessiman v. The Hav. & Fran. Iron M. Co.*, 1 N. Hamp. R. 68; *Armstrong v. Masten*, 11 John. R. 189. In this last case the court observe: "There were some distinctions formerly made in the manner of pleading an award, with respect to the necessity of averring a performance of the thing awarded. Before it was settled that assumpsit would lie upon mutual promises, it was held, when the submission was not by deed, that the party was bound, in pleading, to allege performance of the award. At this day, these distinctions no longer exist, and there is scarcely a case that can now arise, where it is requisite for the defendant, in pleading an award in bar, to allege performance."

The fraudulent conduct of a party before the arbitrators, will not constitute a ground upon which a plaintiff can recover back money paid in compliance with an award: it may be the foundation of relief in chancery, or of an action at law, for that precise wrong, but it cannot change the rights of the parties, as settled by the award. *Bulkley v. Stewart, supra*. (See also *Viele v. Troy & Boston R. Co.*, 21 Barb. 381.)

(2) NOTE 928.—A promise to pay will be implied from an agreement of parties to abide by the decision of individuals named to appraise and determine the value of work done and performed by one party for the other. *Efner v. Shaw*, 2 Wend. 567.

An action may be maintained on an award, made under a submission by a judge's order, the parties having attended at the reference. *Warton v. King*, 1 M. & Rob. 96. Two persons assigned to the plaintiff all debts due to them, and gave him a power to receive and compound for

the same; held, that the plaintiff might maintain assumpsit on the award in his name. *Banfill v. Leigh*, 8 T. R. 571.

Assumpsit lies for revoking a submission to arbitration, not under seal, before award made, although it contains no express agreement not to revoke, but only the words, "agrees to stand to, abide, perform," &c., the award; and the proper measure of damages for such injurious revocation, was the sum the plaintiff would have recovered if the defendant had not revoked. *Brown v. Tanner*, 1 Car. & Payne, 651; 1 M'C. & Y. 464.

The death of defendant, after making the award in pursuance of a rule of court, where no verdict or judgment has been entered up, abates the suit; and the court will not enforce the award by attachment; still the party has a remedy by action. *Maffey v. Godwin*, 1 Nev. & M. 101.

In an action between the owner of land and a party holding by his permission, but claiming to hold as bailiff, and not as a tenant, it was referred to an arbitrator, who was to say what was to be done by the parties with respect to the land. He awarded that the holding was as tenant, that the tenancy should cease on the delivery of the award, and that possession of the land should be delivered up to the owner in one month after. On an issue between landlord and an execution creditor of the tenant, whether the crops on the land at a certain time were the property of the party so found to have been tenant, the award was held to be admissible in evidence on the part of the landlord. Held, also, that the award did not, of itself, change the property. *Thorpe v. Eyre*, 1 Adol. & Ell. 926.

Where an award creates a new duty, instead of that which was in controversy, the party has his remedy on the award, and cannot resort to the original cause of action; for the award is a good bar to that action. *Armstrong v. Masten*, 11 John. R. 189.

Where, by the terms of an award, acts are to be performed on the same day by both parties to the submission, as, that one shall convey a lot of land, and the other pay a certain sum of money, in an action for the recovery of the money, it is incumbent on the plaintiff to aver performance, or an offer to perform, on his part, and if he neglect so to do, defendant may craveoyer of the award, and demur to the declaration, or plead the non-performance of the plaintiff, in bar of the action. *Hay v. Brown*, 12 Wend. 591.

The general principle of law is, that in an action on the award, the *merits* of the award cannot be examined, nor can it be *impeached*, except for the corruption, partiality or misconduct of one or more of the arbitrators, or on account of some fraudulent concealment of facts by one of the parties. Per Mellen, C. J., in *Parsons v. Hall's Ex'r*, 3 Greenl. R. 60—citing 1 Saund. 327, note d; 2 Burr. 701; *Kleine v. Cator*, 2 Gall. 61; 2 Ves. jun. 15; *Newburyport M. Ins. Co. v. Oliver*, 8 Mass. R. 402; *Homes v. Avery*, 12 Id. 134. But where defendant, being executor, and no party to a receipt, which was discovered after award made; and the submission being to determine a demand against the estate; and which by the receipt, appeared to have been paid; held, that under the circumstances, the defendant was entitled to give the receipt in evidence, in bar of the action on the award; there being strong ground to believe that the plaintiff *fraudulently concealed* this fact from the arbitrators, for purposes wholly unjustifiable. *Parsons v. Hall, supra*.

A lease was made to S. for 999 years, at a stipulated rent for the first seven years; but subsequent, at such rent as three or five arbitrators of the parties to be chosen in the eighth year, should award and *indorse thereon*. It appeared that a writing, purporting to be an award, was *annexed*; but it being proved at the trial that the award annexed, was, by mistake, substituted for the award really made between the parties; held, that the plaintiff could not recover in covenant broken upon the lease. *Montague v. Smith*, 8 Mass. R. 396. Parker, C. J., in delivering the judgment of the court, observed: "The mode adopted by the parties to effect this (their) intention was, that the award should be indorsed upon the lease; and either party might well refuse to consider anything as an award which was not so indorsed." "It would be monstrous that the rent of this estate, to continue forever, as we almost say, should depend upon oral testimony, or upon writings wholly disjoined from the documents of the title; and it would be directly in opposition to the express provision of the parties to the original contract." (As the defence in an action on an award, see *Strong v. Strong*, 9 Cush. 560.)

dence, in actions founded on the original debt, as an admission on the part of the defendant. In the case of *Keen v. Bathshore*,⁽¹⁾ which was an action for work done, with the usual money counts, Lord Chief Justice Eyre, admitted the award of the arbitrator as a statement of accounts between the parties and an admission of the balance due to the plaintiff.⁽²⁾ And upon the same principle, in the case of *Kingston v. Phelps*,⁽³⁾ which was an action of assumpsit on a policy of insurance, Lord Kenyon allowed an award on the matters in dispute to be given in evidence.⁽⁴⁾

(1) 1 Esp. N. P. C. 194.

(2) And see *Daniell v. Pitt*, and other cases there cited.

NOTE 929.—Even an award, void as such, is, in some instances, admissible as evidence of an account stated. *Montgomery v. Ivers*, 17 John. R. 38.

* * *Brady v. The Mayor, &c.*, of Brooklyn, 1 Barbour S. C. R. 584, S. P. * *

The plaintiff and defendant entered into a joint and written contract with the owner of a vessel, to supply her with colonial produce at Jamaica, by a given time. The contract not being complied with, the owner made a demand on the plaintiff alone, who agreed to refer the amount of the damage sustained by such owner to an arbitrator, without the knowledge or consent of the defendant. The arbitrator having awarded a certain sum to be due to the owner, the plaintiff paid the amount, and brought an action for money paid, against the defendant, for a moiety thereof; held, that he was entitled to recover. *Burnell v. Minot*, 4 J. B. Moore, 340.

(3) *Peake* N. P. C. 328. The proof of the plaintiff's submission to the reference failed in this case; so that he was obliged to resort to other evidence.

(4) NOTE 930.—An award directing payment of money at a certain time, interest from that time is recoverable by action. In the *Matter of Arbitration between Churcher and Stringer*, 2 Barn. & Adol. 777. But on motion, principal only.

An action of debt will lie on an award of money, without regard to the penalty of the bond. *Ex parte Wallis*, 7 Cowen, 522.

In *Shepherd v. Watrous* (3 Caines, 166), the parties agreed to submit the matter in dispute in an action of slander; and the arbitrator awarded \$100 to the plaintiff; and in an action to recover the sum awarded, held, that the defendant could not show that the words were not actionable. And where the submission is not made a rule of court, it is no ground of objection to the award, in an action to enforce it, that it is against law. *Jackson v. Ambler*, 14 John. R. 211; *Cranston v. Kenney's Ex'rs*, 9 Id. 212; *Mitchell v. Bush*, 7 Cowen, 185. In *Mitchell v. Bush* (*supra*), the action was assumpsit, on an award of arbitrators; held, that a parol submission and award that B. shall pay M. a sum of money as a compensation for the future use of M.'s private road, made by him partly over his own land, and partly over the land of others, without their permission, is valid; the passing of a permanent right of way not being in the contemplation of the parties.

The parties agree to submit the demand, made by the plaintiff upon the defendant, to arbitration; and, for that purpose, execute under their seals an instrument of submission, which they acknowledge before a justice. The arbitrator having made his award, the parties in writing, *under their hands only*, agreed that the decision of the arbitrator might be opened and made public; and further agreeing to abide the decision; in assumpsit on the award and the promise to abide; held, that the plaintiff could not recover. *Bowes v. French*, 2 Fairf. R. 182. The promise to abide, not being founded on any consideration, was not binding. The submission not being pursuant to the statute, the award could not receive the sanction of the Common Pleas; nevertheless, the defendant had a right to insist upon this condition precedent to his liability. *Weston, J.*, observes: "But it is contended that this condition might be, and was, waived by the defendant. If it was, his liability to abide the award depended upon the submission, for which the appropriate action was debt or covenant."

However, this seems to be "a subtlety about a form; for it is reduced to nothing else." An award has been held to be sufficient to enable a party to recover in an action of ejectment. *Sel-*

lick v. Adams, 18 John. R. 197. The award, as such, is not offered as evidence of title; but the opposite party is concluded, by his agreement, from disputing the right of the plaintiff, and is as effectual when by parol as under seal. An award is conclusive between the parties as to the subject matter. Williams, C. J., in Shelton v. Alcox, 11 Conn. R. 240. Accordingly, it was held, that an award in writing not under seal might be given in evidence in an action of trespass *quare, &c.*, without pleading it; for the award concluded defendant from contesting the title again. *Id.* The award in such case has not the operation of a conveyance; and is, therefore, as effectual without deed as if under seal. *Id.*

Parties agree to admit to certain arbitrators questions in difference between them, and agree to abide, each giving a note to be placed in the hands of a third person, to be delivered up against the party failing to perform; held, that the action was properly brought upon the note. Kellogg v. Curtis, 9 Pick. 534; Gregory v. Allyn, 10 Conn. R. 133. And this, though the sum for which the note was made is reduced by the indorsement of the arbitrators.

In Small v. Connor (8 Greenl. R. 165), the submission was made pursuant to the statute; the condition of which, therefore, was, that the award should be reported to the court for their sanction; but it was not returned in season. Nevertheless, an action was held to be sustainable on a bond executed subsequent to the submission conditioned for the payment of the sum that might be awarded by said referees. Mellen, C. J., says: "By examining the condition of the bond, it does not appear that the acceptance of the report and judgment thereon, at the proper term of the court, were made necessary to entitle the plaintiff to recover on the bond."

In Bulkley v. Stewart (1 Day's R. 130), it was said by the court: "When not complied with, it shall, in some cases, furnish a rule of damages, in an action brought on the original claim. If, however, in such cases, there are any circumstances which would be a sufficient objection, in point of law, to an award, it will be open for the parties to show it at the trial. Bailey v. Leichmere, 1 Esp. R. 377.

Covenantor and covenantee submitted the amount of damages accruing from a breach of covenant to an arbitrator; held, that in action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached. Whitehead v. Tattersall, 1 Adol. & Ellis, 491. The award of an arbitrator conclude the right. (See Cushing v. Babcock, 38 Maine, 452.)

If a contract be subsequently changed, you must declare otherwise than on the contract itself. Thus Freeman v. Adams (9 John. R. 115), where the time for making an award was enlarged, and the award made within such enlarged time; held, that no action lay on the bond, though the enlargement was under seal; the proper remedy being on the submission implied in the agreement to enlarge the time.

To recover upon an award, made in pursuance of a submission by executors, it must be brought by the executors in their personal right; because they cannot recover upon the original cause of action. Though for the purpose of description of the persons suing, it may not be improper to name them as executors. Tevis's Ex'r v. Tevis's Ex'r, 4 Mon. R. 46.

To recover upon an award made under a submission by one of two or more executors, the action should be brought in the name of the executor only, by whom the agreement to submit was made; and where the action is brought by two or more, upon a submission alleged to be made by all, there can be no recovery upon evidence going to prove a submission by one only. *Id.* And this upon the principle, that in an action by two or more, upon a contract alleged to have been made by all, there can be no recovery upon evidence of a contract by part only; though the plaintiffs declare in their fiduciary characters, it does not alter the general principle. *Id.*

In assumpsit on an award, the plaintiff proves and recovers less than the sum demanded: it is not cause of demurrer that the plaintiff in his declaration states the indebtedness of the defendant and his promise to pay, in a greater sum than he is entitled to recover. Waite v. Barry, 12 Wend. 377.

* * Brady v. The Mayor, &c., of Brooklyn, 1 Barbour S. C. R. 534, S. P. * *

Counts on an award may be joined with counts in assumpsit for the breach of an agreement to stand by, perform, and not revoke an award to be made; and the judge at Nisi Prius will not put the plaintiff to elect which set of counts he will rest his case upon. Brown v. Tanner, 1 Car. & Payne, 651; M'Clell. & Yerg. 464.

Arbitrament without performance is a good plea, where the parties have mutual remedies.

Defence.

The defendant may insist at the trial, under the general issue, on any legal objection to the validity of the award, which is apparent in the award itself; and if courts of law have not any jurisdiction over the award, so that there is no power to make an application for setting it aside, the defendant may show some irregularity by matter extrinsic,⁽¹⁾ such as

Gascoyne v. Edwards, 1 Y. & J.R. 19. Thus, where there are mutual covenants to perform the award, in an action of covenant; held, that each party has his remedy upon the submission. So in *Allen v. Harris* (Ld. Raym. 122), the court recognized the same distinction. So in *Crafts v. Harris* (reported in *Carthew*, 187), where the action was assumpsit, to which the defendant pleaded, that after the promises stated in the declaration, he and the plaintiff had submitted themselves, and all matters in difference, to arbitrators, who made their award, which was set out in the plea, without alleging that he had performed the award on his part. The case was argued on demurrer; and it was adjudged by the court that an award without performance is a good bar to an action on the case, if the parties have mutual remedies against each other; but it is not, if there be no mutual remedies to enforce the performance. In that case, the award was had being conditional, and the plaintiff had judgment.

Where an action is referred which is not referable by statute, it may be treated as a submission to arbitration, and then it becomes a proper subject of an action. *Spencer, C. J.*, in *Harris v. Bradshaw*, 18 John. R. 26. But where an action of assumpsit is referred pursuant to a rule of court entered by consent of parties; it being not referable, as not involving the examination of long accounts, yet the consent of the parties will conclude from making the objection, because, it being an action of assumpsit, there might have been long accounts; the reference being an admission that the case was within the statute. *Id.* Although the judgment on the report is vacated, the plaintiff cannot sue an action on such report and treat it as an award: the cause pending in court was referred, the court had jurisdiction, and their rule, unless itself vacated, put an end to the effect of the report; and this left the plaintiff where he was before, at liberty to go to trial in the original cause; consequently an action on the report could not be sustained. *Id.* Had the action been in *tort*, then the objection to the jurisdiction of the court to refer the cause would have been open to either party, on a writ of error. *Id.*

Whenever an award is made *nominally* to one, where the interest is in another, that other is entitled to recover the money received in an action for money had and received. *Heard v. Bradford*, 4 Mass. R. 326.

* * And a report made by a referee, in an action not referable, will enure as an award. *Diedrick's Adm'r's v. Richley*, 2 Hill, 271. And see the reporter's notes, to *Id.* pp. 272, 273, as to form of submissions, and where they are irrevocable. * *

An award made upon a parol submission, and performance of the award, is a bar to an action founded on simple contract. *Homes v. Avery*, 12 Mass. R. 134. But it is very clear, that an arbitrament and award, if valid, merges the original demand; it will bar an action brought on the original cause of action. *Tev's Ex'r v. Tevis's Ex'r*, 4 Mon. R. 46. To be such a bar, the award must be a valid one, and have been made in pursuance of a legal submission by the proper person. *Id.* (See also *Brazil v. Isham*, 2 Kernan N. Y. 9.)

* * And see *McManus v. McCulloch*, 6 Watts, 357; *Elmendorf v. Harris*, 23 Wend. 628; *Brady v. The Mayor, &c., of Brooklyn*, 1 Barbour S. C. R. 584; *Hays v. Hays*, 23 Wend. 263. * *

(1) NOTE 931.—* * In *Butler v. The Mayor, &c., of New York* (7 Hill, 329), it was held, that parol evidence that the arbitrators exceeded their powers, by considering matters not embraced in the submission, was competent, though the submission and award were in writing, and that the rule was the same at law and in equity. *Matter of Williams*, 4 Denio, 195, S. P.; *Hays v. Hays*, 23 Wend. 932. And see *post*, note 932. * *

See *Kleine v. Catars*, 2 Gall. R. 61.

In *Barlow v. Todd* (3 John. R. 368), *Spencer, J.*, delivering the opinion of the court said: "It

want of notice of the meeting, or collusion in the arbitrator;(1) but if a court of law has such jurisdiction (as, where the reference is by rule of

is now well established, that at law nothing *dehors* the award invalidating it, can be pleaded or given in evidence to the jury."

An award sought to be impeached in a court of equity for misconduct of the arbitrators, especially after great length of time, the evidence, to set aside the award, should be conclusive. *Dougherty v. McWhorter*, 7 Yerger, 239.

In an action founded on an award, the plea of *non assumpsit* enables the party to show anything which at law would defeat and destroy the action; but when the matter of defence is a pure equity, calling for the interposition and requiring the aid of a court of equity, the defendant desirous of availing himself of it, must give notice either by plea or notice; nothing but the common-law defence can be received on the general issue. *Duncan, J., in Taylor v. Coryell* (12 Serg. & Rawle, 243, 251), held, that mistake of the arbitrators was a matter only in equity, and under the general issue, could not be given in evidence. *Id.* An award cannot be impeached for erroneous judgment; it must be a mistake amounting to excess of authority, something very gross and palpable; and even that matter could not be gone into at law, for if it was given in evidence the party would be wholly unprepared, as all that he has to do is to prove the submission and the award. *Duncan, J., in Id.*

In England, "in a trial at law, the corruption and partiality of the arbitrators cannot be got at." *Wills v. Maccormack*, 2 Wils. R. 148. But in Massachusetts and in Pennsylvania, the courts admit defendants to plead the matter in an action on the award; but under the general issue, and without special notice, it seems that the defendant cannot avail himself. *Id.*

(1) NOTE 932.—* The omission to appoint, or give notice of the meeting of the arbitrators, is fatal to the award. See *Jordan v. Hyatt*, 3 Barb. S. C. R. 275; *S. P., Elmendorf v. Harris*, 23 Wend. 628; *Butler v. The Mayor, &c., of New York*, 1 Hill, 489; *S. C., 1 Barb. S. C. R. 326.* And receiving evidence in the absence of a party (*Blanton v. Gale*, 6 B. Monroe, 264), or refusing a proper application for time to produce testimony (*Torrance v. Amsden*, 3 M'Lean, 509), or fraud in a party whereby the other is entrapped into an omission to produce evidence (*Baird v. Crutchfield*, 6 Humph. 171), may be shown against an award. But an award may be made by an umpire (*Ranney v. Edwards*, 17 Conn. 309), or by the arbitrators on a rehearing, without further proof or notice unless the party ask to be heard further. *Baker v. Hunter*, 16 M. & W. 672. And see on the same subject, *Russell on Arbitr.* pp. 185, 186, 192, 199, 209, 230. **

If the arbitrators refuse to hear evidence pertinent and material to the matter in controversy, it is unquestionably such misconduct as will vitiate an award in a court of equity. Partiality and corruption in either of the arbitrators, or the suppression and concealment of material facts by either of the parties, if it can reasonably be supposed that the knowledge of such facts by the arbitrators would have produced a different result, are causes for setting aside an award. Per *Spencer, Ch. J.*, 17 John. R. 405.

An umpire, being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was in question, made his award without calling for further evidence, or giving any notice on that subject to the parties; held, that the award could not be objected to on that ground by a party who knew that the case had gone before an umpire, and made no application to hear further evidence. *In re Tunno*, 2 Nev. & Man. 328; 5 Barn. & Adol. 488.

In an action upon an attorney's bill, which is not taxable, and a verdict taken subject to a reference as to the amount, and the arbitrator awards a certain sum, the court nevertheless will examine whether the arbitrator has adopted a right rule. *Broadhurst v. Darlington*, 2 Dowl. P. C. 38. Corruption, misbehavior, excess of power, and mistake admitted by the arbitrators, are grounds for the impeachment of an award. *Morgan v. Mather*, 2 Ves. jun. 15, S. P.; 1 Id. 369. So is partiality. 3 Bing. 167; 8 East, 344. But misconduct in the arbitrators is not the subject of a plea. *Riddle v. Sutton*, 2 Moore & Payne, 356. New evidence discovered is not sufficient ground to set aside the award. *Anderson v. Darcey*, 18 Ves. jun. 447.

An award cannot be set aside on any ground which is a question of merits as between the

the court, or order of *Nisi Prius*, or where the submission is in writing, and the parties agree to make it a rule of court, under the authority of statute 9 & 10 W. III, c. 15), he cannot, in such cases, impeach the award by proof of any extrinsic matter, which would be a ground for an appli-

original parties. *Winter v. Lethbridge*, M'Clel. 253; 13 Price, 533. The court refused a rule to set aside an award on the ground that the submission had been obtained by fraud; the application should have been to set aside the order. *Sackett v. Owen*, 2 Chitty, 39.

If an award is a nullity, or is of such a nature that nothing can be done upon it, but by suit at law, the court does not interfere to set it aside, because if any suit were brought upon it, it must fail. *Doe v. Brown*, 8 Dowl. & Ryl. 100. But if the award orders a verdict to be entered for defendant, the court will set the award aside, though a nullity. *Id.*

An arbitrator awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant; and then, by mistake, directed that the costs of the reference and award should be paid by the defendant, meaning the plaintiff; held, that the arbitrator, having executed his award in this form, could not rectify it. The plaintiff moved the court for a taxation of costs as adjudged; or that the award which had been executed in duplicate, and one copy afterwards corrected by the arbitrator, might be set aside. The defendant not agreeing to this latter proposal, the court ordered a taxation. *Ward v. Dean*, 3 Barn. & Adol. 234.

Where an arbitrator who had made his award in the plaintiff's favor, was supposed to have made a mistake in calculating the sum which the plaintiff claimed a right to recover; held, that the court could not refer it back to the arbitrator to correct the mistake, without the consent of the defendant. *Ex parte Cuerton*, 7 Dowl. & Ryl. 774.

Misconduct of an arbitrator cannot be pleaded or set up as a defence to an action at law upon an arbitration bond. The same rule prevails with respect to error or mistake of law or fact, in making an award, which does not appear on the face of it. *Sherron v. Wood*, 5 Hals. 7. In *Chicot v. Laqueène* (2 Ves. sen. 315), Lord Hardwick said he knew no case of a defence at common law, in an action brought on an award by corruption. In *Newland v. Douglass* (2 John. R. 62), the court say: "A court of chancery may correct a palpable mistake or miscalculation made by the arbitrators, or relieve against their partiality or corruption. But there is no such remedy at law in a case of submission, not within the statute."

In *Cortland v. Underhill* (2 John. Ch. R. 366), Chancellor Kent, says: "The courts of law have always been averse to grant any relief in these cases, and the injured party was obliged to resort to equity. The arbitrators are judges chosen by the parties themselves, and their awards are not examinable in a court of law, unless the condition is to be made a rule of court, and then only for corruption and gross partiality." *Sherron v. Wood*, 5 Halst. R. 7. Courts of law cannot listen to suggestions contradicting the award, or impeaching the conduct of the arbitrators. In *Mitchell v. Bush* (7 Cowen, 187), it was held, that where a matter is submitted to arbitrators by the mere act of the parties without being made a rule of court, it is no ground of objection to their award in an action to enforce it, that it is against law. In *Harper v. Hough* (2 Hals. 428), the arbitrators had refused to consider one of the matters submitted to them, and of which they had notice; and the court held that the award was a nullity. The action was on the bond conditioned for the performance of the award; defendant pleaded that the arbitrators had refused to hear or investigate a certain claim which he set forth, and which he averred was within the submission; this plea on demurrer was adjudged good. It was in effect a plea of no award, for the arbitrators had not pursued their authority. *Mitchell v. Stavelly*, 16 East, 58. The ground on which these cases stand is, not that the award was bad for the misbehavior of the arbitrators, but there was actually no award within the terms of their submission.

In Pennsylvania and Massachusetts, in cases of corruption in the arbitrators, or where they exceed their authority, or there are gross errors and mistakes in the award, relief may be granted by allowing the defendant to plead the matter in an action on the award. *Bean v. Farnam*, 6 Pick. 269; *Williams v. Paschall's Heirs*, 3 Yeates, 564; (*Strong v. Strong*, 9 Cush. 560.)

cation to set aside the award, and which ought to be brought forward in that specific form within a limited time.(1)

Revocation of authority.

The defendant may show that the arbitrator's authority has been determined.(2) And the death of any of the parties will be a determination

(1) *Swinford v. Burn*, 1 Gow, 5; *Braddick v. Thompson*, 8 East, 344; *Wills v. Maccarmick*, 2 Wils. 148; *Brazier v. Bryant*, 3 Bing. 167.

NOTE 933.—*Perkins v. Wing*, 10 John. R. 143.

But an arbitrator, who had authority to decide on what terms a partnership agreement should be canceled; directed, among other things, that the agreement should be canceled; that one of the partners should have all the debts due to the firm; and should, if necessary, sue for them in the name of his late partner; held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority. *Burton v. Wigley*, 1 Bing. N. C. 665. The power by which he is authorized to settle the terms on which the agreement between the parties should be canceled, includes the power of directing actions to be brought.

A cause being referred, the arbitrator, in 1825, received from the plaintiff's attorney £87 for his fees and expenses. In 1827 the parties went before the prothonotary, when he allowed only £35. The defendant now, after a lapse of eight years from the time the payment was made (the attorney who paid the money having died in the interim), applied to the court to order the arbitrator to refund the difference; held, that the application was too late. *Brazier v. Bryant*, 3 Moore & Scott, 844.

The English courts of common law never exercise jurisdiction over awards, nor interfere with, or set aside, an award, when the parties have not agreed that their submission to arbitration should be made a rule of court. Per *Ewing*, C. J., in *Sherron v. Wood*, 5 Hals. R. 7. So in *New Jersey*. *Id.*

The court will not interfere to set aside an award made under a submission; without rule of court. *Cranston v. Kenney's Ex'rs*, 9 John. R. 212.

A defendant may move to set aside a judgment entered up on an irregular award, though the time for setting aside the award itself has elapsed, if the defect insisted on be apparent on the face of it; and an objection grounded on such defect need not be stated in the rule *nisi*. *Manser v. Heaver*, 3 Barn. & Adol. 295.

(2) *Vynior's Case*, 8 Co. 162.

NOTE 934.—* In *The Bank of Monroe v. Widner* (11 Paige, 529), a submission was held to be irrevocable under the special circumstances. *M'Gheehen v. Duffield*, 5 Barr. 497, S. P. * *

Arbitrators are appointed under seal; they say we decline acting; they are no longer arbitrators; any award by them under such circumstances, is without jurisdiction, and void. *Relyea v. Ramsay*, 2 Wend. 602. And in an action on such award, defendant may prove resignation, and that the same was accepted in bar of the action on the award. *Id.*; *Allen v. Watson*, 16 John. R. 203. And such previous revocation is admissible under the general issue.

Where the submission is by *one* on the one side, and *two* on the other, one of the two cannot revoke the powers of the arbitrators, without the assent of the other. *Robertson v. M'Neil*, 12 Wend. 578.

A void award is no award. Thus, in *Allen v. Watson* (16 John. R. 205), the action was brought on the bond, defendant pleaded no award, then the plaintiff answered by setting out an award, defendant, in his rejoinder, stated that the power of the arbitrators was revoked by him, under seal, before the making of the award; held, that the revocation was effectual, and the rejoinder good. The rejoinder was no departure, because it did not go to impeach the award for some extrinsic cause; it strikes at the validity of the award itself, by proof of want of power. *Id.* See *Fisher v. Pimbley*, 11 East, 187.

* * See the reporter's note to 2 Hill, 272, for several cases in which the validity of a parol submission has been questioned. * *

of the arbitrator's authority;(1) although the reference is by order of Nisi Prius.(2) And where an award is made under a submission of all matters in difference, the defendant may show, that a particular matter was not contested(3) before the arbitrator; and the arbitrator may

(1) *Edmunds v. Cox*, 2 Tidd's Practice, 877; *Cooper v. Johnson*, 2 Barn. & Ald. 394; 1 Chitty, 187, n. a.

(2) *Cooper v. Johnson*, 2 Barn. & Ald. 394; *Rhodes v. Hay*, 2 Barn. & Cress. 345; *Potts v. Ward*, 1 Marsh. 366; *Toussaint v. Hartop*, 1 B. Moore, 287. It is usual to provide against this inconvenience in the modern rules of reference. *Tyler v. Jones*, 3 Barn. & Cress. 144; *Dawse v. Cone*, 3 Bing. 20; *Clark v. Crofts*, 4 Bing. 143; *M'Dougal v. Robertson*, 4 Bing. 435.

(3) NOTE 935.—If the cause of action subsisted at the time of the reference, and was within the terms and scope of reference, it seems that he cannot support an action upon the original cause of action; the award is conclusive and binding. *Smith v. Johnson*, 15 East, 213; *Dunn v. Murray*, 4 M. & R. 571. In the former case, Lord Ellenborough lays it down, that where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. And Lord Tenterden, in the latter case, affirms the same doctrine. "Now it is certain (he observes) that the present claim *might* have been brought before the arbitrator." "The present claim was within the scope of the former reference, for it arose out of the dismissal; it was the duty of the plaintiff to bring it before the arbitrator; and not having done so, he cannot now make it the subject matter of a fresh action."

An award must decide upon all the points contained in the submission: it must, however, appear that the points not decided upon were actually in controversy between the parties. *Jackson v. Ambler*, 14 John. R. 93.

Where the award is in issue, the arbitrators are competent to prove the points decided. *Zeigler v. Zeigler*, 2 Serg. & Rawle, 286.

Where an agreement was made by bond to submit all demands to arbitration, and only part of those existing between the parties are laid before the referees, an action lies for a breach of the agreement; even at law, the award is not void if it embrace all the subjects actually laid before the arbitrators, though other demands existed between the parties which were not laid before them. *Whittemore v. Whittemore*, 2 N. Hamp. R. 26. And *Baspole's Case* (8 Co. 195), decides that when the submission is general of all actions, &c.; and the award is of the premises, it shall be intended of all that was submitted. But the contrary may be alleged and proved by the other party. "Where the submission is of certain things in special, and with a proviso or condition that the award be made *de praemissis*, &c., or words which are tantamount, there the arbitrator ought to make award of all, otherwise it is void. But if divers things in special are submitted, without such conditional conclusion, the arbitrator may make the award of any of them." Id. A mere private agreement to refer, and an award in consequence of it, have none of the "incontrovertible verity," and few of the legal presumptions, which belong to proceedings in courts of record. In such case, the award on such demands as were actually laid before the arbitrators, is binding, and in a subsequent action at law for those not laid before them, the award is not a conclusive bar to a recovery. *Whittemore v. Whittemore*, *supra*.

Parties submitted all demands to referees by a rule entered into before a justice of the peace pursuant to statute: the referees reported upon all the demands submitted to the Court of Common Pleas, who rendered judgment thereon; in assumpsit sued on a promissory note as indorsee, defendant produced an agreement between the payee of the note and himself, submitting all demands, &c. He also produced a record of a judgment of the Court of Common Pleas rendered on the report of the referees; there he rested his defence, insisting that it was incumbent on the plaintiff, who claimed the note by a blank indorsement, to show that he purchased it before the agreement was made; but the judge decided the point against the defendant. The whole court confirmed the decision on a case reserved. *Webster v. Lee*, 5 Mass. R. 334. It appeared that the note was not indorsed to the plaintiff until after the reference; it was not laid before the referees, nor considered by them; and that it had not been paid. On this evidence, and on the

admission by the parties of the execution and indorsement of the note, a verdict was found for the plaintiff. Parsons, delivering the judgment of the court, said: "That a promissory note is a demand for certain purposes cannot be denied, because a release of all demands would be a bar to an action upon it. Yet it may well be questioned, whether a submission of all demands to arbitrators includes an acknowledged debt not in controversy, and concerning which there is no difference or dispute. If it is a fair construction of such a submission, that it includes all matters in difference, that either party may prove that a particular demand was not laid before the arbitrators, and so was not a matter of difference between the parties. But as either party might exhibit to the arbitrators, on the submission of all matters in difference, any personal demand he had on the party, the presumption is that all demands were in fact submitted. But this presumption may be encountered by clear evidence that any particular demand was not laid before the referees." *Golightly v. Jelicoe*, 4 T. R. 147, in note; *Seddon v. Tutop*, 6 Id. 607; S. C., 1 Esp. R. 401, were cited. The learned chief justice, in conclusion, observed: "In the case at bar, the defence is substantially payment of the note before indorsement; and the agreement to submit all demands, the award, the judgment thereon, and the testimony that the property was then the property of D. (a party to the reference), are all produced to prove the payment. But by the counter evidence, arising from the cross-examination of D., it is manifest that this note formed no ground for any part of those proceedings, and the payment is sufficiently negatived."

In *Boyd v. Davis* (7 Mass. R. 359), an action for money had and received, was referred by rule of court; and in the agreement of the parties to refer, it was stated that the plaintiff had no other demand against the defendant except what was included in this action; but the referees negatived the plaintiff's concession in the submission; and reported that the plaintiff still held sundry notes, the proceeds of which, when collected, would belong to the plaintiff, annexing a schedule thereof to the report; the court said that concession will be no bar to his recovery in a future action.

In *Bean v. Farnam* (6 Pick. 269), in debt on an award, defendant pleaded, with other pleas, 1. *Nil debet*: 2. A special plea, viz: that the arbitrators did not pursue their commission; on the contrary, allowed demands not included in the submission, and omitted to include various demands which were submitted; and they also made the said S. debtor to said E., twice for the same thing; held, that *nil debet* was a good plea, citing the case of *Wills v. McCormack* (2 Wils. 148). Held, also, that the special plea was good; it showed that the award was not final, but there was no award respecting some of the matters referred, *Wilde, J.*, saying: "The plea in the present case does not require us to try over again a matter already settled by the arbitrators; but to determine whether the matter alleged has been tried at all, or has been wholly omitted." *Id.*

Where a matter never was in fact submitted to the arbitrators, and they refused to take the same into consideration, and did not, in forming their award, the award will be no bar to a suit for the original cause of action. *Bixby v. Whitney*, 5 Greenl. R. 192; *Webster v. Lee*, 5 Mass. R. 334; *Hodges v. Hodges*, 9 Id. 320; *Smith v. Whiting*, 11 Id. 445.

A submission of all demands includes questions concerning real as well as personal property. *Munroe v. Alaire*, 2 Caines' R. 320; 2 Wend. 268. An award directing an exchange of lands, is good. *Id.* If a special matter be submitted, and a general release awarded, it enures only to the matter submitted, and where no other differences between the parties are shown, no other will be intended. *Id.*

Under a general submission to arbitration by partners, of all accounts, dealings, controversies, demands, &c., as well individually as partnership concerns and transactions, an award giving the joint property to one of the partners, and directing him to pay the other partner a sum in gross, and to discharge and satisfy the sums owing by the firm, is good, and will be supported, especially if there be no evidence that the arbitrators have decided matters not in dispute between the parties. *Byers v. Van Deusen*, 5 Wend. 268.

A parol submission and an award reciting that "certain disputes arising out of the charges of the plaintiff against the defendant, relative to the steamboat *New London*," held, that the award not being on its face or by its terms conclusive, as to the matters submitted, he might show by the arbitrator that the demand he now claimed to recover was not included in the submission, or embraced in the award. *Birkbeck v. Burrows*, 2 Hall, 51. Such an award is sufficient to cast the

be examined, to prove that no evidence was given to him upon the subject.⁽¹⁾

CHAPTER VII.

OF EVIDENCE IN AN ACTION OF ASSUMPSIT ON THE SALE OF REAL PROPERTY.

IF the buyer or seller of real property refuse to perform the contract, the other party may bring an action of assumpsit for the breach of the contract. The plaintiff, in support of this action, will have to prove the contract or particulars of sale; the performance of everything to be done on his part; and the breach of the contract by the defendant.

burden upon the plaintiff of showing what the matters in dispute were which the arbitrator had before him, and that the present claims were not included.

Trespass, pleas, general issue, and sundry justifications; cause referred to an arbitrator, costs to abide event; arbitrator awards for defendants on the general issue, and disposes of the rights contested in the pleas of justification, but does not in his award decide on or notice the issues on those justifications. The court refused to set aside the award. *Anglesey v. Dibben*, 10 Bing. 568. After finding that the defendants had not committed any trespasses, any inquiry into the truth of the special pleas could only have been material with reference to the question of costs.

Plaintiff had sued defendant for negligence, *per quod* plaintiff became liable to pay certain sums, and lost the custom of A., B. and C. The cause was referred under an order of *Nisi Prius*, by which plaintiff was precluded from bringing any new action. The arbitrator made an award in favor of plaintiff, who nevertheless sued the defendant again, the new declaration differing from the old one, in stating that the plaintiff *had* paid the money he before alleged himself *liable* to pay, and had lost the custom of D., E. and F.; held, that the court could not stay proceedings on a summary application. *Dicas v. Jay*, 6 Bing. 519. Gaselee, J., said that the recovery in the first of these actions may be pleaded in bar to the second; and he therefore agreed that it would be mercy to the plaintiff to make this rule (to stay proceedings) absolute.

An agreement to be bound by the final judgment in another suit, must be understood that such a judgment was intended as proceeded from a real trial, in which the claims of the parties were contested; and not a judgment which was submitted to for the very purpose of being overthrown in a review of the action. *Higginson v. Gray*, 8 Mass. R. 385.

(Where arbitrators exceed their powers, the award is void as to the excess, but valid as to the residue; provided the award is so made that that part which is without authority can be separated from the matter submitted. *Doke v. James*, 4 Comst. 568; *Muldrow v. Norris*, 2 Cal. 74. To render it valid, it must also appear to be mutual and final. *Conger v. James*, 2 Swan Tenn. 213; *Calvert v. Carter*, 6 Md. 135. In an action at law upon an award, no evidence of any kind can be given to show a mistake in the award. *Doke v. James*, *supra*; *Emmet v. Hoyt*, 17 Wend. 410; *Fidler v. Cooper*, 19 Id. 286; *Dater v. Wellington*, 1 Hill R. 319. But oral evidence may be given to invalidate an award, by showing that the arbitrators exceeded their powers. *Butler v. The Mayor, &c., of N. Y.*, 7 Hill, 329; *Matter of Williams*, 4 Denio, 194. And the arbitrators themselves are competent witnesses to prove that they exceeded their authority, where no bad faith is imputed to them. *Briggs v. Smith*, 20 Barb. 410. See also *French v. New*, Id. 481.)

(1) *Rose v. Farmer*, 4 T. R. 146; *Marten v. Thornton*, 4 Esp. C. 180.

First, of the action by a vendor of real property.

Statute of Frauds.

The best evidence to prove the contract of sale, is the contract itself, and this must be in writing.(1) The statute extends to agreements as well for interests arising out of land, as for the land itself, such as rent charges, or rights of common,(2) and also to contracts conferring an exclusive right to land for a time, for the purpose of making a profit of the growing surface;(3) but it does not include agreements for the sale of the produce of a given quantity of land, and which will afterwards become a chattel, though some advantage may accrue to the vendee by its continuing for a time in the land.(4) And the statute has been held,(5) not to be applicable to an agreement for a beneficial privilege to be exercised upon a person's own land. Sales by auction are within the statute.(6)

(1) 29 Car. II, c. 3, § 4.

(2) *O'Connor v. Spaight*, 1 Sch. & Lef. 306; *Pitman v. Poor*, 38 Maine, 237.

(3) *Crosby v. Wadsworth*, 6 East, 602. And see *Waddington v. Bristow*, 2 B. & P. 452; *Teal v. Auty*, 2 B. & B. 99; *Emmerson v. Heelis*, 2 Taunt. 38.

(4) *Evans v. Roberts*, 5 B. & C. 836. And see *Mayfield v. Wadsley*, 3 B. & C. 357, case of growing crops; *Parker v. Stainland*, 11 East, 362; *Warwick v. Bruce*, 2 Maule & Selw. 205. The party may, in some cases, recover on a parol agreement, when executed. *Salmon v. Watson*, 4 B. Moore, 73; *Teal v. Auty*, 3 B. & B. 99; *Poulter v. Killenbeck*, 1 B. & P. 397.

(5) *Winter v. Brockwell*, 8 East, 308. In several cases, it has been held, that the grant of an easement to be enjoyed on another person's land need not be in writing. *Webb v. Paternoster*, *Palmer*, 71; *Wood v. Lake*, *Sayer*, 3; *Taylor v. Waters*, 7 Taunt. 374, the case of opera tickets. But it would seem that a deed is necessary for conferring such easements; especially if the interest is freehold. *Hewlings v. Shippam*, 5 B. & C. 227.

NOTE 936.—But where plaintiff being about to take an apartment of defendant's tenant, defendant promised the plaintiff never to trouble him or his property, so long as he paid the tenant the rent of the apartment. The plaintiff paid the rent up to a certain period, and had made a tender of the residue remaining due, when the defendant, who had received no notice of the tender, distrained the plaintiff's goods; held, that this right to distrain was not barred. *Welsh v. Rose*, 6 Bing. 638.

An authority coupled with an interest cannot be revoked. *Gausson v. Morton*, 10 Barn. & Cress. 731. Thus, A. being indebted to B., in order to discharge the debt, executed to B. a power of attorney, authorizing him to sell certain lands belonging to him, A.; held, that this being an authority coupled with an interest, could not be revoked. *Id.*

A distinction is taken between an easement or privilege irrevocably to be exercised on my land, and a mere privilege of doing something on his own land, which otherwise I might oppose. For the former, a deed is necessary; not so as to the latter. *Bayley, J.*, in *Hewlings v. Shippam*, 5 Barn. & Cress. 233; *Tindal, Ch. J.*, in *Leggins v. Inge*, 7 Bing. 690, and *Taunton, J.*, in *Bridges v. Blanchard*, 1 Adol. & El. 536. The latter seems to have been of opinion that a license to the owner of a house to enjoy an unobstructed access of light and air to his new window from over his neighbor's premises, may be given by parol, and was not countermandable.

(A continuous right to enter and cut growing timber is an interest in the land, that cannot be given by parol. *Buck v. Pickwell*, 1 Wms. Vt. 157. See *Carter v. Harlan*, 6 Md. 20, as to a right to flow.)

** On the subject of this chapter, generally, see *Chitty on Contr.* (7th ed.) 293–313, and notes. **

(6) *Blagden v. Bradbear*, 12 Ves. jun. 466; *Walker v. Constable*, 1 B. & P. 306, and many other cases.

Both the contracting parties must be named in the note or memorandum of the agreement required by the Statute of Frauds,(1) and none of the terms can be left to be supplied by parol.(2) The note or memorandum need not have been delivered to the party, seeking to enforce it; a letter written by the defendant to a friend, or to his own agent, is sufficient.(3) It must, however, import a concluded agreement;(4) though a proposal by letter, when acceded to by parol, will be binding.(5)

Several writings.

It is not necessary that all the terms, or essential parts of the agreement, should be contained in a single paper.(6) But where the contract is established by evidence of several writings, they ought to have a plain reference to each other:(7) and nothing can be left to be supplied by parol evidence. Therefore, if an agreement refer to such parts of another paper, as have been read by a party, it is sufficient.(8) Hence, also, in sales by auction, where a note of the contract is made by the auctioneer upon the catalogue, it is necessary that it be annexed to or connected by express reference with the conditions of sale.(9) And where an agreement is made with reference to a public advertisement, it is essential that the connection between the agreement and advertisement should appear on the

(1) *Champion v. Plummer*, 1 N. R. 252; *Allen v. Bennet*, 3 Taunt. 169; *Klinitz v. Surry*, 5 Esp. 267, cases on the 17th section.

(2) *Seagood v. Meale*, Prec. Ch. 560; *Rose v. Cunningham*, 11 Ves. jun. 590; *Lord Ormond v. Anderson*, 2 Ball & Beatty, 363; *Sugden's V. & P.* 79 (7th ed.). And see *Champion v. Plummer*, 1 N. R. 252; *Hinde v. Whitehouse*, 7 East, 558; *Cooper v. Smith*, 15 East, 103; *Elmore v. Kingscote*, 5 B. & C. 583; cases on the 17th section.

(3) By *Lord Hardwicke*, 3 Atk. 503; *Moore v. Hart*, 2 Ch. R. 284; *Sugden's V. & P.* 84 (7th ed.).

(4) *Heddlstone v. Briscoe*, 11 Ves. jun. 583; *Stradford v. Bosworth*, 2 V. & P. 341; *Ogilvie v. Foljambe*, 3 Mer. 53; *Knight v. Crockford*, 1 Esp. C. 189. And see the observation of *Lord Redesdale* in the case of *Tawney v. Crowther*, 1 Sch. & Lef. 34.

(5) *Coleman v. Upcot*, 5 Vin Ab. 527; *Bird v. Blossie*, 2 Vent. 361. See *Hodgson v. Hutchinson*, 5 Vin. 522; 1 Evans, St. 236, n. 13.

(6) Where an agent authorized by parol to sell lands in another state, enters into a written contract of sale, this is a sufficient compliance with the statute; and though the principal be acting under a power to sell, conferred upon him by a will, which cannot be delegated to another, it is enough if the principal ratifies and adopts the contract of sale with full knowledge of all the facts; for this is the exercise of his own judgment and personal discretion in the sale. *Newton v. Bronson*, 3 Kernan (N. Y.) Rep. 587.)

(7) *Tawney v. Crowther*, 1 Bro. Ch. C. 161. And see *Allen v. Bennet*, 3 Taunt. 169; *Saunders v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & S. 286; *Jackson v. Lowe*, 1 Bing. 9; cases on the 17th section.

(8) *Gordon v. Trevelyan*, 1 Price, 64; *Ogilvie v. Foljambe*, 3 Mer. 61; *Hughes v. Gordon*, 1 Bligh, 287; *Boydell v. Drummond*, 11 East, 157.

(9) *Brodie v. St. Paul*, 1 Ves. jun. 326; *Higginson v. Glowes*, 15 Ves. jun. 516; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Richards v. Porter*, 6 B. & C. 437.

(9) See *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 2 B. & C. 947; *Phillimore v. Barry*, 1 Campb. N. P. C. 513; cases on the 17th section.

perusal of the papers themselves; though the identity of the advertisement may be proved by parol evidence.(1)

Memorandum signed.

Another requisite is, that the memorandum or note of the agreement should be signed. It will not be sufficient to show that the defendant perused and altered the draft of an agreement; or that it was reduced into writing in his presence.(2) The signing need not be in any particular part of the instrument;(3) provided it appear to have been made in such a manner as to authenticate the whole agreement.(4) A memorandum signed by one party alone, will bind the party who signs.(5)

Signature by agent.

The agreement is to be signed by the party charged, or some other person by him thereunto lawfully authorized. The agent of the party need not be authorized in writing.(6) But the memorandum cannot be signed by one of the contracting parties, as the agent for the other.(7) In sales by auction, the auctioneer is a sufficient agent within the meaning of the

(1) *Clinan v. Cooke*, 1 Sch. & Lef. 22, 33. See *Gordon v. Trevelyan*, 1 Price, 64; *Cooper v. Smith*, 15 East, 103; *Boydell v. Drummond*, 11 East, 157.

(2) *Gunter v. Halsey*, Amb. 586; *Whitechurch v. Bevis*, 2 Bro. C. C. 359; *Hawkins v. Holmes*, 1 P. Wms. 770; *Shipley v. Denison*, 5 Esp. C. 190; *Cooper v. Smith*, 15 East, 103.

(3) *Ogilvie v. Poljambe*, 3 Mer. 62; *Saunderson v. Jackson*, 2 Bos. & Pul. 239; *Right d. Cator v. Price*, 1 Doug. 241; *Selby v. Selby*, 3 Mer. 2. In *Welford v. Beasley* (3 Atk. 503), the defendant was bound, though he signed as a witness. 9 Ves. 291.

(4) *Stokes v. Moore*, 9 Ves. 253; 1 P. Wms. 770, n. 1; 1 Cox's Case, 222.

(5) *Fowle v. Freeman*, 9 Ves. jun. 351; 3 Ves. & Beam. 187; *Egerton v. Matthews*, 6 East, 307; *Allen v. Bennett*, 3 Taunt. 169. See *Wheeler v. Collier*, 2 Mo. & M. 123.

NOTE 937.—*M'Crea*, appellant, and *Purmont*, respondent, 16 Wend. 460; *Clason v. Bailey*, 14 John. R. 484; 12 Id. 102, S. P. In the last case, *Clason's* name was inserted in the contract by his authorized agent; and the chancellor said: "And if it were admitted that the name of the other party was not there by their direction, yet the better opinion is, that *Clason*, the party who is sought to be charged, is estopped, by his name, from saying that the contract was not duly signed within the purview of the Statute of Frauds; and that it is sufficient, if the agreement be signed by the party to be charged." In *Ballard v. Walker* (3 John. Cas. 60), the Supreme Court held, that a contract to sell land, signed by the vendor only, and accepted by the other party, was binding on the vendor, who was the party there sought to be charged. (*Lawrence v. Taylor*, 5 Hill R. 107.)

* * On the last general revision of the New York Statutes, the revisors recommended an alteration, to make the statute conform to the adverse construction by Lord Redesdale (in *Lawrence v. Butler*, 1 Schoales & Le Froy, R. 14), that "a contract, to be binding, ought to be mutual in its obligation;" but the legislature adhered to the old words. Per *Verplanck*, Senator, in *Davis v. Shields*, 26 Wend. 362. The New York Statute requires the party's name to be *subscribed* to the writing. Id. See *Champlin v. Parish*, 11 Paige, 405.

(6) *Colcs v. Trecothick*, 9 Ves. 260; *Emmerson v. Heelis*, 2 Taunt. 48; *McWharten v. McMahan*, 10 Paige, 386; 5 Hil R. 107.

(7) *Wright v. Danna*, 2 Campb. 203. If the action is brought in the name of the auctioneer, his signature will not, for the above reason, be sufficient. *Farebrother v. Symmons*, 5 B. & Ald. 333.

statute, both for the seller,(1) and for the purchaser.(2) But the clerk of the auctioneer is not authorized to sell in his absence.(3)

A written paper, signed by an auctioneer, and delivered to a bidder, to whom the lands are sold by auction, containing a description of the lands, and the terms on which they are sold, requires a stamp, as evidence of a material part of the agreement; though it may not be such a memo-

(1) *Blagden v. Bradbear*, 12 Ves. 471; 13 Ves. 473; 7 East, 569.

(2) *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Kemys v. Proctor*, 3 Ves. & Beam. 57; *Cases and Opinions*, Vol. 1, p. 143; *Hinde v. Whitehouse*, 7 East, 558; *Fare-brother v. Symmons*, 5 B. & Ald. 334; *Kenworthy v. Schofield*, 2 B. & C. 945. In *Emmerson v. Heelis*, the purchaser had an agent to bid for him at the sale.

NOTE 938.—Whether in a sale of real estate at auction, the auctioneer is to be regarded as the agent of the purchaser, and, as such, competent to charge him by his signature, does not appear to have been decided in Massachusetts, nor in Maine, before 1826. *Weston, J.*, in *Cleaves v. Foss* (4 Greenl. R. 1), held, that in a sale of lands at auction, the auctioneer is to be considered the agent of both parties, and that his memorandum stating the particulars of the contract, with the name of the purchaser, was sufficient to charge the purchaser within the Statute of Frauds. The same principle applies to the sale of land as to the sale of goods, as settled in *Simon v. Motivis* (3 Burr. 1921, 1 Wm. Black. 599), *Trustees, &c., of Ithaca v. Bigelow* (16 Wend. 28). However, the signature must be by a third person, and not by a contracting party on the record. *Bird v. Boulter*, 4 Barn. & Adol. 443.

Land was struck off to R. (who, in truth, was one of the sellers), he let B. take his place, the latter agreeing to give his note for an advance or premium, paying deposit to the auctioneer and receiving the auctioneer's receipt as the buyer. On a bill for specific performance, a plea of the Statute of Frauds was interposed, but overruled, with liberty, however, to R. to set it up in an answer—it being a case of some nicety. *Bailey v. Le Roy*, 2 Edw. Ch. R. 514. The vice-chancellor observed: "I am inclined to say that, for all the purposes of the statute, the auctioneer's receipt, under present circumstances, may be deemed the whole contract."

On the trial of an action by vendee of an estate against the auctioneer, to recover the deposit upon a failure of title, the auctioneer's receipt and the conditions of sale were produced, one of which conditions prescribed the execution of an agreement by the vendee. It further appeared, that there was a written agreement respecting the sale, signed by the plaintiff. Held, that the defendant was entitled to ask whether that agreement related to the deposit, as the answer might make it incumbent on the plaintiff to produce the writing as part of his case. *Curtis v. Greated*, 1 Adol. & El. 167. Some oral evidence must be given to introduce the fact of there having been a written agreement; and for this purpose a party may ask in cross-examination whether there was not an agreement in writing upon the subject matter of the suit.

(The Statute of New York declares "that every contract for the sale of lands shall be void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the sale is to be made, or by an agent of such party, lawfully authorized." 2 R. S. 135, §§ 8, 9. The auctioneer may act as agent of the vendor and vendee, in making a note or memorandum of the contract; which may be made in his sale-book. But his entry, properly signed, must contain all the essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writing itself, or some other papers to which the writing refers, without resorting to parol proof. *Talman v. Franklin*, 3 Duer R. 395. See *Howe v. Dewing*, 2 Gray, 476; and *Kurtz v. Cummings*, 24 Penn. State R. 35. When the names of the parties and the terms of the contract, with a description of the premises, are entered by the auctioneer, and signed by him, the statute is complied with. *Pinckney v. Hagadorn*, 1 Duer (N. Y.) Rep. 89; *Doty v. Wilder*, 15 Ill. 407.)

(3) *Coles v. Trecothick*, 9 Ves. 234, 243; *Blore v. Sir R. Sutton*, 3 Mer. 237.

random of the contract as would satisfy the Statute of Frauds.(1) But it is otherwise, if the paper is not signed by any of the parties.(2)

Performance by vendor.

The vendor, in support of this action, must prove that he was ready, on his part, to perform everything which the contract required him to do, when the other party ought to have completed the purchase.(3) But it is

(1) *Ramsbottom v. Mortly*, 2 Maule & Sel. 445; *Brewer v. Palmer*, 3 Esp. N. P. C. 213. See *Drant v. Brown*, 3 B. & C. 668, that a mere proposal, accepted by parol, need not be stamped.

(2) *Ramsbottom v. Tunbridge*, 2 Maule & Sel. 434.

(3) The above is the general rule, when the acts to be done are concurrent. *Goodison v. Nunn*, 4 T. R. 761; *Morton v. Lamb*, 7 T. R. 129; *Glazebrook v. Woodrow*, 8 T. R. 366; 1 East, 210; *Mason v. Corder*, 7 Taunt. 9; *Ferry v. Williams*, 8 Taunt. 62. There are several distinctions, where the acts are not necessarily concurrent, or where an immaterial part of the consideration is unperformed. See 1 Saund. 320 a, n. 4; 2 Saund. 352 b, n.; *Carpenter v. Cresswell*, 4 Bing. 409.

NOTE 939.—Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act. 1 Saund. 320, n.; Salk. 112, pl. 1, 171, pl. 3; Str. 569; Bull. N. P. 147; 2 John. R. 207; *Jones v. Gardner*, 10 Id. 266; 5 Id. 179; *Gazey v. Price*, 16 Id. 267; *Parker v. Parmelee*, 20 Id. 130; *Spindle v. Miller*, 6 Munf. R. 170. In *Green v. Reynolds*, the court say, that on such a covenant, the fair intent and good sense of the contract is, that the money is not to be paid until the deed is ready to be delivered. The averment in the declaration was, only, that he was ready and willing to convey; held, that the declaration was defective, in not averring a tender of the deed by the plaintiff. In *Jones v. Gardner* (*supra*), the same principle is repeated. In *West v. Emmons* (5 John. R. 181), Van Ness, J., puts the decision on the order or precedence in which the acts are to be done. There the defendant was to give a deed, and the plaintiff was to execute a bond and mortgage; and he held, that an averment of a readiness to execute the bond and mortgage, was enough, because the mortgage would be inefficacious until after the deed was given. In *Parker v. Parmelee* (*supra*), defendant covenanted to pay a stipulated sum on a particular day, as the consideration; the plaintiff also covenanted, that upon the performance of such covenant on the part of the defendant, he would "execute to him, &c., a good deed;" held, in an action against defendant on his covenant, that the plaintiff (vendor) could not maintain an action, without an actual tender, or offer to convey; an actual conveyance or a tender and refusal was essentially necessary.

However, if defendant covenants to pay any substantial part of the consideration money before the delivery of the deed, that is proof that he relies on his covenants and does not intend to make performance on the part of the vendor the condition of performance on his part. *Terry v. Duntee*, 2 H. Bl. 389. He would be compelled to pay, whether the land was conveyed or not. But this construction may be repelled and disproved by other parts of the instrument, and other circumstances; and if it appears, on the whole, that any substantial part of the agreement on one side was to be performed, only on condition of performance on the other, the court is bound to construe the covenants accordingly; whatever may be the order in which they are placed in the instrument, or the manner in which they are expressed. Per Jackson, J., in *Gardiner v. Corson*, 15 Mass. R. 500. Here, defendant being in possession of the land to be conveyed, covenanted that he would purchase the land, and pay for it \$920, in four years, with interest annually. The plaintiff's intestate covenanted that he would deliver a deed of conveyance to the defendant, upon his paying the money "at the time or times above named." Held, that these were mutual conditions; and neither party could complain of the other, until he

not necessary to do any nugatory act; and therefore the plaintiff, if the circumstances admit, may aver and prove, that he has tendered the draft of a conveyance, and that the defendant discharged him from executing it.(1)

Conveyance by whom tendered.

Where, by the terms of the agreement, the vendee is to prepare the conveyance, the vendor may maintain an action, without tendering a conveyance;(2) and, it seems, that in the absence of any express stipulation,(3)

had offered to perform his part of the agreement. Though the defendant was to pay the annual interest, this was, in fact, by way of rent, as defendant was to remain in possession; but as to the interest for the last year, this was to be paid, together with the principal, on receiving the deed; for the parties have thought fit to make the last payment of interest, as well as the payment of the principal sum, depend on the condition of his receiving a deed at that time.

(Full performance by the vendor, the plaintiff, of a contract void under the Statute of Frauds, and a partial performance by the defendant, does not take it out of the statute, as to what remains. *Duncan v. Blair*, 5 Denio R. 196. The action for the purchase money unpaid, cannot be based upon the contract, but may be recovered as purchase money under the common counts. *King v. Brown*, 2 Hill R. 485; *Thomas v. Dickinson*, 14 Barb. 90; *Martin v. Roberts*, 5 Cushing, 126.)

(1) *Jones v. Barkley*, 2 Doug. 684, 694; *Phillips v. Fielding*, 2 H. Bl. 123; by Lord Ellenborough, Ch. J., 5 East, 202.

NOTE 940.—Every contract when reduced to writing, must be proved by the written instrument. But the parties may vary a written contract by a subsequent parol agreement. The contracting parties may enlarge the time of payment, or change the mode of payment, or put an end to the contract, and this may be proved by parol. *Parris, J.*, in *Low v. Treadwell*, 3 Fairf. R. 441; *Keating v. Price*, 1 John. Cas. 22; *Ratcliff v. Pemberton*, 1 Esp. R. 33; *Thresh v. Rake*, Id. 53; *Edwin v. Saunders*, 1 Cowen R. 250; In *Fleming v. Gilbert* (3 John. R. 528), it was held, that the time of the performance of the condition of a bond may be enlarged by a parol agreement of the parties. In *Brooks v. Wheelock* (10 Pick. 439), defendant entered into a contract in writing to execute and deliver a deed of land upon payment of certain notes given for the purchase money, and made a subsequent verbal promise to deliver the deed upon the payment of the notes before they should fall due. Payment of the notes was tendered before they became payable, but the tender was refused, and the notes were not actually paid. Held, that defendant was not bound by his written contract to receive payment before the notes fell due; the tender, consequently, was of no effect. The difference between the latter case and that of *Low v. Treadwell* (*supra*), is, that in the former, plaintiff was seeking the performance of a verbal agreement; but in the latter, plaintiff was seeking the performance of a written agreement. The court say: "The plaintiff is seeking for the performance of a written agreement, and he proves that he has so performed the condition precedent on his part, as to be entitled to relief; and whether time be the essence of his contract or not, it has been waived. The contract he calls upon the defendant to perform is wholly in writing."

Where the subject is the sale of land, a promise by parol to take no advantage of the delay, will not be a waiver of the party's right to recover damages for such delay where the damages are stipulated. *Hasbrouck v. Tappen*, 15 John. R. 200.

(2) *Hawkins v. Kemp*, 3 East, 410.

(3) *Sugden's Law of Vendor and Purchaser*, 230, 383 (7th ed.)

NOTE 941.—A vendor, bound to give a deed by a day certain, must be at the expense of having it drawn, but is not obliged to have it prepared until it is demanded. *Connelly v. Pierce*, 7 Wend. R. 129. When a party covenants to convey, he is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and having waited a reasonable time to have it drawn and executed, has made a second demand. Id. The

the purchaser ought to prepare, and tender the conveyance; especially where it is to be executed at his expense.(1)

Vendor's title.

In an action against the defendant for not accepting the conveyance of an estate, which he agreed to purchase, on having a good title; the plaintiff will, in general, at the trial, have to produce the evidence of his title.(2) He must also prove such representations as are made in the particulars of sale respecting collateral matters, as the state of repair of the premises, or a right of way attached to them, although these circumstances are not noticed in the declaration.(3) And if a lease is read at a sale, the plaintiff will be bound by a description of the premises contained in it, though not stated in the particulars of sale.(4) It seems that where

court said: "In England the party entitled to the deed, is bound to have it drawn and presented for execution; we have not gone so far; the party who is to give a deed, certainly should have it drawn at his own expense." *Id.* However, a purchaser may prepare the deed and tender it, and then only one demand is necessary. *Wells v. Smith*, 2 Edw. Ch. R. 78.

The vendor of a sale of lands at auction by order of the court, is bound to perform, or to offer to perform, whatever it is incumbent for him to do on his part; and this within a reasonable time, before he is entitled to maintain an action against the purchaser for not completing his contract; held, that two days was within reasonable time for him to tender a deed. *Cleaves v. Foss*, 4 Greenl. R. 1.

On a sale of land, if no place be fixed for the delivery of the deed, the vendor is bound to seek the vendee and tender the deed. *Fauchot v. Leach*, 5 Cowen R. 506. Or the vendee may appoint a place, and a tender at that place is sufficient. *Id.*

* * A tender of the money and demand of a deed at the vendor's residence is sufficient to give the purchaser a right of action; and if the former is absent, a personal tender is not necessary. *Smith v. Smith*, 25 Wend. 405. The vendor is bound to prepare the deed, unless it is otherwise stipulated. *Tinney v. Ashley*, 15 Pick. 546; *Hill v. Hobart*, 4 Shepley, 104. * *

(When there is an agreement for the sale of a farm, described as containing ninety-six acres, more or less, for \$60 per acre, and a conveyance is executed and security by mortgage given for the purchase money, at the rate of \$60 for ninety-six acres, the purchaser cannot, by showing that the farm contained only eighty-six acres, obtain relief against paying the whole amount of the mortgage given thereon. *Fause v. Martin*, 3 Selden N. Y. 210.

When the vendor brings an action to recover on a contract for the sale of real estate, he must prove performance, or a readiness and offer to perform on his part, according to his agreement. *Dubignon v. Love*, 5 Rich. 251; *Pomeroy v. Drury*, 14 Barb. 418; *Garlock v. Love*, 15 Id. 359. Either party suing on the contract must do the same. *Van Schaick v. Winne*, 16 Id. 89. Nothing being said in the contract as to the kind of conveyance to be given, the vendor must give a good and valid title. *Pomeroy v. Drury*, *supra*. See *Witter v. Biscoe*, 8 Eng. (13 Ark.) 422.)

(1) *Seward v. Willock*, 5 East, 198.

(2) *Phillips v. Fielding*, 2 H. Bl. 123; *Duke of St. Albans v. Shore*, 1 H. Bl. 270. An averment that the title was satisfactory to the purchaser, will render a particular statement of the title in the declaration unnecessary. *Martin v. Smith*, 6 East, 555.

(3) *Thompson v. Miles*, 1 Esp. N. P. C. 184.

(4) *Granger v. Worms*, 4 Campb. N. P. C. 83. And see *Jones v. Edney*, 3 Campb. N. P. C. 288.

NOTE 942.—The lease being in the hands of the vendor, he has peculiarly, and indeed exclusively, the means of the exact restrictions contained in it; the purchaser at the auction has none. For the reading the lease at the auction by the auctioneer has been decided to be no excuse for

the plaintiff's title deeds are produced in evidence, it is not necessary to prove their execution by the subscribing witness.(1) And the vendor of a leasehold interest, will not, in the absence of express stipulation, be obliged to prove the title of his lessor.(2) If a good title is not made out on the defendant applying for it, upon the day when the purchase ought to be completed, or at a subsequent time, it seems the defendant may, at law, abandon the contract.(3) But if the purchaser has not made an application for the title before the commencement of the action, and no time is fixed for completing the contract, the vendor will be at liberty to show a complete title at the time of the trial, though it was not complete

a misdescription of the terms of the lease in the particulars of sale. *Jones v. Edney*, 3 Camp. 285; per Tindal, C. J., in *Flight v. Booth*, 1 Bing. N. C. 370.

A condition in articles of sale, "that any error in the particulars shall not vitiate the sale, but a compensation shall be made," only applies to cases where the circumstances afford a principle by which this compensation can be estimated. *Sherwood v. Robins*, 1 Mood. & Malk. 194. Therefore, on the sale of a reversion expectant on the death of A. B. without children, an error in the statement of A. B.'s age does not come within the condition (as it would if the reversion were simply expectant on A. B.'s death), because it affects the probability of the other contingency, which is not a subject of calculation; and the purchaser is entitled to rescind the contract. *Id.*

Where in the particular of sale, property was stated to be held under the C. estate upon three lives, and it appeared in an action to recover back the deposit, that one of the lives had dropped before the sale, and that the property was not held directly under the C. estate; held, that the defendant could not call the auctioneer to prove that he stated before the sale that the life had dropped; but that the defendant might give evidence to show that, before the sale, the plaintiff had read the original lease under which the property was held. *Bradshaw v. Bennett*, 5 Car. & Payne, 48.

Parol evidence of declarations of an auctioneer, to contradict the written terms of sale, ought not to be admitted; as it might introduce great uncertainty as to titles derived under sales at auction. *Lessee of Wright v. De Klyne*, 1 Pet. C. R. 199.

(1) *Thompson v. Miles*, 1 Esp. C. 184; *Crosby v. Perry* is *contra*. But the former decision coincides with the practice in these cases. *Sugden on Vendor and Purchaser*, 225 (7th ed.).

NOTE 943.—If the agreement is in the hands of one of the parties, the party in whose possession it is, shall be compelled to produce it to the other party. *Sugden on Ven.* 241. Where one party produces the agreement, under a notice from the other, the latter need not call the subscribing witness to prove the execution of the agreement, as the defendant takes an interest under it. *Bradshaw v. Bennett*, 5 Carr. & Payne, 48. The case was assumpsit by vendee against vendor, to recover back a deposit paid on purchase of real property, the defendant produced the agreement signed at the foot of the conditions of sale.

(2) *George v. Pritchard*, 1 Ry. & Mo. 417; *Gwillim v. Stone*, 3 Taunt. 433; *Temple v. Brown*, Taunt. 60. See *Purvis v. Roger*, 9 Price, 488; *Felder v. Hooker*, 2 Mer. 424; *Sugden's V. & P.* 301 (7th ed.).

(3) *Cornish v. Rowley*, MS. case cited, 1 Selw. N. P. 175; *Berry v. Young*, 2 Esp. C. 640. As to question whether time is the essence of the contract at law, see *Lang v. Gale*, 1 Maule & Selw. 111; 2 Esp. C. 640; *Wilde v. Fort*, 4 Taunt. 344; *Hagedon v. Lang*, 1 Marsh. 514; *Sugden's V. & P.* 355 (7th ed.).

NOTE 944.—1 *Sugden on Ven.* 419 (Am. ed. 491); *Benedict v. Lynch*, 1 John. Ch. R. 370. Where a purchaser by a covenant in the contract, was to pay a further sum of money, provided the adjoining houses should be completed, that is, paved in front, &c., before a day named, and the payment was not completed until after the day appointed, although the delay was occasioned by the bad weather, which prevented the workmen from proceeding, yet the seller was held not

at the time when the contract was made, or when the action was commenced.(1)

Defects in title.

The plaintiff cannot recover if his title is defective; as where he has a shorter interest in the premises than he contracts to sell.(2) Or where the premises are subject to an incumbrance of which no notice has been given, and the discharge of which is only shown by presumption.(3) It seems to be the better opinion that a court of law will regard equitable defects in a title;(4) but it will not take notice of doubtful titles, and it will adjudge a title to be good or bad, without inquiring whether it be marketable or not.(5) Where property is sold in lots, it seems that the contract, in respect of each lot, will not be considered as distinct from the rest, unless there is a special agreement to connect them; and, therefore, a de-

entitled to recover the £80. *Maryon v. Carter*, 4 Car. & Payne, 295. But a party may, even at law, waive the forfeiture, and enlarge the time of his contract. *Carpenter v. Blandford*, 8 Barn. & Cres. 575. To entitle the vendor to recover the purchase money in a sale by a private agreement, he must, in his declaration, aver performance of the contract on his part, or an offer to perform, *on the day specified* for performance; and this averment must be sustained by proofs, unless the tender has been waived by the purchaser. *Sutherland, J.*, in 12 Wend. 461; 1 Pet. R. 467.

Where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed. 1 Sugden on Ven. 427; *Inman v. Western Fire Ins. Co.*, 12 Wend. 452.

If the deed is to be delivered at a future time, and on payment by the vendee of certain specified part of the purchase money, the vendee must pay such purchase money, so as to be in a condition to demand a deed before he can charge the vendor with a default; and this, although there is an incumbrance on the land. *Greenby v. Cheevers*, 9 John. R. 126.

Equity cannot relieve from the consequences of a condition unperformed. *Wells v. Smith*, 2 Edw. Ch. R. 78.

(1) *Thompson v. Miles*, 1 Esp. C. 184.

NOTE 945.—If a seller will not make an assurance when reasonably demanded, he loses the bargain, and the purchaser is not bound to wait until he is able to convey; and it seems that after a continued neglect and inability of the seller for six years subsequent to a request and refusal to convey, neither a court of law or equity will interfere to enforce the performance of the agreement. *Van Benthuysen v. Crapser*, 8 John. R. 257.

(2) *Farrer v. Nightingal*, 2 Esp. C. 639; *Hibbert v. Shee*, Campb. 113.

(3) *Turner v. Beaurain*, MS. case cited Sugden's V. & P. 261; *Barnwell v. Harris*, 1 Taunt. 430.

(4) *Maberly v. Robins*, 5 Taunt. 626. See *Elliott v. Edwards*, 3 Bos. & Pull. 181; Sugden's V. & P. 226 (7th ed.)

NOTE 946.—In *Dale v. Roosevelt* (5 John. Ch. R. 174), relief was afforded where a false representation had been made by the defendant, of the existence of a valuable coal mine on the bank of the Ohio River, on a tract of land, which the plaintiff's testator had thereby been induced to purchase. In *McFarran v. Taylor* (3 Cranch, 270), it was held, that he who sells property on a description given by himself, was in equity bound to make it good.

* * See *post*, note 948. * *

(5) *Maberly v. Robins*, 5 Taunt. 625; *Romilly v. James*, 6 Taunt. 274; *Camfield v. Gilbert*, 4 Esp. C. 221.

fect in the vendor's title as to some of the lots, will not prevent him from recovering the price to be paid for the others.(1)

The defendant under the general plea of non-assumpsit, may show any defect in the vendor's title of the same nature with those above considered.(2) He may also show that the contract is absolutely void, on ac-

(1) *Poole v. Shergold*, 2 Brown Ch. C. 118; *Emmerson v. Heelis*, 2 Taunt. 30; *James v. Shore*, 1 Stark. 36; *Sugden's V. & P.* 264; *Infra* "Sale of goods;" *Chambers v. Griffiths*, 1 Esp. N. P. C. *contra*. On the defects in the quantity of the estate, and the effect of the terms by "estimation" and "more or less," see *Sugden's V. & P.* 290 (7th ed.)

(2) NOTE 947.—(A general denial of each and every allegation in the complaint will be sufficient to enable the defendant to controvert any fact necessary to support the plaintiff's action. But special defences must be pleaded and proved.)

* * The cases as to failure of consideration, and the right to show a partial failure in mitigation or by way of recoupment of damages, are collected in 2 Kent C. (6th ed.) 471-475, and notes. See *Banks v. Walker*, 2 Sandf. Ch. R. 344; *Brown v. Reeves*, 19 Martin's Louis. R. 235; *Whitney v. Lewis*, 21 Wend. 132; *Tallmadge v. Wallis*, 25 Wend. 117; *Carter v. Carter*, 1 Bailey's R. 217; *Bordeaux v. Cane*, Id. 250; *Moore v. Nesbitt*, 3 Hill S. C. R. 299. As to the right of *recoupment*, see *Reab v. McAllister*, 8 Wend. 109; *Still v. Hall*, 20 Id. 51; *Goodwin v. Morse*, 9 Metc. 279; *Batterman v. Pierce*, 3 Hill. 171; *Van Eppes v. Harrison*, 5 Id. 63; *Whitbeck v. Skinner*, 7 Hill, 53; *Sedgwick on Damages*, ch. 17; *Chitty on Contracts* (7th ed.) 622. * *

In assumpsit, it is competent for the defendant to set up a failure of consideration as a complete defence. *Judson v. Wass*, 11 John. R. 525; *Washburn v. Picott*, 3 Dev. 390; *Greenleaf v. Cook*, 2 Wh. 15. So, also, a fraud on the purchaser, in the representation of his title to the land. But it is different where the action is upon a specialty; a failure of consideration is no defence. *Parker v. Parmelee*, 20 John. R. 130. In *Vrooman v. Phelps* (2 Id. 177), it was expressly decided that a specialty could not be invalidated for any other cause than the illegality of the consideration. And *Spencer*, Ch. J., in 20 John. R. 134, says: "It is not for me to question the wisdom of the common law, in denying a party who has entered into an agreement, under his hand and seal, a right to impeach it, on the ground of a want of consideration. It is sufficient that the law is so." Therefore, in an action for breach of covenant, by which plaintiff was to sell and defendant to buy a piece of land; and the defendant covenanted to pay 250 dollars on a certain day; upon performance, plaintiff covenanted that he would give a *good warranty* deed of conveyance of the premises: plea in effect, said, that the defendant ought not to pay the consideration money, because plaintiff did not own the land on the day he agreed to convey it, nor had he since owned it; held, that plaintiff's covenant only extended to the instrument of conveyance, and not to the *title*. Defendant's remedy is in a court of chancery.

In the state of New York, the above rule is now changed by statute. In 2 R. S. 406, § 77, it is enacted, "That in every action upon a sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed." But such defence must be pleaded, or notice given thereof, to make it available. Id. § 78; *Case v. Boughton*, 11 Wend. 106.

"It is generally true that a man shall not be received to aver against his own deed. But the case of fraud is always excepted, which vitiates every transaction; and a deed obtained by fraud is to be considered as a void contract, as to the fraudulent party." *Parsons*, C. J., in *Bliss v. Thompson*, 4 Mass. R. 488. It seems, the suppression of the truth, as well as an allegation of falsehood, in respect to a transaction, will vitiate; for not only good morals, but the common law requires good faith, and that every man in his contracts should act with common honesty, without overreaching his neighbor by false allegations or fraudulent concealment. Id. The line which separates cases, where the rule of *caveat emptor* applies, from others which call for relief, is not defined with precision; each one will rest, in some measure, upon its peculiar circumstances. Per *Weston*, C. J., in *Bean v. Herrick*, 3 Fairf. R. 262. In that case, the court held that a vendor, making a false representation in respect to the quality of new lands which were

count of fraud practiced against him by the plaintiff; as where the plaintiff has fraudulently misrepresented the quality, or value of the property; or willfully misdescribed its locality, so as to make it appear more valuable;(1) or has given such a description of the property as would deceive a person, not a lawyer, or a very careful man.(2) It seems, that if a person has been employed to bid for the owner at a public sale, although he is only authorized to bid to a certain amount, the sale may be avoided, if it is not announced at the time, that there is a person bidding for the owner; and this is clearly the case where more bidders are employed than one.(3)

II. Secondly, as to the action by the purchaser.

The purchaser may make his election, either to affirm the contract, by bringing the action for the non-performance of it; or, if he has paid any part of the purchase money he may sue the vendor for his deposit.(4)

at a distance, was liable to the vendee in an action to recover the damages, although the defects are open to observation. *Id.* The buyer had not equal means of knowing with himself. So, in *Hill v. Gray* (1 Stark. R. 43), where it appeared that the purchaser of a picture labored under a deception in supposing the picture to be Sir Felix Agar's, and the agent of the vendor did not remove it. Lord Ellenborough held, in an action to recover the price, that the contract was void, saying: "although it was the finest picture Claude ever painted, it must not be sold under a deception." "It appears that the purchaser labored under a deception, in which the agent permitted him to remain on a point which he thought material to influence his judgment."

In the language of Lord Ellenborough, "If he fraudulently misrepresent the quality of the thing sold to be other than it is, in some particular which the buyer has not equal means with himself of knowing; or if he do so, in such a manner as to induce the buyer to forbear making the inquiries, which, for his own security and advantage, he would otherwise have made," the seller is liable for the deceit. *Vernon v. Keyes*, 12 East, 637.

* * See the next note. * *

(1) *Duke of Norfolk v. Worthy*, 1 Campb. 337. In this case there was a provision that misstatements in the particular should not vitiate the sale. *Fenton v. Brown*, 14 Ves. jun. 144; *Trower v. Newsome*, 3 Mer. 704; *Sug. V. & P.* 281 (7th ed.); *Infra*, "Sale of goods."

(2) *Waring v. Hogart*, 1 Ry. & Mo. 40.

NOTE 948.—* * On the subject of fraudulent representations, &c., on the sale of land, see *Sugden on the Law of Property*, pp. 64, 73, 644, 649, 660, and the cases there cited; 2 *Kent C.* (6th ed.), 482-489 and notes; *Chitty on Contr.* (7th ed.), 295-297, and notes. * *

(3) *Wheeler v. Collier*, Mo. & M. 126; *Crowder v. Austin*, 3 Bing. 368; *Smith v. Clarke*, 12 Ves. jun. 477; *Howard v. Castle*, 6 T. R. 642; *Sug. V. & P.*, p. 20; *St. 42 G. III.*, c. 93, § 1.

(4) *Datch v. Warren*, cited by Lord Mansfield, 2 Burr. 1011; *Farrer v. Nightingale*, 2 Esp. C. 641.

NOTE 949.—*Judson v. Wass*, 11 John. R. 525; *Putnam v. Westcott*, 19 Id. 190. If the contract of sale were by parol merely, and not in writing, the purchaser who has paid part of the consideration, cannot, there being no default on the part of the vendor, maintain an action to recover it back. *Dowle v. Camp*, 12 John. R. 451. A party who has advanced money, or done any act in part performance of an agreement, but refuses to proceed to the completion and execution of the contract, the other party having performed, or being ready to perform everything agreed to be done on his part, cannot recover back the money he has advanced, nor is he entitled to compensation for what he may have in part performance; and after such refusal to proceed, or voluntary abandonment of the contract by the vendee, the vendor is at liberty to sell the land to another. *Ketcham v. Evertson*, 13 John. R. 359. To entitle a purchaser to recover back part of the consideration money, paid on a contract of the purchase of land, he must show that he has

But, in the latter case, he must show that he has disaffirmed the contract *ab initio*.(1) If he has had an occupation of the premises under the contract, the parties cannot be put into the same situation in which they before stood; and, consequently, in such a case, the only remedy for the purchaser is upon special agreement.(2)

By and against whom.

The action may be maintained by a principal, though the agent contracted in his own name;(3) a payment of the deposit to the agent who made the contract with the plaintiff, on behalf of the owner of the estate,

tendered the residue of the purchase money, and demanded a deed, so as to put the vendor in default. *Hudson v. Swift*, 20 John. R. 24.

* * And see *Coughlin v. Knowles*, 7 Metc. 57, S. P.; and the other cases cited in note 2 to *Chitty on Contr.* (7th ed.), 306. * *

Where the state of facts are such as to justify the purchaser in avoiding the contract altogether, he is entitled to recover the deposit as money had and received to his use. *Flight v. Booth*, 1 Bing. N. C. 370.

(Where the sale is void under the Statute of Frauds, the vendee may treat the sale as a nullity, and recover back the money paid thereon. *Sheid v. Stamps*, 2 Sneed (Tenn.) 172; *Sims v. McEwen*, 27 Ala. 184. Part performance does not take the case out of the statute, so as to render the agreement valid at law. Per Kent, Ch. J., in *Jackson v. Pierce*, 2 Johns. 221. Suing for the purchase money, the vendor must prove a legal contract of sale, as alleged in his complaint, or he cannot recover. *Reynolds v. Dunkirk & State Line Railroad Co.*, 17 Barb. 613. Payment of purchase money is not such a part performance as will take the case out of the statute (*Black v. Black*, 15 Geo. 445); or entitle the vendee to the aid of a court of equity to compel a specific performance. *Parke v. Lewright*, 20 Mis. (5 Bennett) 85. Possession and valuable improvements made under the agreement, entitle the purchaser to a conveyance as a matter of equity. *Despain v. Carter*, 21 Id. 331; *Otterhouse v. Burleson*, 11 Texas, 87. In such cases the agreement must be clearly proved. *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Stoddard v. Tuck*, 4 Md. Ch. Decis. 475. Though the contract for the sale of lands is void under the statute, the vendee cannot in this state recover back money paid thereon so long as the vendee stands ready to perform his part of the contract. *Collier v. Coates*, 17 Barb. 471; *Abbott v. Draper*, 4 Denio, 51. See also cases cited by Johnson, J., in *Collins v. Coates*.)

* * See *Chitty on Contr.* (7th ed.) 307-311, and notes. * *

(1) *Conner v. Henderson*, 15 Mass. R. 319.

(2) *Hunt v. Salk*, 5 East, 449.

NOTE 950.—It is a well settled rule of equity that a grantee, to whom possession has been delivered under covenants of title and warranty, can have no relief in equity against his grantor for a return of purchase money or security, on account of a deficiency and failure of title. *Dens-ton v. Morris*, 2 Edw. Ch. R. 37. If a grantee in possession has taken no covenants, and the title fails, he will be without a remedy in equity as well as at law, in the absence of fraud. *Id.* But if there be fraud, the purchaser may come into equity for indemnity against eviction, disturbance, or defect of title. *Id.*, and cases cited.

On the other hand, it is well established, that equity will not order purchase money to be paid before a title is given, unless under special circumstances, such as taking possession against the consent of the vendor, or where the purchaser is in fault in not completing the purchase or is exercising improper acts of ownership by which the property is lessened in value. *Birdsall v. Waldron*, 2 Edw. Ch. R. 315. (See also *Thomas v. Dickinson*, 14 Barb. 90.)

(3) *Duke of Norfolk v. Worthy*, 1 Campb. 337. See *Edda v. Read*, 3 Campb. 338; *Langs-brath v. Toulmin*, 3 Stark. N. P. C. 145.

is a payment to the principal, who may be sued for the recovery of it.(1) An auctioneer is considered as a stakeholder; and, it seems that he is not justified in paying over the deposit to his principal, until the sale has been carried into effect; and he is clearly liable to be sued for the deposit, if the payment is made after notice.(2) If an auctioneer does not disclose the name of his principal, he will be personally liable for damages for a breach of the contract of sale.(3)

Performance by vendee.

The plaintiff, in this case, as in the last, will have to prove the contract, the conditions of sale, the performance of everything requisite on his part, and the breach of the contract on the part of the defendant. Accordingly, where it is incumbent on the purchaser to prepare the conveyance,(4) he must prove a tender of it, unless the tendering of it would be a nugatory act; as where the vendor's title is defective,(5) or he has disposed of the estate.(6) The purchaser will be entitled to his deposit, by showing that

(1) *Duke of Norfolk v. Worthy*, 1 Campb. N. P. C. 339.

NOTE 951.—See *Anderson v. The President, &c.*, of the H. T. Co., 16 John. R. 86.

Taber v. Perrot, 2 Gall. R. 565. But where there is no privity of contract between the defendant and plaintiff—the person receiving the money and the principal, but the privity is between the defendant and his master, and between the latter and the plaintiff, the action cannot be maintained. Thus, in *Stephens v. Badcock* (3 Barn. & Adol. 354), where an attorney's clerk received money in the absence of his master and gave a receipt signed "B., for Mr. J.;" held, that the action did not lie; for defendant received the money as the agent of his master; and this, though it appeared that the attorney had absconded, and the clerk, having the money in his hands, had refused to pay it over to the client. *Edden v. Read*, 3 Campb. R. 338, which was against a banker's clerk, and is to the same point.

(2) *Burrough v. Skinner*, 5 Burr. 2639; *Berry v. Young*, 2 Esp. C. 640; *Spurrier v. Elderton*, 5 Esp. C. 2; *Jones v. Edney*, Sugden's V. & P. 40 (7th ed.); *Edwards v. Hodding*, 5 Taunt. 515. (3) *Hanson v. Roberdeau*, Peake's N. P. 120; *Owen v. Gooch*, 2 Esp. 567.

NOTE 952.—(Where a sale at auction cannot be carried into effect by reason of the vendor's failure to make a valid title to the premises, the action of the vendee for purchase money is against the auctioneer for the money deposited or paid (*Johnson v. Roberts*, 30 Eng. Law & Eq. 234); so when an auctioneer sells personal property at a public sale, he can maintain an action against the purchaser in his own name for the price. *Minturn v. Main*, 3 Selden N. Y. R. 220.)

The general principle is, that an agent is not liable to be sued upon contracts made by him on behalf of his principal, if the name of his principal is disclosed and made known to the person contracted with, at the time of entering into the contract. *Rathbone v. Budlong*, 15 John. R. 1.

Where the Court of Sessions had authority for making assessments for the opening and making of certain roads, and they ordered an assessment for opening and making of a road not laid out according to the provisions of the statute; held, that an individual paying money under such an assessment was entitled to recover it of the county; the court having no jurisdiction in the case, their judgment was a nullity. *Joy v. The County of Oxford*, 3 Greenl. R. 131. Though the tax was assessed without any authority, the county had received its amount into their treasury, hence the county was responsible; and it was no answer to the action that the money had been expended upon the road; the appropriation was unlawful. *Id.*

(4) *Ante*, p. 356; Sugden's V. & P. 230, 383 (7th ed.)

(5) *Loundes v. Bray*, Sugden's V. & P. 231; *Seward v. Willock*, 5 East, 198.

(6) *Knight v. Crockford*, 1 Esp. C. 189. See *Duke of St. Alban's v. Shore*, 5 H. Bl. 270.

the agreement has been vacated by the mutual default of the parties; and this, notwithstanding the agreement contains stipulations for liquidated damages, in case of non-performance.(1)

The plaintiff in an action to recover his deposit, may, in general, show that the contract has been avoided in consequence of defects in the defendant's title.(2) But he will not be allowed to give evidence of defects of title which have not been previously urged, as a ground for rescinding the contract, provided they could have been supplied, if they had been specified at the time.(3) And the plaintiff must furnish the defendant with a particular of such matters of fact as he intends to rely upon as the grounds for recovering his deposit,(4) if such a particular is applied for.(5) But the plaintiff is not bound to state his legal objections to the defendant's abstract of title.(6)

Damages.

The plaintiff, it would seem, is entitled to the whole of his deposit, though the estate has diminished in value, pending the contract;(7) and he will be allowed to recover more than nominal damages if the defendant has put up the premises, the subject of the contract for sale, without having any title to them.(8) It seems, however, that the plaintiff cannot claim more than nominal damages where the defendant has offered to convey the estate with such title as he had, or to return the purchase money with interest.(9)

It seems, that the purchaser, in general, under counts properly framed, may recover the expenses to which he has been put in investigating the title,(10) and also interest upon his deposit;(11) but the expenses of investi-

(1) *Clarke v. King*, 1 Ry. & Mo. 394.

(2) *Vide ante*, p. 358.

(3) *Todd v. Haggart*, Mo. & M. 128. See *Squire v. Todd*, 1 Campb. 293.

(4) *Collett v. Thompson*, 3 Bos. & Pull. 246.

(5) *Squire v. Todd*, 1 Campb. N. P. C. 293.

(6) *Collett v. Thompson*, 3 Bos. & Pull. 246.

(7) See *Sugden's V. & P.* 220 (7th ed.)

(8) *Hopkins v. Grazebrook*, 6 Barn. & Cressw. 33.

(9) *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bratt v. Ellis*, *Sugden's V. & P.* App. No. 7 (7th ed.); *Johnson v. Johnson*, 3 Bos. & Pull. 167. See *Hopkins v. Grazebrook*, 6 Barn. & Cressw. 33.

(10) *Kirtland v. Pounsett*, 2 Taunt. 145; *Turner v. Beaurain*, *Sugden's V. & P.* 222. See *Wilde v. Fort*, 4 Taunt. 341, where the expenses were not allowed.

(11) *Sugden's V. & P.* 221, 504 (7th ed.); *De Bernales v. Wood*, 3 Campb. 258; *Richards v. Barton*, 1 Esp. 268; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Farquar v. Farley*, 7 Taunt. 594, where there had been a previous action for the deposit against the auctioneer; by *Gibbs, Ch. J.*, *Maberly v. Robins*, 5 Taunt. 625. See *Wilde v. Fort*, 4 Taunt. 341, where interest was not allowed. Interest cannot be recovered on the deposit, where the contract is void, by the Statute of Frauds. *Walker v. Constable*, 1 Bos. & Pull. 306; *Adams v. Fairbairn*, 2 Stark. N. P. C. 277.

gating the title cannot be recovered under a count for money paid ;(1) nor can interest upon the deposit be recovered under a count for money had and received.(2) It has been held, that interest is recoverable on the residue of the purchase money, after payment of the deposit, where it has been lying ready to be paid, without making interest.(3) An auctioneer is, in general, not liable for interest, until after a demand and refusal of the deposit.(4) But it may be otherwise, if the auctioneer has actually made interest of the money,(5) or has rendered himself liable by his conduct, as where he has sold without sufficient authority.(6)

A witness who is liable to the vendor in case the title of the estate contracted to be sold proves defective, is not competent to support the title.(7) But if he has sold the estate to the vendor, without any covenant, or warranty for the sufficiency of the title, his evidence is admissible.(8)

CHAPTER VIII.

OF THE EVIDENCE IN ASSUMPSIT ON A SPECIAL CONTRACT FOR THE SALE OR PURCHASE OF GOODS AND CHATTELS.

THE averments in the declaration in this species of action are similar to those required in an action for the sale or purchase of real property ; and as in that action, so in the present, it is necessary, in the first place, to establish the contract in evidence. When the price to be paid for the

(1) *Camfield v. Gilbert*, 4 Esp. N. P. C. 221.

(2) *Walker v. Constable*, 1 Bos. & Pull. 306; *Tappendall v. Randall*, 2 Bos. & Pull. 472. See by Gibbs, Ch. J., *Maberly v. Robins*, 5 Taunt. 625.

(3) *Flureau v. Thornhill*, 2 W. Bl. 1073.

(4) *Sugden's V. & P.* 504 (7th ed.) See *Lee v. Munn*, 8 Taunt. 45; *Farquar v. Farley*, 7 Taunt. 597; *Maberly v. Robins*, 5 Taunt. 625; *Edwards v. Hodding*, 5 Taunt. 515.

(5) By Gibbs, Ch. J., *Farquar v. Farley*, 7 Taunt. 594.

(6) See *Jones v. Dyke*, *Bratt v. Ellis*, *Sugden's V. & P.*, App. Nos. 7, 8 (7th ed.)

(7) 2 Roll Ab. 685; Str. 445.

(8) *Bushy v. Greenslate*, Str. 445.

NOTE 953.—No objection on account of interest can exclude a witness, unless he be interested in the event of the suit. *Parsons, C. J.*, in *Bliss v. Thompson*, 4 Mass. R. 488. Thus, the witness had a similar action pending against the same defendant arising out of the same transaction, and for the same supposed fraud; held, that the objection was to his credit, not to his competency. *Id.* *Parsons, C. J.*, observed: The verdict in this action cannot be given in evidence for or against him in any action in which he may be a party. And although his demand may arise out of the transaction, this case cannot be stronger than that of one underwriter on the same policy of insurance, in which another underwriter on the same policy may be a witness for the defendant.

(A donee of a chattel who has given a voluntary warranty of title is a competent witness in an action involving the title (*Gunn v. Mason*, 2 Sneed Tenn. 637); not so when the vendor is bound to make the title good. *Elliott v. Bowen*, Id. 662.)

goods and chattels contracted for, exceeds ten pounds, the Statute of Frauds requires, except in some specified cases, that "some note or memorandum of the bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.(1)

Executory contracts.

It has been settled by late authorities, that the statute applies to executory contracts; and that an agreement for the sale of goods to be delivered at a future time is within its meaning.(2) Where, indeed, an article contracted for does not exist at the time, as where the contract was for a quantity of oak pins, which had not been made, but were to be cut out of slabs, the contract has been considered, rather as for work and labor, and not within the statute.(3) But where the thing to be sold exists at the time of the contract in the same shape and substance in which it is to be delivered, the contract has been held to be substantially for the sale of goods; and although it may happen that some work is to be employed about the article before the sale is completed, it is within the statute; as

(1) Stat. 29 Car. II, § 17. As to the case where several articles under the value of 10*l.* are contracted for at the same time, *vide infra*.

(2) *Rondeau v. Wyatt*, 2 H. Bl. 67; *Cooper v. Elston*, 7 T. R. 14; *Alexander v. Comber*, 1 H. Bl. 20; *Garbutt v. Watson*, 5 Barn. & Ald. 613. See *Towers v. Osborne*, 1 Str. 505; *Clayton v. Andrews*, 4 Barn. 210.

(3) *Groves v. Buck*, 3 Maule & Sel. 179. And see the observations of the court, on the case of *Towers v. Osborne*, in *Garbutt v. Watson*, 5 B. & A. 613.

NOTE 954.—The statute means goods *in solido*. In *Towers v. Osborne* (1 Str. 506), defendant bespoke a carriage, and after it was made for him refused to take it; held, that it was not a case within the statute. In *Crookshank v. Burrell* (18 John. R. 58), *Spencer, C. J.*, said: "The distinction taken in *Rondeau v. Wyatt*, and in *Cooper v. Elston*, was between a contract *in solido*, and an agreement for a thing not yet made, to be delivered at a future day. The contract in the latter case, the judges considered not to be a contract for the sale and purchase of goods; but a contract for work and labor merely. However refined this distinction may be, it is well settled, and it is now too late to question it." The contract in the last case was for a wagon to be made by the plaintiff within a certain time agreed upon, when defendant was to pay for the wagon in lambs at an agreed price; held, that the contract was not within the statute. The same principle was also recognized in *Sewall v. Fitch*, 8 Cowen R. 215.

* * See also *Gadsdent v. Lance*, 1 McMullan S. C. R. 87; *Haight v. Ripley*, 19 Maine R. 137; *Smith v. Surman*, 9 B. & Cressw. 516; *Downs v. Ross*, 23 Wend. 270. And see *Scott v. Eastern Co. R. W.*, 12 M. & W. 33, where it was held that when a part of the goods are made and delivered, and the residue are to be manufactured according to order, the whole forms one entire contract, and the acceptance of part applies to the whole, so as to satisfy the Statute of Frauds. And see 2 Kent C. (6th ed.) 510—512, and notes. * *

(Where goods are ordered of a manufacturer, and are to be afterwards made pursuant to the order, the property in them is not transferred until the goods have been finished and delivered. *Andrews v. Durant*, 1 Kernan N. Y. R. 35. It is not therefore a sale of goods within the statute. *Edwards on Bailm.* 347—353. It is not enough to take the contract out of the statute, that some work may be required to put the goods in proper condition for delivery; as in the case of a sale of wheat that requires to be threshed. *Downs v. Ross*, 23 Wend. 270. An agreement to furnish materials and complete the carpenter's work for a building, is not within the statute (*Courtright v. Stewart*, 19 Barb. 455); nor is an agreement to finish a carriage half built and deliver it for a certain price, within the statute. *Mixer v. Howarth*, 21 Pick. 205.)

where flour which had been purchased was to be ground, or where the goods were to be packed and delivered at the seller's expense.(1) And now by the statute 6 G. IV, c. 14, § 7, it is enacted, that the provision of the Statute of Frauds shall extend to contracts for goods, "notwithstanding they may be intended to be delivered at some future time; or may not, at the time of such contract be actually made, procured, or provided, or fit or ready for delivery; or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." Sales of goods by auction are within the Statute of Frauds.(2)

Acceptance.

A written memorandum of a contract for the sale of goods is not required by the Statute of Frauds, where "the buyer accepts part of the goods sold, and actually receives the same, or gives something in earnest to bind the bargain, or in part payment.(3) The acceptance here intended is the

(1) *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Astey v. Emery*, 4 Maule & Selw. 262; *Kent v. Huskinson*, 3 Bos. & Pull. 262; *Rondeau v. Wyatt*, 2 H. Bl. 67; *Alexander v. Comber*, 1 H. Bl. 20; *Cooper v. Elston*, 7 T. R. 14, and see the observations of the court on *Clayton v. Andrews*, in 5 Barn. & Ald. 613. And see *Wilks v. Atkinson*, 6 Taunt. 11.

(2) *Kenworthy v. Schofield*, 2 Barn. & Cressw. 945; *Pike v. Balch*, 38 Maine, 302.

(3) NOTE 955.—If goods are sold and delivered for a certain price, at thirteen months' credit, without writing, the delivery of the goods being a clear execution of the contract on one part, the vendor would be bound by the agreement. *Long on Sales*, p. 56; *Donellan v. Reed*, 3 Barn. & Adol. 899.

Plaintiff and defendant having made an exchange of lands, the former delivered to the latter six cows, under a verbal agreement, that if defendant was dissatisfied with the exchange of lands at the expiration of two years, the cows were to become his property absolutely; otherwise, he was to return the cows, or their value; held, that the contract was not within the Statute of Frauds, although it amounted to a contract of sale; it appearing in evidence that defendant was satisfied with the exchange of farms. *Holbrook v. Armstrong*, 1 Fairf. R. 31. A parol contract, for the sale of goods to be delivered, and which are accordingly delivered within a year from the making of the bargain, but which, by the terms of the contract, are not to be paid for until the expiration of that period, is not within the Statute of Frauds, because in such case, all that is to be performed on one side, namely, the delivery of the goods, is done within a year. *Parris, J.*, observed that, "the clause giving the defendant the election to return the cows or pay for them the value in money, divests the plaintiff of his interest in the specific thing, and leaves him to his remedy on the contract for the value."

An agreement void by the statute, is such an one as, where by the express appointment of the parties, the thing is not to be performed within a year; it does not embrace cases which may be performed within the year. *M'Lees v. Hale*, 10 Wend. 426; *Moore v. Fox*, 10 John. R. 244; *Lown v. Winters*, 7 Cowen, 364. But where the contract is not to be performed within the year, it is different. Thus, where a party contracts by parol to work for another for the term of *two years*, for which he is to receive one hundred or fifty dollars a year, and quits the service at the end of six months, the contract is within the statute. *Drummond v. Burrell*, 13 Wend. 307.

* * And see 2 Kent C. (6th ed.) 510 and notes. The statute applies to agreements which, by express stipulation, are not to be performed within the year. *Talley v. Greene*, 2 Sandf. Ch. R. 91; *Peters v. Westborough*, 19 Pick. 364; *Lockwood v. Barnes*, 3 Hill, 128; *Herrin v. Butters*, 20 Maine, 119. In *Donellan v. Reed* (3 B. & Adolph. 899), the statute was held not to apply to the case of goods sold and delivered within the year, where the price was to be paid after the expiration of the year. But *Donellan v. Reed* was disapproved, and not followed, in *Broadwell v.*

ultimate acceptance either of the whole or part of the commodity, such as completely affirms the contract.(1) There is not an actual acceptance so long as the buyer continues to have a right to except either to a quantum or quantity of the goods;(2) nor, as it seems, so long as the seller retains his lien upon the whole of the goods sold for the price.(3)

Whether the acceptance of a sample will be such an acceptance as will satisfy the statute, depends on the fact, whether the sample is delivered merely as a specimen, or is also considered as part of the purchase, and as making up the quantity sold.(4) When the goods are ponderous and incapable of being handed over from one to another, it has been considered sufficient to deliver the symbols of the property, as the muniments of a ship, or the key of a warehouse, in which the goods contracted for are lodged.(5) But it has been recently held, that the receiving of a delivery order for goods lying in public docks, where the order for delivery has not been accepted, is not an acceptance within the statute.(6) An accept-

Getman (2 Denio, 87), and is questioned in Smith's Merc. Law, 402, note *p*; and see Birch v. E. of Liverpool (9 B. & C. 392), which was not cited in Donellan v. Reed. And the statute was held to apply to goods to be made and delivered within the year. Gardner v. Joy, 9 Metc. 177. For an extensive collection of the English cases on the Statute of Frauds, see Stevens' N. P. 1968-1987. * *

(There must be a part payment, or a delivery of part of the goods sold, to take the case out of the statute. Maxwell v. Brown, 39 Maine R. 98. But the delivery need not be made at the time of the agreement, it will be sufficient if made afterwards. Marsh v. Hyde, 3 Gray, 331. The subsequent act concludes or completes the agreement; as it does where there is a verbal contract for the sale of lands, completed by the execution and delivery of a deed. Thomas v. Dickinson, 14 Barb. 90.

The statute does not apply to a stipulation for the return of duties on a valid sale of merchandise. Allen v. Aguirre, 3 Selden R. 543.)

(1) By Heath, J., 3 Bos. & Pul. 235.

(2) Howe v. Palmer, 3 B. & Ald. 321; Hanson v. Armitage, 5 B. & Ald. 559.

(3) Baldey v. Parker, 2 B. & C. 37; Carter v. Toussaint, 5 B. & Ald. 855. See Rhode v. Thwaites, 6 B. & C. 393.

(4) Hinde v. Whitehouse, 7 East, 558; Talver v. West, Holt's N. P. C. 178; Blenkinsop v. Clayton, 1 B. Moore, 328; Cooper v. Elston, 7 T. R. 14; Klinctz v. Surry, 5 Esp. N. P. C. 267.

(5) By Lord Kenyon, 1 East, 194; 1 Taunt. 460; Searle v. Keeves, 2 Esp. N. P. C. 598; Peakesley v. Appleby, Com. 354; Colt v. Nethersoll, 2 P. Wms. 308; by Lord Hardwicke, 1 Atk. 171. See Bell's Commentaries on the Commercial Laws of Scotland, Vol. 1, p. 60.

(6) Bentall v. Burn, 1 Ry. & Mo. 107; 3 B. & C. 423. See Searle v. Keeves, 2 Esp. N. P. C. 598. *Vide infra*, tit. "Trover."

NOTE 956.—But if the order is accepted by the depositary, it amounts to a sale according to the terms of the order; and the written contract or order being deposited with a witness in a foreign country, may be proved by the depositary on commission and need not be produced in court. Bailey v. Johnson, 9 Cowen, 116. But a mere contract to deliver, unattended with the circumstances from which a delivery can be presumed, will not change the property. Brewer v. Smith, 3 Greenl. R. 45.

Where a party in England refuses to accept goods which he has agreed to buy abroad, the delivery of them abroad, on board a ship chartered by him, is not a sufficient delivery to render unnecessary a memorandum of the bargain in writing, as required by the Statute of Frauds. Accbal v. Levy, 10 Bing. 376. See Holderness v. Shackels, 8 Barn. & Cress. 612. Held, that where

ance by a wharfinger, or mere agent for the shipment of goods, is not sufficient; the acceptance must be by the buyer himself.(1)

Acts tantamount to acceptance.

A great number of decisions have been made upon the circumstances of particular cases, as to what shall be a sufficient acceptance of goods within the meaning of the Statute of Frauds. In the later authorities, it has been considered, that the weighing and measuring of goods in the presence, or by the direction of the buyer; or the buyer's affixing his mark on the goods; or their remaining, at his request, in the possession of the seller, does not amount to such an acceptance as is required by the statute.(2) It has been held, that where a person bought a commodity, and afterwards sold a part of it to another, who took his part away, a jury might presume an acceptance by the buyer, the defendant.(3) In a recent case, where a lot, at public auction, had been knocked down to the defendant as the highest bidder, and delivered to him immediately, but, after it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it, the Court of King's Bench thought, that there was a very slight evidence of the defendant's acceptance of the lot as owner, and that it ought to be submitted as a question of fact for the jury, whether there was a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to another.(4)

Questions have frequently occurred, respecting what shall be deemed a sufficient acceptance of a horse by the purchaser, where the contract is by parol, in order to take the case out of the Statute of Frauds. In the case of *Elmore v. Stone*, where the buyer of horses desired the seller to keep them for him at livery; and the seller accordingly transferred them from his sale to his livery stables, where an expense for their keep was incurred by the buyer's directions, a written memorandum of the bargain was

it is the custom to detain until certain disbursements are paid, a delivery of part is not a delivery of the whole.

The sale of a specific chattel passes the property in it to the vendee, without delivery. But where there is a sale of goods generally, no property in them passes till delivery; because, until then, the very goods sold are not ascertained. *Dixon v. Yates*, 5 Barn. & Adol. 313. The very appropriation by the vendor of a specific chattel to the vendee, and the assent of the latter, is equivalent to his accepting possession. The effect of such contract is to vest the property in the bargainee. *Id.* (See *Frostburgh Mining Co. v. New England Mining Co.*, 9 Cush. 115.)

(1) *Hanson v. Armitage*, 5 B. & Ald. 559; *Atsey v. Emery*, 4 Maule & Sel. 262; *Anderson v. Hodgson*, 5 Price, 690. See *Hart v. Sutley*, 3 Campb. 528.

(2) *Howe v. Palmer*, 3 B. & Ald. 321; *Baldey v. Parker*, 2 B. & C. 37; *Thompson v. Maceroni*, 3 B. & C. 1; 3 Bos. & Pul. 233; 7 B. Moore, 219. See *Anderson v. Scott*, 1 Campb. N. P. C. 295; *Hodgson v. Le Bret*, 1 Campb. N. P. C. 233; 1 W. Bl. 601; *Rhode v. Thwaites*, 6 B. & C. 393.

(3) *Chaplin v. Rogers*, 1 East, 192. See by the court in *Blenkinsop v. Clayton*, 1 B. Moore's 328, and *Howe v. Palmer*, 3 B. & Ald. 325.

(4) *Philips v. Bistolli*, 2 B. & C. 514.

thought not to be necessary.(1) And where a horse was bargained for in the stable, and the purchaser soon afterwards brought in a third person and stated to him that he had bought the horse, and offered to sell it to him for a profit of £5; it was held, that it ought to be left to the jury to say, whether this was or was not an acceptance.(2) But in a late case, where the defendant had agreed to purchase a horse of the plaintiff for ready money, and to take him away within a fixed time; and shortly before the expiration of that time, the defendant rode the horse, and gave directions concerning his treatment, &c., but requested the plaintiff to keep the horse some time longer, at the end of which time he promised to take the horse, and pay for him; and before that time, the horse died; the Court of King's Bench held, that the plaintiff could not maintain an action for the price of the horse, as payment of the price was to be an act concurrent with the delivery of the horse, and before payment the plaintiff had no right of property in the horse, and could not exercise any right of ownership.(3) And in a still more recent decision, where there was a verbal contract for a horse, for the payment of which no time was fixed, and the horse was to remain with the seller for a certain time, without any charge to be made for it; at the expiration of that time, the horse was sent to grass, by the direction of the buyer, but entered as the horse of the seller; the Court of King's Bench held, that the character of owner remained in the seller, unchanged from first to last, and he could not have been compelled to deliver the horse without the payment of the money; consequently that there was not a sufficient acceptance to take the case out of the Statute of Frauds.(4)

(1) 1 Taunt. 458. See the observations of the court upon this case in 3 B. & Ald. 324; 5 B. & Ald. 858.

(2) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(3) *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

(4) *Carter v. Toussaint*, 5 B. & Ald. 855.

NOTE 957.—Actual possession taken, earnest paid, or a note or memorandum signed by the party to be charged, are unequivocal acts. And where a constructive delivery has been held equivalent to actual, it was because acts of ownership have been exercised by the purchaser, or he had employed the seller as his agent in taking care of the property. But some clear and positive act is required by the Statute of Frauds to show the completion of the bargain, so as to take away all doubt as to the intent and understanding of the parties. *Bailey v. Ogden*, 3 John. R. 399. Where payment is to precede a delivery, and the facts do not warrant the inference that credit was contemplated, even possession taken for a temporary purpose will not amount to a delivery. Thus, in *Phillips v. Hunnewell* (4 Greenl. R. 376), the price for a yoke of oxen had been fixed; the purchaser said he would give it; and while he had his arm upon one of the oxen, in the act of measuring him, the owner told him he might have them; afterwards the purchaser borrowed them to haul a load of wood; the vendor assenting, but limiting the use of them to that work; held, that the bargain was not consummated, the property not transferred, because there had been no sufficient delivery.

In *Ward v. Shaw* (7 Wend. 404), plaintiff sold to C., a butcher in New York, a yoke of oxen, at \$7.50 for every hundred weight the quarters should weigh when slaughtered, the purchaser to take the cattle into his possession, prepare them for slaughtering, slaughter them in the week in which the contract was made, and when slaughtered take the quarters to market, weigh them,

It is not a payment of earnest,(1) within the meaning of the Statute of Frauds, where the purchaser draws the edge of a piece of money over the

and pay for the cattle the price agreed. C. having received the cattle in pursuance of such contract, they were levied upon by defendant, the sheriff, by virtue of an execution against C.; and in an action by the plaintiff, the defendant had a verdict: and the Superior Court in New York refused to set it aside; but the Supreme Court reversed the judgment on error.

The chief justice in delivering the opinion of the court says: "I put the case upon its own circumstances; the delivery was for a specific purpose, not an absolute delivery to the vendee as such, but rather as bailee. There was an act to be done to ascertain the price. In general, the act of weighing is to be done by the seller; but parties have a right to stipulate that the purchaser shall do such act." It does not appear from the report that any such stipulation was made; neither does it appear that any evidence was offered of the usage in such cases. However, it is proper to observe, that if there is nothing to distinguish the case from the contracts constantly occurring between owner and purchaser, drovers and butchers, it is prodigiously important in its consequences; and it is difficult to see how the decision can be upheld.

The delivery of possession is necessary in a conveyance of personal chattels, against every one but the vendor. Jackson, J., in *Lanfear v. Sumner*, 17 Mass. R. 110. When the same goods are sold to two different persons, by conveyances equally valid, he who first acquires the possession, will hold them against the other. *Id.*; *Lamb v. Durant*, 12 Id. 54; *Caldwell v. Ball*, 1 T. R. 205. The latter, indeed, was a case not of actual delivery of goods to either party, but of delivery of the bill of lading. There were two bills of lading signed at different times by the master of the ship; and the party who first obtained one of them by a legal title from the owner of the goods, was held to have the best right, although the bill of lading under which he claimed was made the last. The indorsement and delivery of the bill of lading in such case is equivalent to the actual delivery of the goods. In *Lanfear v. Sumner* (*supra*), July 2, 1819, a conveyance was made in Philadelphia to plaintiff of a quantity of tea on board of ship, bound to Boston; a few hours *after* this conveyance, the defendant, as sheriff, attached the goods in Boston, at the suit of the creditors of the vendor; held, that the defendant must prevail; because there was no legal delivery before the attachment made; the case not coming within the rule applicable to the indorsement and delivery of a bill of lading. Jackson, J., observed: "It is the case of two creditors, each endeavoring to secure his debt out of the same fund; he who first acquires possession will hold the goods."

* * See further, on the subject of delivery, the notes to *Lickbarrow v. Mason*, 1 Sm. Lead. Cases, p. 413, *et seq.*; *Story on Sales*, 276—280; *Chitty on Contracts*, p. 375, *et seq.* To constitute a good delivery, there must be something more than *words*, there must be *acts*. Per Cowen, J., in *Artcher v. Zeh*, 5 Hill, 205. In *Shindler v. Houston* (1 Denio, 48), it was held, that where a sale was agreed upon by words *in presenti*, and nothing more is to be done to ascertain the quantity, quality or value of the articles, and payment is postponed, the articles (lumber) being bulky are deemed to be delivered; but the Court of Appeals (S. C., 1 Comstock's R. 261), reversed the decision, holding that there was no distinction between portable and bulky articles, and that *acts* must be done to change the possession of the goods; *Bronson, J.*, who had concurred in the judgment below, upon more mature consideration, giving an opinion in favor of the reversal. * *

(1) NOTE 958.—In *Langfort v. Tyler* (1 Salk. 113), the defendant bought eighty-one tubs of tea, paid for and took away one, and paid £50 earnest; *Holt, Ch. J.*, held, that notwithstanding the earnest, the money must be paid upon fetching away the goods, no other time for payment being appointed; and that after earnest, the vendor cannot sell the goods to another without default in the vendee: and if the vendee does not come and pay and take away the goods, the vendor ought to go and request him; and then if the vendee does not come in convenient time, and pay and take away the goods, the agreement is dissolved, and he is at liberty to sell them to any other person. In *Sands v. Taylor* (5 John. 410), *Kent, Ch. J.*, said: "It would be unreason-

hand of the seller, and returns the money into his own pocket, which, in the north of England is called striking off a bargain.(1)

Memorandum of bargain.

The memorandum of the bargain required by the Statute of Frauds, must contain the terms upon which the parties contract.(2) But the contract may be collected from separate documents, in the same manner as in the case of sale of lands, provided no part of it is left to be supplied by parol evidence; as from a bill of parcels or signature of one party in the book of the other, connected with subsequent letters.(3) With respect to the signature required by the statute, the same rules are observed as have been mentioned in considering cases under the fourth section.(4) It has been held a sufficient signature by the seller where his name was printed(5)

able to oblige him (the vendor) to let the article perish on his hands, and run the risk of the solvency of the buyer.' See *Clarkson v. Carter*, 3 Cowen, 84.

* * As to *earnest*, see *Story on Sales*, §§ 273—275. * *

(1) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(2) *Kenworthy v. Schofield*, 2 B. & C. 947; *Elsmore v. Kingscote*, 5 B. & C. 583; *Champion v. Plummer*, 1 N. R. 252. And see *Egerton v. Matthews*, 6 East, 307. *Vide supra*, p. 351.

(3) *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & S. 286; *Allen v. Bennett*, 3 Taunt. 164, where the subsequent letter was written by the seller to his own agent; *Cooper v. Smith*, 15 East, 103; *Richards v. Porter*, 6 B. & C. 438, where there was not a complete memorandum. *Vide supra*, p. 351.

(4) *Vide supra*, p. 352.

NOTE 959.—If the agreement be signed by the party to be charged, it is sufficient. *Ballard v. Walker*, 3 John. Cas. 60; *Penniman v. Hartshorn*, 13 Mass. R. 87, citing *Egerton v. Matthews*, 6 East, 307. An agreement concerning goods, signed by the seller, and accepted by the buyer, was considered a valid agreement, and binding on the party who signed it. *Roget v. Merritt*, 2 Caines' R. 117. The construction of the statute respecting agreements concerning the sale of chattels as to this point, has been uniformly the same in both cases. *Clason v. Bailey*, 14 John. R. 484; S. C., 2 Id. 100, 102. In a contract for the sale of lands, it is sufficient to satisfy the statute, if the party to be charged signs the contract. *M'Crea v. Purmort*, 16 Wend. 460.

* * The New York statute requires the writing to be *subscribed* at the end. An entry, by a broker or auctioneer, without such subscription, is not sufficient. *Davis v. Shields*, 26 Wend. 362; S. P., *Champlin v. Parish*, 11 Paige, 406; *Champlin v. Haight*, 10 Paige, 274. * *

(Where the owner of certain standing timber, sells it to the owner of the land, who is already in possession of the premises, the sale is a sufficient delivery of the chattels. *Smith v. Bryan*, 5 Md. 141.

Under the code of New York, it has been held, that the party suing on a contract which the statute declares void, unless it is duly executed in writing, must allege facts that constitute a valid contract in law, *i. e.* that the contract was in writing, or that it was rendered valid by a partial delivery. *Le Roy v. Shaw*, 2 Duer R. 626; *Thuman v. Stevens*, Id. 609. And the contrary has been held, on the ground that the Statute of Frauds has not altered the common-law rule of pleading, but only declared what shall be the requisite evidence of the contract. *Stern v. Dunker*, 2 E. D. Smith R. 406; *Dewey v. Hoag*, 15 Barb. 368; *Homer v. Wood*, Id. 371; 9 How. Pr. 373; 11 Id. 316. The proof certainly must show such a contract as the law declares valid, *i. e.* that the contract was in writing and *subscribed* by the party to be charged therewith. *James v. Patten*, 2 Selden N. Y. Rep. 9.)

(5) *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Morris*, 2 M. & S. 286.

NOTE 960.—A bill of parcels being considered evidence of a contract, and a sufficient memorandum in writing to take the case out of the Statute of Frauds, parol evidence cannot be received substantially to change it. *Bathurs v. Sellers*, 6 Har. & John. 249.

on a bill of parcels. And an auctioneer,(1) or a broker,(2) are sufficient agents, within the meaning of the statute, to bind the contracting parties by their signature.

It is a point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. Per Chancellor, in *Clason v. Bailey*, 14 John. R. 486. See *Weightman v. Caldwell*, 4 Whar. 85; *Douglass v. Spears*, 2 Nott & M'Cord, 207. (But see *James v. Patten*, 2 Seld. 9.)

* "It was admitted (2 Black. Com. 297, 2 Bos. & Pul. 238; 3 Esp. R. 180), that printing was writing, within the statute; and (2 Bro. 585) that stamping was equivalent to signing; and (8 Ves. 175) that making a mark was subscribing within the act." Per Chancellor, in *Clason v. Bailey*, *supra*. "To write, is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink." "In the days of Job, they wrote upon lead with an iron pen. The ancients used to write upon hard substances, as stones, metals, ivory, wood, &c., with a style or iron instrument. The next improvement was writing upon waxed tables; until, at last, paper and parchment were adopted; when the use of the *calamus* or reed was introduced. The common law has gone so far to regulate writings, as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument or the material by which letters were to be impressed on paper or parchment, has never yet been defined. This has been left to be governed by public convenience and usage; and as far as questions have arisen on this subject, the courts have, with great latitude and liberality, left the parties to their own discretion. Id. A memorandum written with a lead pencil, by a broker, was held equally valid as if it had been written with a pen and ink. Id.

If the name of the party appears on the instrument, written by himself, though not signed, it is held sufficient. But where the name is not written by the party to be charged, as a memorandum at the foot of a mortgage and signed by the mortgagee only, stating the sum due on the mortgage; held, that though the mortgagors signed the mortgage, that signing could not be applied to the memorandum. *Cabot v. Haskins*, 3 Pick. 83.

(1) *Kenworthy v. Schofield*, 2 B. & C. 947; *Simon v. Metiers*, 1 W. Bl. 501; 7 East, 569. *Vide supra*, p. 352.

NOTE 961.—A memorandum, kept by a clerk of a vendor who sells goods at auction, of the articles sold, and the prices bid for them, is a sufficient note in writing to bind the vendee. *Frost v. Hill*, 3 Wend. R. 386.

The fourth section of the New York Revised Statutes (2 R. S. 136) is as follows: "Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale book, a memorandum, specifying the nature and the price of the property sold, and the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section." The section referred to is that which declares void every contract for the sale of goods, chattels or things in action, for the price of fifty dollars or more, unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby. *Hicks v. Whitmore*, 12 Wend. 548. The entry in such book of the name of an agent, factor, consignee or other persons having legal authority to sell, is a sufficient compliance with the requisite of the statute, that "the name of the person on whose account the sale is made," shall be entered. Id. But the owner of the property can maintain an action upon the contract, although his name be not mentioned in the entry of the memorandum of contract of sale. Id.

* * *Vide supra*, note 959. * *

(2) 3 Taunt. 173; *Hayman v. Neale*, 2 Campb. 337. *Vide infra*, "Sale by broker." If the plaintiff be described in the contract as "broker," he cannot sue as principal. *Rainer v. Linthorne*, 1 Ry. & Mo. 325. See *Farmer v. Robinson*, 2 Campb. 389, that the authority may be revoked at any time before the sale note is made out.

It will not be necessary that the contract, when in writing, shall have been stamped, if it answer the description of a "memorandum, letter, or agreement made for or relating to the sale of any goods, wares, and merchandise." (1) The construction of this clause of exemption in the stamp acts has been considered in the second volume. The legislature do not appear to have made any distinction, with respect to stamping, between contracts for the sale of goods ordered to be made, and contracts for such as are already made, especially if they were in existence, though not finished; or in a prepared state at the time of the contract. (2) Agreements for the sale of growing crops or vegetables are now generally considered as contracts relating to goods or merchandises, unless it is necessary for the buyer to have exclusive possession of the land, in order to avail himself of his bargain. (3)

A contract for the sale of goods under seal, is not exempted from being stamped. (4) And where the sale of goods is not the primary object of an agreement, but merely secondary and collateral, the agreement requires a stamp. (5) An unstamped agreement is valid, as far as it relates to the sale of goods, though it contains other stipulations for which a stamp would be required; provided they are unconnected with the contract respecting the goods. (6) It has been held, that a memorandum in writing containing an order for goods, but not proving the contract between the parties, may be read in evidence without a stamp. (7)

Contract.

The evidence adduced to prove a contract for the sale of goods should correspond with the averments in the declaration. It is, however, sufficient, if there is no difference in substance and legal effect between the contract as stated and proved. (8) Thus it will not be a material variance

(1) A memorandum or writing made necessary by 9 G. IV, c. 14, is not to be deemed an agreement within the meaning of the stamp acts. Sect. 8, *vide supra*, p. 366.

(2) *Wilks v. Atkinson*, 6 Taunt. 11; 1 Marshall, 412; *Hughes v. Breeds*, 2 Carr. & P. 597. *Supra*, p. 366.

(3) *Vide supra*, p. 350.

(4) *By Bayley, J., Clayton v. Burtenshaw*, 5 Barn. & Cress. 45.

(5) *Smith v. Cator*, 2 Barn. & Ald. 778.

(6) *Heron v. Granger*, 5 Esp. 269; *Corder v. Drakeford*, 3 Taunt. 332. And see *Gray v. Smith*, 1 Campb. 337.

(7) *Ingram v. Lea*, 2 Campb. N. P. C. 521. See *Forsyth v. Jervis*, 1 Stark. N. P. C. 437.

(8) NOTE 962.—*Vide Crawford v. Morrill*, 8 John. R. 253; *Umberbocker v. Rassel*, 3 Yeates' R. 339; *Id.* 444. *Vide Bristow v. Wright*, Dougl. 665; 2 Caines' R. 120. But the whole consideration of parol agreement must be stated, although consisting of several parts (6 East, 564; 3 Caines' R. 286; 3 Cro. Eliz. 79; 9 East, 9; 13 Id. 15); and although it may be in the alternative. 2 Bos. & Pull. 119; 2 East, 4; 1 New R. 351.

Where a request is not essential to the maintenance of the action, it is not necessary to make a demand prior to the suit. *Utica Bank v. Van Gibson*, 18 John. R. 485. A note payable in chattels, and so not a promissory note under the statute; nevertheless, a reference to the statute in the declaration may be rejected as a surplusage, and is good after verdict. *Thomas v. Roosa*,

from an allegation, that the whole price of a horse was to be paid in money, to prove that another horse was taken in part payment; especially, if a receipt be given, which shows that the other horse was considered as money.(1) Where an offer for the sale or purchase of goods is made by the post, the person sending the letter are to be considered, in law, as making, during every instant of time their letter is traveling, the identical offer contained in their letter, and the contract is completed by the acceptance of it, previously to the arrival of the notification of such acceptance.(2) Where a contract is made for the sale of a certain quantity of goods, the amount of which is not exactly known at the time, it will not be a variance, though the quantity contracted for is laid (under a *videlicet*) in the declaration, as of the amount which it afterwards proves to be.(3) An allegation that the goods contracted for were of a particular amount in respect of quantity, requires proof that they were of a specified amount according to statute measure.(4)

Contract when entire.

Where several articles have been sold by the plaintiff to the defendant about the same time, the evidence must support the averments in the declaration, as to whether there is only one, or several contracts. Thus, if two horses are sold together, with a joint warranty, it will be a fatal variance, if the contract is described in the declaration as relating to a single horse.(5) Where different lots are sold by auction for different

7 Id. 461. Nor is any request requisite to be specially averred and proved, for a request is not parcel of the contract. Id. Any defect or inaccuracy in assigning the breach is aided after verdict, for the court will intend that damages could not have been given, if a good breach had been shown. Id.

(1) *Hands v. Burton*, 9 East, 349; *Brown v. Fry*, Selw. N. P. 630. See *Harris v. Fowle*, cited 1 H. Bl. 287. On the mode of stating the contract in the declaration, see Vol. I, p. 510.

(2) *Adams v. Lindrell*, 1 Barn. & Ald. 683. And see *Cooke v. Oxley*, 5 T. R. 653; *Humphreys v. Cornwallis*, 16 East, 45.

(When an offer to sell is made by letter, and accepted by letter, the contract is complete as soon as the letter containing the acceptance is deposited in the post-office for transmission by mail to the party making the offer (*Mactier v. Frith*, 6 Wend. 103; *Vassor v. Camp*, 1 Kernan N. Y. R. 441, and several cases there cited; *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278); holds it necessary to the completion of the contract that the party making the offer should know of its acceptance.)

(3) *Gladstone v. Neale*, 13 East, 410; *Wildman v. Glossop*, 1 Barn. & Ald. 9; *Crissin v. Williamson*, 8 Taunt. 107; *Laing v. Fidgeon*, 6 Taunt. 108.

(4) *Hockin v. Cooke*, 4 T. R. 314. For other cases on the subject of variance in this statement of contracts for the sale of goods, see *Jones v. Cowley*, 4 Barn. & Cress. 445; *Niles v. Steward*, 8 East, 6; *Silker v. Hoseltine*, 1 Chit. 39; *Samuel v. Darch*, 2 Stark. N. P. C. 60; *Tell v. Douglas*, 4 Barn. & Ald. 374; *Harrison v. Wilson*, 2 Esp. N. P. C. 708; *Thornton v. Jones*, 2 Marsh. 287; *Barker v. Palmer*, 4 Barn. & Ald. 387; *Sequier v. Hurst*, 3 Price, 78; *Churchill v. Wilkins*, 1 T. R. 447; *Aldritt v. Kettridge*, 1 Bing. 355; *Clark v. Manstope*, 5 Esp. N. P. C. 239; *Leery v. Goodson*, 4 T. R. 687; *Hodson v. Davies*, 2 Campb. 532.

(5) *Symonds v. Carr*, 1 Campb. 361; *Hort v. Dixon*, Selw. 101.

sums, the contracts are, in general, separate.(1) Where several articles are purchased of a tradesman at the same time, the contract will generally be considered as entire.(2)

To prove that a purchaser has had notice of the terms according to which a sale by auction is made, it is sufficient to give in evidence the printed conditions of sale, pasted on the auctioneer's box.(3) An auctioneer may maintain an action against a purchaser in his own name, though the property at the time of the sale, was known to belong to another person.(4) The case, in which sales by auction will be avoided in consequence of the employment of puffers, have been before considered.(5)

Sale by broker.

Where a broker effects a sale between two parties, the bought and sold notes delivered to them, and not the entry in his book, are the proper evidence of the contract;(4) especially if the entry in the book be not

(1) *James v. Shore*, 1 Stark. N. P. C. 426. *Vide supra*, 358.

(2) *Champion v. Short*, 1 Campb. 53. And see *Balday v. Parker*, 2 Barn. & Cress. 37; *Price v. Lee*, 1 Barn. & Cress. 156, on the Statute of Frauds; *Walker v. Dixon*, 2 Stark. N. P. C. 281; *Gilb. L. Ev.* 191, 194.

(3) *Kernard v. Aldridge*, 3 Esp. C. 271.

(4) *Williams v. Millington*, 1 H. Bl. 81. And see *Coppin v. Walker*, 7 Taunt. 237; *Coppin v. Craig*, 7 Taunt. 243.

NOTE 963.—*Hulse v. Young*, 16 John. R. 1.

Undoubtedly the auctioneer may sue, where the right of no third person intervenes. But where such right is established, and the person employing the auctioneer is proved not to be the owner, it then becomes clear that the auctioneer, who can have no interest in the goods but what he derives from his employer, has no longer any claim upon the property against the right owner. Thus, in *Dickenson v. Naul* (4 Barn. & Adol. 638), an auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment, the real executrix claimed the money from the buyer; held, that the auctioneer could not afterwards maintain an action against the buyer, though the latter expressly promised to pay, on being allowed to take away the goods, which he did. (That the auctioneer may sue, see *Minturn v. Main*, 3 Seld. 220.)

The auctioneer, also, suing in his own name on the contract of sale, cannot avail himself of his character of agent for the defendant; for his signature of defendant's name is not sufficient to entitle *him* to sue, yet it is settled, that a signature by the auctioneer's clerk, is sufficient for that purpose. *Bird v. Boultier*, 4 Barn. & Adol. 443.

Where there is an unqualified consignment of property, the consignee is presumed to be the owner, and may sue for an injury to the property in his own name, but the action may be in the name of the *real owner*. A sale by a master of a vessel, ordering goods to be sold without authority so to do, either by himself or his agents; held, that the real owner may sue the purchaser, notwithstanding that the latter has paid a *bona fide* price for the goods. *Everett v. Saltus*, 16 Wend. R. 474.

* * As to sales and the memoranda made by brokers, see Story on Sales, §§ 87-90. If the bought and sold notes do not correspond with each other or with the entry in the broker's books, the memorandum will not satisfy the statute. *Davis v. Shields*, 26 Wend. 341. And see Smith's Merc. Law, 411, and notes. For a learned discussion of the title and function of a broker, see *Milford v. Hughes*, 16 M. & W. 174. * *

(5) *Ante*, p. 358. And see the other points connected with sales by auction, *ante*, pp. 359-364.

signed.(1) If the bought and sold notes vary from each other, it has been held that the defect cannot be supplied by an entry in the broker's book, at least if it be not signed.(2) But an inaccuracy of the broker in describing the names of the contracting parties will not always avoid the sale, if no prejudice is sustained in consequence of the mistake.(3) A material alteration made in the sale note by the broker, at the instance of the seller, and without the consent of the purchaser, will preclude the seller from recovering.(4) It seems, that where goods in the city of London are sold by a broker to be paid for by a bill of exchange, the seller has a right within a reasonable time to annul the contract, if he is not satisfied with the sufficiency of the purchase.(5) Evidence is admissible for the purpose of showing, that, where a sale is made by a broker, his authority, by the custom of trade, expires with the day on which it is given.(6)

Sale by factor.

A factor is authorized to make an absolute sale on credit.(7) If he buy

(1) *Thornton v. Meux*, 1 Mo. & M. 44; *Groom v. Afialo*, 6 B. & C. 117; *Hayman v. Neal*, 2 Campb. N. P. C. 337, where it was held by Lord Ellenborough, that after the broker had entered the contract in his book neither party could recede from it; 12 Ves. 466; 13 Ves. 456; *Cumming v. Roebuck*, Holt's N. P. C. 172; *Dickenson v. Lilwell*, 1 Stark. N. P. C. 120; *Rucker v. Cumming*, 1 Esp. N. P. C. 109. See *Hinde v. Whitehouse*, 7 East, 568.

(2) *Grant v. Fletcher*, 5 B. & C. 436; *Cumming v. Roebuck*, Holt's N. P. C. 172. See *Thornton v. Kempster*, 1 Marsh. 355; 5 Taunt. 788; *Rowe v. Osborne*, 1 Stark. C. 140, where the defendant was bound by the note which he had signed.

(3) *Mitchell v. Lepage*, Holt's N. P. C. 254.

(4) *Powell v. Devett*, 15 East, 29.

(5) *Hodson v. Davies*, 2 Campb. 530, where five days was considered an unreasonable time.

(6) *Dickenson v. Lilwell*, 1 Stark. N. P. C. 128.

(7) *Scott v. Surman*, Willes, 406; *Houghton v. Matthews*, 3 Bos. & Pull. 489, unless it be of stock in the funds; *Wiltshire v. Sims*, 1 Campb. 258.

NOTE 964.—*Goodenow v. Tyler*, 7 Mass. R. 36. In the last case, Parsons, C. J., observed: "The court will take notice, as a part of the law merchant, that a factor may sell goods at a reasonable credit, at the risk of his principal, when he is not restrained by his instructions, nor by the usage of trade. He is not, however, authorized to give credit to any but persons in good credit, and whom prudent people would trust with their own goods. If, through carelessness or want of reasonable inquiry, he sell on credit, to a man not in good credit, and there be a loss, the factor must bear it."

In the absence of particular instructions, a general power to sell implies a power to sell in the usual way; and the authority of an agent to sell on credit, depends entirely on the fact of that being the *usual mode of dealing* in the particular trade in question. Bissell, J., in *Jones v. Warner*, 11 Conn. R. 40. There, the usage was for the seller not to part with his property until it was paid for; and the clerk not having express authority to give credit, it was held, that the principal was not bound by his contract, and the property in the coals was not changed, although they were on board the purchaser's vessel. See *Laussatt v. Lippincott*, 6 Serg. & Rawle, 392.

Although a factor has orders to sell for cash: and he accordingly sells to a person in good credit, who receives the goods on the day of sale; and the following day sends in his bill; held, that the factor was not liable for any loss, it being the usage of the trade to do so. *Clark v. Van Norwick*, 1 Pick. 343. Such a sale is no violation of orders to sell for cash, unless sold to one in insolvent circumstances.

or sell goods in England for a foreign principal, it seems he will be personally liable.(1) A principal, though he is unknown at the time of the sale, may sustain an action on the contract, and is, when discovered, personally liable.(2) A party may preclude himself from recovering against the principal, by electing to give credit to the agent.(3) A person who has made a contract in the character of agent, must give notice that he is really interested before he can sue as principal.(4)

Symington v. M'Lin, 1 Dev. & B. 291. It seems that the construction to be put upon written instructions from a principal to his factor, is to be determined by the court, and not by the jury.

In *Simpson v. Swan* (3 Camp. 292), the factor sold the leather consigned to him to a man notoriously insolvent *at the time*; and, according to the usual practice, without naming the purchaser to his principal, he received a bill of exchange for the price, payable to himself; and then made and sent his own note to the defendant for the net proceeds. Lord Ellenborough said that the factor's remitting his note to the principal, seemed to close the concern, and that it could not be unraveled without danger. The loss, also, had been occasioned by the gross negligence of the plaintiff, which was a fatal objection to the action. But if the principal draws before the sale, it is very reasonable that he should repay the money when the consideration fails on which the factor granted the acceptance. *Greely v. Bartlett*, 1 Greenl. R. 172.

* * As to sales by factors, see Story on Sales, §§ 91-107; and the notes to *Paterson v. Gandasequi*, 2 Smith's Lead. Cases, marg. p. 189, *et seq.* See also, *Covill v. Hill*, 4 Denio, 323, as to what beyond mere possession is necessary to clothe a person selling goods with the character of a factor, so as to bind the true owner. In *Nelson v. Cowing* (6 Hill, 336), it was held, that an agent authorized to sell an article is presumed to have the power of warranting its quality and condition, unless the contrary appear, and that, in such cases, the principal will be affected by fraudulent representations made by the agent. *S. P.*, *Sandford v. Handy*, 23 Wend. 260, per Nelson, Ch. J. * *

(Having instructions as to the terms on which he is to sell, the factor is bound to observe them (*Sheeter v. Henlock*, 1 Bing. 34); if he does not he is liable for all the damages sustained in consequence of a departure from them. *Evans v. Root*, 3 Selden N. Y. R. 186; *Day v. Crawford*, 13 Geo. 508. In the absence of specific instructions, he is at liberty to sell according to the usual course of business. *Edwards on Bail*. 289-283; *Beach v. Forsyth*, 14 Barb. 499, 602.)

(1) *Gonzales v. Sloden*, Bull. N. P. 130. See by Eyre, Ch. J., 1 Bos. & Pul. 358; by Bailey, J., 15 East, 69.

(2) See *Paterson v. Gandasequi*, 15 East, 62.

(3) *Addison v. Gandasequi*, 4 Taunt. 574; *Peele v. Hodgson*, 4 Taunt. 576; *Owen v. Gooch*, 2 Esp. N. P. C. 567; *Thornton v. Meux*, 2 Ry. & Mo. 44.

(4) *Bickerton v. Burrell*, 5 Maule & Sel. 383, where it was said that an unnamed principal must give the like notice. As to the right to set off by the purchaser of goods sold by factor, see *George v. Clagett*, 7 T. R. 359; *Rabone v. Williams*, 7 T. R. 360, n.; by broker, *Atkins v. Amber*, 2 Esp. C. 493; *Baring v. Corrie*, 2 B. & Ald. 137; *Morris v. Cleasby*, 1 Maule & Sel. 576; by auctioneer, *Jarvis v. Chapple*, 2 Chit. 387; *Coppen v. Craig*, 7 Taunt. 243.

NOTE 965.—It has been held, that a broker suing in his own name against a vendee for not accepting goods, cannot recover on a contract describing him as a broker selling for his principal (*Rayner v. Linthorne*, 1 Ryl. & Man. 6, 325); for the note shows him to be a broker and not a principal, and if the note were out of the question, there would be nothing to satisfy the Statute of Frauds. However, in *Short v. Spackman* (2 Barn. & Adol. 962), where the principal repudiated the contract of the broker, it was held, that this did not determine the contract as between the broker and vendor; and the broker notwithstanding might sue in his own name to recover damages in not delivering the goods, although it appeared that the vendor was told that there was an unnamed principal.

The case of *Capel v. Thornton* (3 Car. & Payne, 352), proves that an agent authorized to sell

Conditions precedent, by vendor.

The plaintiff, after proof of the contract, must show that he has performed every condition precedent which it was incumbent on him to have performed.(1) Thus, where the vendor is to deliver goods that have been contracted for, he must aver and prove a tender of them; or must show what is equivalent to a tender, as that the buyer refused to complete his contract.(2) But when it is the duty of the purchaser to take away the

goods, has (in the absence of advice to the contrary) an implied authority to receive the proceeds. But a factor has no authority to pledge the goods of his principal. *Guichard v. Morgan*, 4 J. B. Moore, 36.

A factor who sells goods in his own name, without a *del credere* commission, is a good petitioning creditor against the purchaser (*Sadder v. Evans*, 4 Campb. R. 185), unless the principal has considered the purchaser as his debtor, by taking steps to recover the debt directly from him. *Id.* (See *Beach v. Forsyth*, 14 Barb. 499; and *Henbach v. Rother*, 2 Duer N. Y. 227.)

The rule of law is well established, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. *Denman, C. J.*, in *Sims v. Bond*, Barn. & Adol. 389. This rule is most frequently acted upon in sales by factors, agents, or partners, in which either the nominal or real contractor may sue; but it may be equally applied to other cases. *Id.* But where money is lent by another in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own. *Id.*

(1) *Vide supra*, p. 354.

NOTE 966.—*Johnson v. Reed*, 9 Mass. R. 78, where the court say: "The true intent of the parties, as apparent in the instrument, should determine whether covenants or promises are independent or conditional, instead of any technical rules, of which the parties were totally ignorant, and the application of which would, in most cases, utterly defeat their intentions."

The plaintiff agreed to deliver a large quantity of timber, for which he was to be paid—except the part which he had already received—when the whole quantity should be delivered. He furnished a part, and then, without any excuse, stopped short, and claimed to recover for the timber actually delivered; held, that the plaintiff could not recover for a part of the timber contracted for, without proof that he had performed the contract on his part, although the vendee had consented to a variation of the contract as to the price and time of performance. *Mead v. Degolzer*, 16 Wend. 632.

Upon a contract to manufacture shingles for another, the latter finding materials, the manufacturer *may*, though he is not bound to work up unsuitable materials; and if the shingles are as good as could be manufactured out of such materials, he is not in default. *Morton v. Fairbanks*, 11 Pick. R. 368.

It is a rule, that where performance by the plaintiff is a condition precedent to the defendant's liability, he must aver and prove a performance of the entire contract, and cannot, by showing a part performance, recover *pro tanto*. *McMillan v. Vanderlip*, 12 John. R. 165; *Thorpe v. White*, 13 Id. 53; *Jennings v. Camp*, *Id.* 94. But this rule applies more peculiarly to contracts of hiring and service.

No time being fixed for the delivery, the law makes it deliverable in a reasonable time, which depends on circumstances; but if no objection is made in point of time, when a demand is made, the jury may assume that as the time of delivery, and by the refusal of the defendant, that the contract was then broken. *Blydenburgh v. Welsh*, 1 Bald. R. 331, 338.

* * For a full illustration of the doctrine stated in the text, see *Cutter v. Powell*, 2 Smith's Leading Cases, p. 1, and the English and American notes thereto. * *

(2) *Parker v. Rawlins*, 4 Bing. 280; *Jones v. Berkeley*, Doug. 687.

goods, it seems sufficient for the plaintiff to aver and prove that he has been always ready and willing to deliver them.(1)

Warranty.

Where goods are sold with a warranty,(2) the plaintiff will not be allowed to recover their price, if he has not delivered them in a state corresponding with the warranty; provided the purchaser has rescinded the contract by returning the goods, or refusing to accept them.(3) And if

(1) See *Rawson v. Johnson*, 1 East, 203; *Wilks v. Atkinson*, 1 Marsh. 412.

(2) *NOTE 967*.—By the common law, where there is no fraud or agreement to the contrary, if the article turns out not to be that which it was supposed, the purchaser sustains the loss, the rule is *caveat emptor*. In *Seixas v. Wood* (3 Caines, 48), which is a leading case in New York, the principle established was, that to maintain an action for selling one article for another, there must be either a *warranty* or a *fraud*. And this principle was recognized in all the subsequent cases reported in Johnson's Reports. In *Sweet v. Colgate* (20 John. R. 196), the defendants purchased, at auction, the goods in question, invoiced as *barilla*, and advertised as such; but there was no warranty, nor any concealment on the part of the vendors. After the purchase, the defendant's discovered that the article purchased was not *barilla*, but *kelp*. Before the sale, they inspected and examined it; and a sample was exhibited at the time of sale. The consignees of the goods in this country knew it was an article of bad quality, but did not know that it was other than *barilla*; held, that there being neither warranty nor fraud, the plaintiffs were entitled to recover the price. The sample was fairly taken from the bulk; the defendant exercised his judgment on it, and bought it at his own risk. But see the observations in 2 K. C., and next page in note. So, in *Goodhue v. Butman* (8 Greenl. R. 116), where bricks were sold, and in an action for the price, it was submitted to the jury to determine whether, if some of the bricks were not as good as they ought to have been, others were not better, and whether, upon the whole, the defendant or his agent had not waived all objections to the quality, and received them under the contract; and they found that he had, and the court affirmed their verdict, saying: "If the defendant did so, he was chargeable for the price he had agreed to pay; and we are of opinion that the judge was warranted in presenting the case under this aspect to the jury."

The principle established is, that to maintain an action for selling one article for another, there must be either warranty or fraud. *Seixas v. Woods*, 2 Caines' R. 48; *Snell v. Morris*, 1 Johns. R. 96; *Perry v. Aaron*, Id. 129; *Defreese v. Tremper*, Id. 274; *Holdon v. Dakin*, 4 Id. 421; *Davis v. Meeker*, 5 Id. 354, 395; *Cunningham v. Spier*, 13 Id. 362; *Fleming v. Slocum*, 18 Id. 403.

A verbal representation by the seller to the buyer, in the course of dealing, that he "may depend upon it, the horse is perfectly quiet, and free from vice," is a warranty. *Cave v. Coleman*, 3 M. & P. 2. That is a sufficient warranty, though the word *warrant* is not used. * * See *post*, note 969. * * (See also cases cited in Edwards on Bills and Notes, 329-333, in respect to selling one thing for another, warranty, and fraud in sale.)

(3) *Okell v. Smith*, 1 Stark. N. P. C. 107; *Cormack v. Gillies*, cited in *Basten v. Butter*, 7 East, 480; *Hibbert v. Shee*, 1 Campb. N. P. C. 113; *Lewis v. Cosgrave*, 2 Taunt. 2.

NOTE 968.—*Fraud*, in the sale of a chattel, cannot be set up in bar of a recovery of a note given on such sale, unless the vendee, on the discovery of the fraud, returns the articles purchased, or shows it to be entirely destitute of value. If the vendee retains the property, he cannot treat the sale as void. *Burton v. Stewart*, 3 Wend. 236. Whether the action be brought on the contract or on the security, the defendant, on proper notice, is entitled to give evidence in mitigation of damages. Id.

The plaintiff sold defendant fifty-eight Leghorn hats, of particular numbers, denoting their fineness, together with an equal number of extra crowns to match the hats delivered, for \$1,566. A parcel of the goods sold were delivered, but the extra crowns were not delivered. The extra crowns actually delivered did not match the hats sold, and of this, immediate information was

the goods have been retained by the purchaser, and the contract is not altogether rescinded in consequence of the breach of warranty, the plaintiff cannot recover more than the actual value of the goods.(1)

Although the words "per sample," when contained in an agreement, are generally considered as amounting to a collateral undertaking on the part of the seller, and need not be mentioned in a declaration to recover the price of the goods sold;(2) yet, if the sale is by sample, and the bulk of the commodity sold does not correspond with the sample, the purchaser cannot be compelled to accept or pay for the goods.(3) In such a case, the seller will not be admitted to prove that there was no fraud intended on his part, or that the custom has been, under such circumstances, that the bargain should stand good upon an allowance being made.(3) On a sale by sample, the buyer has a right to inspect the whole bulk at any proper and convenient time; and if, on refusal, he rescinds the contract, the plaintiff cannot afterwards recover.(4) The seller, upon a sale by sample, is not liable for a latent defect in the article sold, provided he is not guilty of any fraud, and the bulk corresponds with the sample.(5)

given to the plaintiffs, and all redress was denied. In an action to recover the price, held, that defendant was entitled to a deduction proportionate to the diminished value, from the price originally agreed upon. *King v. Paddock*, 18 John. R. 141. Spencer, C. J., observed: "We know of no case in which there is an omission to return the articles agreed to be sold, which precludes the defendant from contesting on the price, on the ground that it was not returned to the vendee; excepting in cases of conditional sales, where the thing about to be sold is taken on trial, with liberty to the vendee to return it, if he dislikes it, in a limited period." * * See the next note. * *

(1) *Germain v. Burton*, 3 Stark. N. P. C. 32; *Farnsworth v. Garrard*, 1 Campb. N. P. C. 38; *Okell v. Smith*, 1 Stark. N. P. C. 107; *Cormack v. Gillies*, and *King v. Boston*, cited in *Basten v. Butler*, 7 East, 480; *Fisher v. Samuda*, 1 Campb. N. P. C. 190.

(2) *Parker v. Palmer*, 4 B. & Ald. 387.

(3) *Hibbert v. Shee*, 1 Campb. N. P. C. 113.

(4) *Lorymer v. Smith*, 1 Barn. & Cress. 1.

(5) *Parkinson v. Lee*, 2 East, 321. See *Bluet v. Osborne*, 1 Stark. N. P. C. 384; *Baglehole v. Walters*, 3 Campb. N. P. C. 154, that a seller, in general, is not liable for latent defects.

NOTE 969.—* * The liability of the seller, on a sale by sample, stands upon the same ground as when the sale is of a specific thing in bulk. He is bound to deliver the thing sold, without responsibility as to its quality, unless he has made, in respect of its quality, a warranty or false and fraudulent representation. The application of the term warranty, to a mere sale by sample, has been justly criticised by the American editors of Smith's Leading Cases, in their note to *Chandelor v. Lopus*. And it is conceived, that the loose and improper use of the term, has led to an important error in doctrine, in holding the vendor by sample for a difference between the sample and the bulk, where the sale has been *executed*, upon the ground of an implied warranty. Where goods are selected, or ordered, and a delivery takes place, the purchaser may refuse to receive them if they are not the identical goods selected, or of the identical kind ordered; or he may receive them, and claim an abatement for any inferiority, in value. But if he receive them without objection, and if he pay for them, it becomes a serious question, whether he did not accept them as a performance of the contract, which, thereby and to that extent, was modified by the act of the parties. It is difficult to discover a valid reason for distinguishing between such a sale by bulk and a sale by sample, after the contract has been executed by a voluntary acceptance and payment. In the case of a sale by sample, the delivery and acceptance of the bulk converts it, in effect, into a sale by bulk. Whether the sale be by sample or bulk, if the

Goods as described.

When goods are sold by a written contract, which contains a description of their quality without referring to any sample, if the goods do not correspond with that description, it is not material for the seller to show that they correspond with a sample exhibited at the time of sale to the purchaser who was skilled in the commodity; this not being a sale by sample, but by the description in the written contract.(1) Though the

article tendered differ from that agreed for, the purchaser may refuse to receive it; but if he receive it, it would seem that it should be with precisely the same effect in both cases, and that the distinction is not solid which treats the seller as having performed his contract in one case, and holds him to have broken it in the other.

It is said, that when a sale is made by sample, the seller expressly agrees to deliver goods, corresponding in kind and quality, and that if he do not make such delivery, he has broken his contract, and an action lies for the breach. But precisely the same thing may be said, when goods are selected and set apart, and when goods are sent to fill an order. The agreement, equally in the one case as in the other, authorizes the purchaser to insist upon a strict performance; and, it is conceived, equally authorizes him to modify or waive it precisely with the same consequences. The implication of a warranty on a sale by sample is an inroad upon the common law, and is admitted to stand upon no principle. Per Bronson, Ch. J., in *Moses v. Mead*, 1 Denio, 346. See *Howard v. Hoey* 23 Wend. 350, and *Moses v. Mead* 1 Denio, 378, on the effect of the distinction between executed and executory contracts.

The leading American authorities, in respect of a sale by sample, are collected in the notes to *Chandelor v. Lopus*, 1 Smith's Leading Cases, p. 77, and Story on Sales, § 376, *et seq.* That every affirmation at the time of the sale of personal chattels is a warranty, if it appear to have been so intended; that it is not a warranty, if not so intended; and that the intention is a question of fact for the jury, where the affirmation is not a part of a written contract; are propositions perfectly well settled. *Chandelor v. Lopus*, and notes, *supra*. If the affirmation forms part of the contract (as in *Budd v. Fairman*, 8 Bingh. 53; *Wason v. Rowe*, 16 Vermont, 525; *Banfield v. Bruton* 7 B. Monroe, 108), it is for the court to pass upon the intention in construing the contract. * *

(The subject of warranty implied on the sale of goods by sample has been recently considered by the New York Court of Appeals; and the decision pronounced on a full canvass of the authorities is, that a warranty of style and quality will not be implied on a sale of goods by sample, unless the vendor expressly represents or undertakes that the bulk of the goods shall correspond with the sample, in a case where the purchaser has the opportunity to examine the goods and neglects to do so; that a warranty will not be implied from the mere fact that a sample is shown on the sale. *Hargous v. Stone*, 1 Selden, N. Y. Rep. 73. The exhibition of a sample is at most only an affirmation that the specimen shown is a fair sample of the bulk of the commodity. To establish a sale by sample, technically so called, there must be evidence to show that the vendor intended to warrant that the bulk should correspond with the sample exhibited. The exhibition of the sample is evidence tending to prove such a sale, but is not alone sufficient to prove it. *Beirne v. Dord*, 1 Selden R. 95, and cases there cited; and also in *Hargous v. Stone*. And though a warranty of goods sold by sample be established, the purchaser is bound to examine them promptly; and where he neglects to do so, and makes no offer to return them, and no complaint for several weeks, he will be estopped from showing that the goods were damaged. *Muller v. Ene*, 3 Duer R. 421.)

(1) *Tye v. Fynmore*, 3 Campb. N. P. C. 462.

NOTE 970.—* * The cases to the point in the text are not uniform. If the articles are not selected and set apart, there is an implied agreement that they shall be free from any remarkable defect, and the purchaser may refuse to receive them if so defective; and he may return them, after a reasonable time to inspect them. *Howard v. Hoey*, 23 Wend. 350. But, where the con-

tract is executed, and there is no fraud or express warranty (the sale not being by sample) there is no implication that the goods are sound or of a merchantable quality. So held in *Moses v. Mead* (1 Denio, 378), on a sale of mess beef, for a sound piece, which proved unsound; in *Hart v. Wright* (17 Wend. 267, and S. C. in error, 18 Wend. 449), on a sale of flour, which proved bad. And see *Mixer v. Coburn*, 11 Metc. 559; *Wilson v. Lombard*, 18 Pick. 59; *Burnby v. Bollett*, 16 M. & W. 644; 2 Kent C. 480 and note (6th ed.) Where hemp is sold in bales, which the purchaser is at liberty to open and examine, the sale is not by sample, although samples are shown, and there is no implied warranty of quality. *Salisbury v. Stainer*, 19 Wend. 159.

In Massachusetts, it is well settled, that a warranty is implied that the goods are of a kind and quality corresponding with their description in a bill of parcels. *Henshaw v. Robins*, 9 Metc. 83. And the rule applies though the purchaser examined the goods at or before the sale, if they are prepared so as to deceive skillful dealers. *Id.* The rule is different in New York (see the cases cited in *Moses v. Mead*, *supra*); and the New York rule is believed to be most prevalent. The unreported case of *Wilson v. Woodhull et al.* (tried in the Supreme Court, at New York, in 1848), illustrates alike the stringency and sound policy of the common-law rule, *caveat emptor*, which is now re-asserted in New York in its ancient integrity. A large quantity of tin, invoiced as of a well-known and favorite brand, was consigned by an English house to the defendants, who were extensive shipping merchants in New York. When the tin was about being discharged from the ship, it was sold by a produce broker, in the defendants' name, to the plaintiff, on a credit of six months, the name of the defendants' foreign principals not being disclosed. The plaintiff, who was a wholesale dealer in metals, received the tin from the ship and transhipped the bulk of it immediately for Milwaukee, Wisconsin, *via* the Hudson River and Erie Canal. The plaintiff's notes for the purchase money were paid at maturity, and the proceeds paid over by the defendants to their principals in England. After the transaction had thus been closed, a suit was brought on the seller's note executed by the broker to the plaintiff, which described the tin as being of a particular brand. The evidence on the trial showed the tin to have been of a different and inferior brand, and almost worthless quality. Mr. Justice Edwards nonsuited the plaintiff, holding that no warranty was implied from the description of the brand in the bought and sold notes. There was no pretence of fraud in the seller, and the buyer might have examined the tin on shipboard, and as it was discharged. He might have refused to receive it, as not being what he had bought. But having omitted to examine it; or being satisfied with it on examination; and having taken it without requiring an express warranty, and paid for it, he had no right to complain. It would involve imminent hazards to the great commercial houses, receiving numerous consignments of every species of commodity from various parts of the world, and selling in the market to dealers possessing skill and judgment at least equal to their own, if warranties were to be implied from general descriptions in bills or parcels or bought and sold notes (descriptions which merely echo those of the invoices), for a breach of which they could be held, after long periods of time, when the real quality of the commodities, which our inland commerce has distributed over our vast territories, has become difficult of proof, and the seller has paid over the proceeds of the consignments to the consignors in foreign countries. Such a rule would open a wide door to fraud, and expose persons of large and various commercial transactions to hazards which few would dare to encounter or be able to meet. The rule of the common law, which holds the buyer to a careful exercise of his own judgment, where he does not take the precaution of obtaining an express warranty, and the seller practices no fraud, is deemed much the most convenient and salutary. * *

Where upon the sale of a vessel, a bill of sale is executed between the parties, containing a warranty of title only, parol evidence is inadmissible to prove an additional warranty of soundness. *Pender v. Fobes*, 1 Dev. & Bat. 250. So, where a contract was entered into for goods, and a bill of sale was afterwards executed, it was held, that the bill of sale was the only evidence of the contract which could be received. *Lano v. Neale*, 3 Stark. R. 105. Parol evidence was refused to the plaintiff to prove a warranty of the soundness of a slave, when there was a written instrument conveying the slave, and containing a warranty of title only. *Smith v. Williams*, 1 Carolina Law Repos. 363; S. C., 1 Murph. R. 426. So, in *Peltier v. Collins* (3 Wend. 450), a warranty of the quality of an article in the sale of chattels, when made, is an essential part of the bargain, and should be stated in the note or memorandum; the omission of it renders the contract void; and parol evidence is inadmissible to take the case out of the statute. So where a

note of hand was indorsed in blank, parol evidence was rejected which went to prove that at the time of the indorsement, the indorser agreed to be answerable at all events, without demand or notice. *Barry v. Morse*, 3 N. Hamp. R. 132.

However, it seems that a bill of parcels is different; *that* will admit of explanation. *Harris v. Johnson*, 3 Cranch, 311. Where A. sold to B. several bags of hops, and gave a bill of parcels, stating the number of bags, the weight, price, &c., with these words: "the hops are warranted to be first quality;" in an action by B. against A. for a false warranty of the hops, it was held, that A. was not precluded by the bill of parcels from showing that the hops were warranted, only in case they were carried by B. to a particular place. *Wallace v. Rogers*, 2 N. Hamp. R. 506. In case on a written warranty, upon the sale of a negro, that he was in good health and in all respects sound, parol evidence was admitted to show, that at the time of the sale, the vendor communicated to the vendee the defect in question, which was in the arm; it being thin and crooked. Kent, Ch. J., observed: "Here the defect was not only visible, but the vendee had notice of it particularly; the defect in question was not therefore within the purview of the contract." *Schuyler v. Russ*, 2 Caines' R. 202. Neither a bill of exchange on its face, nor the indorsement, are within the Statute of Frauds, nor are they to be considered as specialties. Although the written terms of a contract are better evidence of its intent than any parol explanation, yet, there are cases in which evidence has been admitted between the parties to the contract, that the evidence did not contain the whole agreement. Held, therefore, in an action by an indorsee against the drawer of a bill of exchange, notwithstanding the terms of the indorsement, which were thus: The payees indorsed it to A. B., as the agent of the payees for collection only; A. B. indorsed it to C. D., in trust for the payees, without giving any recourse to him; A. B. was admissible as a witness to prove the trust, that the plaintiff, the indorsee, received the bill not as assignee, but as an agent to collect it for the payees. *Barker v. Prentiss*, 6 Mass. R. 430. See *Stackpole v. Arnold*, 11 Id. 27.

The statement in a bill of parcels of a quantity of oil that it was "winter pressed sperm oil," is an express warranty by the vendor, that such oil was winter pressed (*Osgood v. Lewis*, 2 Gill & John. 495), upon the principle that what is inserted in a written instrument is to be taken as true. In *Croemer v. Bradshaw* (10 John. R. 484), a bill of sale was declared on, by which the defendant in consideration of \$175, bargained and sold to the plaintiff "a negro woman slave, named Sarah, aged about thirty years, being of sound wind and limb, free from all disease." And the defendant in due form, in the covenanting part of the instrument (omitting everything as to age or soundness), covenanted only to warrant and defend the slave, so sold to the plaintiff, against the defendant and all other persons. The alleged breach was, that the slave was unsound and affected with divers diseases, &c. The court said, the words "being of sound wind and limb, and free from all diseases," are an averment of a fact, and import an agreement to that effect. They were not descriptive, but amount to an express, not an implied warranty; to a warranty of the soundness of the slave. *Id.* Therefore though the bill of parcels may not be the written contract, it has been held, in *Batturs v. Sellers* (5 Har. & John. 117, and 6 Id. 249), that the bill of parcels in that case was written evidence of the contract; and could not be added to or varied by oral testimony. In *Yates v. Pim* (6 Taunt. 446), which was an action upon a sale note "of fifty-eight bales of prime singed bacon," it was held, that the contract amounted to a warranty, and being in writing, could not be added to by parol evidence. In *Shepherd v. Kain* (5 Barn. & Adol. 240), which was case for breach of a warranty; the only evidence was the advertisement of the vessel as "copper fastened;" yet sold with all faults; upon proof that she was only partially copper fastened, Best, J., held, that the plaintiff was entitled to recover.

However, a party who makes a simple representation, stands in a very different situation from a party who gives a warranty. *Budd v. Fairmaner*, 8 Bing. 48, Tindal, Ch. J.

In a late case, it was held, that a sample or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described, or represented to be, by the vendor. Thus, in *Borrekins v. Bevan* (3 Rawle, 23), the court charged the jury, "that a description in a bill of parcels of the article sold, as *blue paint*, does not amount to a warranty, that it is so; and that in order to support his action, it is incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants." But upon exceptions taken, the judgment was reversed. Gibson, Ch. J., and Kennedy, J., were for adhering to the rule in *Chandeler v. Lopus*, Cro. Jac. 4. However, the

sale is not by sample, the plaintiff can recover against the defendant for not accepting manufactured goods contracted to be sold, unless they are answerable to the description by which they are sold, and also are of a merchantable quality ;(1) especially if the purchaser has no opportunity

decision of the court is upheld by the following cases. *Bradford v. Manly*, 13 Mass. R. 139; 5 John. R. 395; *Hibbert v. Shee*, 1 Peters' R. 317; 20 John. R. 196; 4 Cowen, 440; 19 John. R. 290; 6 Cowen, 354. In these and other cases, a sample or description in the written evidence of the contract, such as a bill of parcels, or a sale note, in the absence of proof, to rebut the presumption, is of equal efficacy to charge the vendor, as if the seller had expressly said, I warrant them to correspond with the description, or representation. In *Bradford v. Manly* (*supra*), Chief Justice Parker, says: "The fair import of the exhibition of a sample is, that the article proposed to be sold is like that which is shown as a parcel of the article; it is intended to save the purchaser the trouble of examining the whole quantity." It is tantamount to a warranty that the goods agree with the sample, and are a true representation of the kind. The bill of parcels is not the only evidence of the contract.

An advertisement of a ship for sale, describes her as copper fastened, and afterwards contains an enumeration of masts, &c., which is headed "inventory." The contract for the sale of the ship refers to the "inventory." This reference has not the effect of entitling the vendee to consider the description in the advertisement as forming part of the contract, though it is shown to be usual to designate the whole advertisement by the name of "inventory." *Freeman v. Baker*, 2 Nev. & Man. 446; 5 Car. & Payne, 475.

(1) *Laing v. Fidgeon*, 6 Taunt. 108, 4 Campb. N. P. C. 169; *Gray v. Cox*, 4 Barn. & Cress. 108; *Holcomb v. Hewson*, 2 Campb. N. P. C. 391; *Bridge v. Wain*, 1 Stark. N. P. C. 104. Actions by the vendee.

NOTE 971.—Every man selling a commodity, warrants it to be of merchantable quality; no purchaser buys except upon that understanding. *Tenterden, C. J.*, in *Obbard v. Betham*, 1 Mood. & Malk. 483; *Jones v. Bright*, 5 Bing. 533; *Osgood v. Lewis*, 5 Gill & John. 495. Warranty that provisions purchased for domestic use are wholesome; warranty of title; and the warranty in executory contracts, or where the purchaser had no opportunity of inspection, that the article contracted for shall be salable as such in the market; these are untinctured by fraud or deceit, and are implied by operation of law. *Dorsey, J.*, in *Osgood v. Lewis, supra*. Implied warranties also exist, where fraud and deceit are of their very essence; without which they do not exist; as in the case where the seller of any article, knowing of its unsoundness, uses any disguise or artifice to conceal, or represents it (whether in the way of expressing opinion or belief, or otherwise), to be exempt from such defect. *Id.* Implied warranties are conclusions or inferences of law, pronounced by the court, upon facts admitted or proved before the jury. *Id.* See *post*, note 985, as to delivery necessary to revest the property, where the contract is rescinded.

* * And see the next preceding note, as to implied warranty of merchantable quality. * *

In *Hyatt v. Boyle* (5 Gill & John. 110), held, that where there is no opportunity of inspection, the seller implied by warrants the quality of the commodity sold, but this applies only to those cases where the examination is impracticable, as where the goods are sold before their arrival or landing.

The court recognize the principle that, in sales of personal property, the seller is not answerable for any defects in the quality or condition of the article sold, without an express warranty or fraud. *Id.*

* * Where a horse is sold with warranty of soundness, the buyer cannot return him and recover back the price paid, if he prove to have been unsound, unless there be an agreement to that effect, or fraud in the vendor. *Cary v. Gruman*, 4 Hill, 625. * *

(There is no implied warranty against latent defects, in the sale of an article on inspection, though it turn out to be a different thing from that for which it is sold. *Welsh v. Carter*, 1 Wend. 185; *Jewett v. Colgate*, 20 John. R. 196; 2 Caines' R. 48. But when a bill of parcels is

for inspecting them.(1) Upon the sale of personal chattels, the law implies a warranty as to the right to sell;(2) and a warranty may sometimes be implied from a custom observed at sales in a particular branch of trade.(3)

Where a warranted article is kept for a considerable time without objection, or part of it is sold again, it is evidence tending to show that it corresponded with the warranty.(4)

Notice.

And if the buyer means to repudiate the contract entirely, he should return the goods, or give notice to take them back as soon as the breach is discovered, and whilst the goods remain in the same state, and their value can be ascertained.(5)

To support an action for not accepting stock, the plaintiff must prove

delivered describing it as a well known article of merchandise, for which it is sold; and it turns out to be a deceptive and worthless preparation, the purchaser may avoid the contract by offering to return it. *Henshaw v. Robbins*, 9 Metcalf, 83. In *Welsh v. Carter*, a similar deception appeared in the thing sold, but the purchaser had carefully examined the article before purchasing.)

(1) *Gardiner v. Gray*, 4 Campb. N. P. C. 144, action by vendee.

(2) 2 Bl. Com. 451; 3 Bl. Com. 451; 3 T. R. 57.

(3) *Jones v. Bowden*, 4 Taunt. 847.

(4) *Prosser v. Hooper*, 1 B. Moore, 106; by Lord Loughborough, *Fielder v. Starkin*, 1 H. Bl. 19.

(5) *Fisher v. Samuda*, 1 Campb. 193; *Curtis v. Hannay*, 3 Esp. N. P. C. 83; *Hunt v. Silk*, 5 East, 452; *Grimaldi v. White*, 4 Esp. N. P. C. 95; *Parker v. Palmer*, 4 Barn. & Ald. 387; 2 Campb. 416; *Rowe v. Osborne*, 1 Stark. N. P. C. 140; *Hopkins v. Appleby*, 1 Stark. N. P. C. 477; 1 Carr. & P. 15, 184, 235; 14 East, 498; 6 Taunt. 416. In *Groning v. Mendham* (1 Stark. N. P. C. 257), Lord Ellenborough held, that without notice, and an offer to return the goods, the defendant would not be allowed to show that they did not answer the description in the contract. Such notice is not absolutely necessary in the case of a warranty. *Vide infra*, p. 392. Nor is the full price always recoverable, though the goods are not returned. *Vide supra*, p. 379, n. 1, 3. As to the necessity of giving the plaintiff notice of this defence before the trial, *vide infra*, "Work and labor."

NOTE 972.—Where a horse is sold upon an implied warranty that he is sound, and at the time of the sale, the vendor knows he is not sound, this is such a fraud in him as will render the contract void at the election of the vendee. If he choose to consider the contract as void, he must return the horse within a reasonable time, and then he can maintain a general indebitatus assumpsit for the purchase money, as money had and received to his use. If he had exchanged horses and given money as boot, he may not only maintain that action for his money, but also trover for the horse he parted with in exchange. Per Parsons, Ch. J., in *Kimball v. Cunningham*, 4 Mass. R. 502. But he ought not to retain any part of the consideration he received upon the sale or exchange; for he shall not compel even the fraudulent seller to an action to recover back the property he has parted with in the exchange. *Id.* This rule applies only to the case of an implied warranty on a fraudulent sale or exchange. *Id.* But the defrauded party is not obliged to consider the fraudulent contract as void. He may, at his option, maintain an action of deceit, or a special assumpsit, and recover damages (if he has sustained any) for the fraud. *Id.* If the warranty be express, his remedy, either on a fraudulent sale or exchange, must be by an action of deceit, or by a special assumpsit. *Id.* (See *Voorhees v. Earl*, 2 Hill R. 288.)

that he was possessed of the stock which is the subject of the action,(1) by the production of the bank books, or an examined copy. And he must show either a tender and refusal of the stock, or that he waited at the bank till the final close of the transfer books, on the day when the stock was to be transferred.(2)

(1) St. 7 Geo. II, c. 8; *Bretton v. Cope*, Peake's N. P. C. 30. It seems that a sale of stock is within the Statute of Frauds. See *Mansell v. Cooke*, Prec. Ch. 553; *Crull v. Dobson*, Cas. tem. King, 41; *Colt v. Netterville*, 2 P. Wms. 307.

(2) *Bordenave v. Gregory*, 5 East, 107; *Heckshen v. Gregory*, 4 East, 607; *Callonet v. Briggs*, 1 Salk. 112. The statutes of 7 Geo. II, c. 8, requires that the stock should be actually transferred to another person. As to the time of making such transfer, see 5 East, 109, *infra*, p. 388.

NOTE 973.—* See Smith's Merc. Law, p. 429, *et seq.*, and the notes, for an epitome of 7 Geo. II, c. 8, the English Stock-Jobbing Act, and various cases upon it. The following case, reported in the Boston Atlas, May 28, 1849, is a valuable illustration of the New York Stock-Jobbing Act. 1 N. Y. Rev. Stat. 706, §§ 6, 7, 8.

"SUPREME JUDICIAL COURT.—*Henry G. Stebbins vs. Louis Leo Wolf*.—This was an action of assumpsit, brought to recover from the defendant the sum of \$1,512.03, paid by the plaintiff as difference on 325 shares of Harlem Railroad stock, alleged to have been bought by him on the defendant's order and account, at 'sixty days, buyer's option,' and not taken by him at maturity. The purchase was made in New York.

"At the trial in the Court of Common Pleas, it appeared from the testimony of several of the witnesses, that the parties from whom the plaintiff alleged that he had purchased 300 of the shares in question, had other contracts for sale and purchase of shares in the same stock, during the sixty days; and the defendant contended that it was incumbent upon the plaintiff to show, in order to take the case out of the Stock-Jobbing Act of New York, that these parties had all the shares necessary to meet all of their contracts of sale in this stock, including the contract in question. The presiding judge ruled this point in favor of the defendant.

"With regard to the remaining twenty-five shares, it appeared that the contract for them matured on Sunday, in which case, by the rules of the board of brokers of New York, where the purchases were alleged to have been made, it would fall due on the Saturday previous. The defendant contended that he was not bound by such rules, not being a member of the board, but that he had, at common law, the whole of Monday in which to meet his engagements, and that, this action having been commenced on that day, was prematurely brought as to these shares. This point was also ruled by the presiding judge in favor of the defendant.

"The jury, under the ruling of the court, found their verdict for the defendant, and the case came before the Supreme Court, upon exceptions to such ruling.

"Wilde, J., delivered the opinion of the court. He said, that as to the first ruling, the first question was, whether this case came within the provisions of the 'Stock-Jobbing Act' of New York; and the second was, upon whom was the burden of proof, to show that the vendors had not sufficient shares of the said stock to meet all their contracts of sale in it. The case, he said, did come within the provisions of that act. The vendor must hold the stock which he has contracted to sell, free from all other obligations. As to the burden of proof, where a contract was in writing to pay a sum of money, and imported a consideration on the face of it, if the defendant would avail himself of a defence of illegality, the burden of proof was on him who set up the defence. But this was a different case. The plaintiff must here show a legal contract. The law requires that the vendor should be the owner of the stock, and this is a part of his contract, and must be proved by him.

"As to the second ruling, he said that if the contract matured on Sunday, the defendant had the whole of the following Monday to perform it in, and the action was brought too soon. The contract was made in New York, and must, therefore, be governed by the rule of law in that state. This rule, in reference to choses in action falling due on Sunday, was not uniform,

Conditions precedent by vendee.

In an action by the vendee for not delivering goods, it is not necessary to aver an actual tender of the price; but it is sufficient to aver a request that the goods might be delivered, and that the plaintiff was ready and willing to pay the price of them; (1) of which averment a demand of the delivery of the goods will be sufficient evidence. (2) If the seller proves that he has tendered his own acceptances in payment for goods, evidence is not admissible on the part of the defendant, but by the terms "by bill,"

but was fully settled in New York. 20 Wend. 20. The exceptions, were, therefore, overruled, and judgment must be entered for the defendant on the verdict." * *

(1) Rawson v. Johnson, 1 East, 203.

NOTE 974.—Where defendant agrees to deliver certain goods at a certain place and time, and the plaintiff agrees to receive and pay for them, the plaintiff must aver a readiness to receive and pay on his part, whether the other party was at the place ready to deliver or not; but an averment that the plaintiff has been at all times ready to receive and pay for them, is sufficient. Porter v. Rose, 12 John. R. 209; Blight v. Ashley, Pet. R. 15. In West v. Emmons (5 John. R. 179), the principle settled was, that where either party has the power to perform, without any act being previously necessary to be done by the other, the party bringing the action must aver performance, or a tender and refusal, which are equivalent to a performance. But where the action is on an agreement to sell and deliver goods at a stipulated price, by a given day, an averment in the declaration that the plaintiff was ready and willing to pay for the goods, and receive and accept the same, but that the defendant refused to deliver, is sufficient, though no actual tender of the money is shown. White v. Demilt, 2 Hall, 405; and Waterhouse v. Skinner, 2 Bos. & Pull. 447. Under such an averment, the plaintiff must prove that he had the money ready to be paid, if the property had been delivered. So, if the payment of the goods was to have been in the notes of third persons. But the payment being to be made in the plaintiff's own notes, which he could execute at any moment, a general averment that he was willing and ready to execute and deliver his own notes, is all that the good sense of the contract requires; and that it was not necessary for him to show that he had actually tendered his notes, formally drawn and executed. White v. Demilt, *supra*, Oakley, J.

Upon the sale of an assorted crate of crockery, which had not been repacked, it was agreed between the vendor and vendee, that the latter should take it home and make an account of what was found broken, and the vendor would pay for all that was broken, at an agreed rate; but *no time* was mentioned when the memorandum of the broken ware was to be delivered to the vendor; held, that the law would have supplied what the parties had omitted. The question of time, in such case, was a question of law, and meant in a reasonable time. Atwood v. Clark, 2 Greenl. R. 249.

(2) Wilks v. Atkinson, 1 Marshall, 412; Sequier v. Hunt, 3 Price, 68, where the demand was made by the plaintiff's foreman.

NOTE 975.—In Porter v. Rose (12 John. R. 209), Chief Justice Spencer says: "When two acts are to be done at the same time; as when one agrees to sell and deliver, and the other agrees to receive and pay, an averment by the purchaser, in case he sues for the non-delivery, of a readiness and willingness to pay, is indispensably necessary; and that, consequently, the readiness and willingness to pay, is matter to be proved on his part; whether the other party was at the place contracted for, or not;" citing 7 T. R. 125; 1 East, 203; 2 Bos. & Pull. 447; 1 Saund. 320, n. 4; 5 John. R. 179; 2 Id. 207; all of which decide that readiness must be averred; but none go so far as to say, that actual proof of readiness must be given at the trial. But in Topping v. Root (5 Cowen, 404), it was held, that the plaintiff must not only aver that he was ready to pay at the time, but he must also prove that he was ready; the court saying: "It is a general rule that all material averments must be proved. And the case of Porter v. Rose is a direct application of the principal case."

being the mode of payment specified in the broker's note, an *approved* bill was intended; and it seems that an *approved* bill is a bill to which there is no reasonable objection, and which cannot be arbitrarily repudiated.(1)

Breach and damages.

In an action for not accepting goods to be paid for, by bill, the plaintiff is entitled to recover interest from the time that the bill if it had been given, would have become due.(2) In an action for not *accepting* stock, the plaintiff is entitled to consider, as the measure of damages, the difference between the price of stock at the time of the breach of contract, and when the stock is ultimately transferred; but if at any intermediate period the stock might have been sold at a higher price than it was ultimately sold for, it shall go in reduction of the damages.(3) In an action for not *replacing* stock, the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial, at the option of the plaintiff.(4)

Where the vendor has exhibited a sample at the time of the contract, with which the goods sold do not correspond, and the written agreement between the parties does not make mention of the sample, the sale is not considered a sale by sample, and the remedy of the vendee is by an action for a deceitful representation.(5) If goods, sold with a warranty, are not conformable to it, the vendee may bring an action for a breach of the warranty, although he retains possession of the goods.(6) The warranty may be proved by a written receipt for the price of goods, stamped as a com-

(1) *Hodgson v. Davies*, 2 Campb. N. P. C. 532.

(2) *Boyce v. Warburton*, 2 Campb. N. P. C. 480.

(3) *Bordenave v. Gregory*, 5 East, 109.

(4) *M'Arthur v. Lord Seaforth*, 2 Taunt. 257; *Shepherd v. Johnson*, 2 East, 211. It seems that the plaintiff is not entitled to the price at any intermediate day.

* * In *Allen v. Dykers et al.* (3 Hill, 593), the plaintiff had borrowed a sum of money, and deposited certificates of stock as collateral security. The defendants had sold the stock, claiming by virtue of a usage in Wall street, New York, the right to sell, and replace it when required. The usage was held to be void, and the defendants bound to pay the plaintiff the highest price which the stock had brought on any day intermediate the deposit and the commencement of the suit. The judgment of the Supreme Court was affirmed by the Court of Errors. S. C., 7 Hill, 498. And see *Vaupell v. Woodward*, 2 Sandf. Ch. R., p. 143. * *

(5) *Meyer v. Everth*, 4 Campb. N. P. C. 55. See *Pickering v. Dawson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 634. But the vendee will not be obliged to receive the goods unless they are merchantable. *Gardiner v. Gray*, 4 Campb. N. P. C. 154, *ante*, p. 385. In an action of deceit, the actual value of the goods may be proved in reduction of damages. 1 Ry. & Mo. 303.

(6) *Fielder v. Starkin*, 1 H. Bl. 17; *Dr. Compton's Case*, cited by Butler, J., in 1 T. R. 136; *Buchanan v. Panshaw*, 2 T. R. 745; *Curtis v. Hannay*, 3 Esp. N. P. C. 83. The warranty cannot be tried in an action for money had and received. *Fortune v. Lingham*, 2 Campb. N. P. C. 416. It seems that a cross action upon the warranty cannot be brought, after the price has been recovered by action. See *Fisher v. Samuda*, 1 Campb. 190; *Curtis v. Hannay*, 3 Esp. N. P. C. 83, *ante*, p. 385. * * See *ante*, note 385. * *

mon receipt without an agreement stamp.(1) Where goods are contracted for, to be delivered at a future day, the damages which the vendee may claim for the default in not delivering the goods, will be the difference between the contract price, and the market price of the goods, at or about the day when they ought to have been delivered.(2) And where goods do

(1) *Skrine v. Elmore*, 2 Campb. N. P. C. 407. Ambiguous expressions may amount to a warranty. *Button v. Coroder*, 7 Taunt. 405.

(2) *Gainsford v. Carroll*, 2 B. & Cr. 624; *Leigh v. Patterson*, 8 Taunt. 540.

NOTE 976.—*Gregory v. M'Dowel*, 8 Wend. 435; *Shepherd v. Hampton*, 3 Wheat. 200; *Blydenburgh v. Welsh*, 1 Bald. R. 331. "It is the price—the market price of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the *value*—the rate at which the thing is sold. To make a *market*, there must be buying and selling, purchase and sale." The purchaser "must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value." "A thing is worth what it will bring." *Hopkinson, J.*, in *Id.* (*Foster v. Rogers*, 27 Ala. 602. See also *Sharon v. Mosher*, 17 Barb. 518.)

The law intends a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter. *Id.* The question of market value is one so peculiarly proper for the decision of a jury, that the court will not oppose themselves to their opinion upon it, unless they are assured that the jury have either mistaken the rule of law, or contradicted the clear purport of the evidence. *Id.* However, if the court have so far overrated the value of the article in question, as to support the objection of excessive damages to their verdict, it is sufficient; and they will set aside the verdict on account of the excessiveness of the damages. *Id.* The jury may take into consideration the lowest and the highest price, as they may deem the refusal of the defendant to perform his contract to be willful or inadvertent; proceeding from an unjust violation of his engagement, or a conscientious, although a mistaken view of the obligation. *Id.* Although the jury may take such matters into consideration in assessing the damages, they are not to go out of the limits of the market price, nor take, as that price, whatever the holders of the article might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought and sold. *Id.* So, in *Miller v. Mariner's Church* (7 Greenl. R. 51), where there exists a fixed standard, by which damages may be calculated, a jury will not be permitted to depart from it; *Weston, J.*, saying: In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct damages, &c.; remote or speculative damages, although susceptible of proof, and deducible from the non-performance are not allowed.

In an early case (1797) in Pennsylvania, it was held, where defendant bound himself to deliver grain, and plaintiff to receive at certain prices, that the damages were to be ascertained by valuing the grain at the current prices, at the time of delivery, with interest from that time. *Meason v. Phillips*, Addison's R. 346; recognized in *Edgar v. Boies*, 11 Serg. & Rawle, 445, as sound law.

In cases of a tortious destruction or conversion of property, the value of property at the time the damages are sustained, is the rule; and the same rule applies, in estimating the value of property where any partial damage is done, in estimating the real damages which the owner has sustained—the market value at that time. *Stone v. Codman*, 15 Pick. 297.

Where a man contracts to deliver any article besides money, and fails to do it, the rule of damages is the value of the article at the time and place of delivery, and the interest of the delay. *Bush v. Canfield*, 2 Conn. R. 485. Here, the plaintiff had advanced part of the purchase money.

In assumpsit on a note payable in specific articles, held, that the measure of damages was the highest market price at any time between the note falling due and the time of trial. *West v. Beach*, 3 Cowen, 82. However, in *Clark v. Pinney* (7 Id. 681), the court reconsidered the former

not answer the description according to which they are sold, the purchaser is entitled to recover as much as the goods would have been worth to him, if the contract had been duly performed; nor is any allegation of special damage, in such case, necessary.(1)

Breach of warranty of a horse.

In an action by the purchaser of a horse for a breach of warranty, an express warranty must be proved; the notion of a high price being tantamount to a warranty has been long exploded.(2) A servant employed to sell a horse may bind his master by a warranty, though it is contrary to his instructions.(3) It has been said that a warranty against defects that are manifest to the eye is inoperative, unless the discernment of such defects is a matter of skill;(4) but such a warranty will be good, if it does not apply to the time of sale, but a subsequent period.(5) A warranty made after the time of sale, is void for want of consideration.(6) As the

case, and affirmed the law laid down in the text, and in *Shepherd v. Hampton* (*supra*). *Dey v. Dox*, 9 Wend. 129. The reason of the rule is, that such damages, added to the contract price which the vendee has not parted with, will enable him to buy the article in the market. See also *Gray v. The President, &c.*, of the Port. Bank (3 Mass. R. 364), where the same principle was adopted in an action for not delivering bank shares, according to contract—plaintiff having made no payment of stock.

A distinction, however, has been taken between the cases above cited and those where money had been advanced by the purchaser; and it is said, that in the latter the above rule does not apply. *Marshall, C. J.*, in *Shepherd v. Hampton*, *supra*; *Clark v. Pinney*, 7 Cowen, 681. In such case, the vendee is not confined, in measuring his damages, to the value of the articles, at the time when they should have been delivered; but may, if he bring his suit in a reasonable time, recover according to the highest price at any time between the period for delivery and the day of trial; especially where the chattels are intended by the vendee for the purpose of trade.

* * See Sedgwick on Damages, and Story on Sales, *passim*. * *

(1) *Bridge v. Wain*, 1 Stark. N. P. C. 504. The defendant is answerable for losses resulting immediately from the breach of warranty. *Borrodale v. Brunton*, 2 B. Moore, 582.

(2) *Parkinson v. Lee*, 2 East, 322; *Baglehole v. Walters*, 3 Campb. N. P. C. 154. On the mode of stating the warranty in the plaintiff's declaration see *Miles v. Steward*, 8 East, 6; *Jones v. Cowley*, 4 Barn. & Cress. 445.

(3) *Alexander v. Gibson*, 2 Campb. N. P. C. 555; by *Bayley, J.*, *Pickering v. Busk*, 15 East, 45. This doctrine is confined to the sale of horses. *Bank of Scotland v. Watson*, 1 Dow, 45. See *Truswell v. Middleton*, 2 Roll. R. 269; *Strode v. Dyson*, 1 Smith, 400; *Fenn v. Harrison*, 6 T. R. 760. An acknowledgment by the servant after the time of sale will not affect the master. *Helyar v. Hawkes*, 5 Esp. N. P. C. 72.

(4) 3 Bl. Comm. 165; *Butterfield v. Burroughs*, 1 Salk. 211; *Liddard v. Kain*, 2 Bing. 184.

(5) 2 Bing. 184. That a future event may be warranted, see by Lord Mansfield, *Eden v. Parkinson*, Doug. 732.

(6) *Finch L.* 189.

NOTE 977.—*Wilmot v. Hurd*, 11 Wend. 584. But "if, upon a treaty about buying certain goods, the seller warrants them, the buyer takes time for a few days, and then gives the seller his price, though the warranty was before the sale, yet this will be well, because the warranty was the ground of the treaty; and this is *warrantando vendit*." *Lysney v. Selby*, Lord Raym. 1120; *Wilmot v. Hurd*, *supra*. But where the whole contract must be presumed to be reduced to writing, parol proof is not admissible of what was said previous. Thus, in *Van Ostrand v. Reed* (1 Wond. R. 424), the vendor, on the sale of a *threshing machine*, made representations

breach of the warranty is the foundation of the action, the fact of the defendant having known that a horse, warranted sound, was unsound at the time of the warranty, need not be averred, and if averred, need not be proved.(1) But the plaintiff must give positive proof of the unsoundness at the time of the warranty; a suspicion of unsoundness is not sufficient.(2)

It was ruled by Chief Justice Eyre, that a horse laboring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not an unsound horse.(3) But Lord Ellenborough has since held that any infirmity, as a temporary lameness, which renders a horse less fit for present use and convenience, though not of a permanent nature, and though it be removed before action brought, amounts in law to an unsoundness.(4) It is clear that a horse will be deemed unsound which is subject to any organic defect, as if he be deprived of a nerve;(5) or if he have a permanent complaint, as some kinds of coughs.(6)

amounting to a warranty; but the sale was consummated by a written transfer without any clause of warranty inserted; in assumpsit on the warranty, held, that the representations made previous to the execution of the written contract, were not admissible.

In an action upon a warranty, in which the defendant warranted the horse to be sound, wind and limb, "*at this time*;" the jury found for the plaintiff, the judge requesting the jury to tell him distinctly, whether, in their judgment, the horse was sound; or, if they believed him to be unsound, whether that unsoundness arose from the splint, of which evidence had been given. In answer to which inquiry, the jury said, "That, although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint; held, that the defendant was liable on his warranty. *Margetson v. Wright*, 8 Bing. 454. Here, the very splint in question was found to cause the lameness. If the lameness had proceeded from a new or a different splint, or from the old splint taking a new direction in its growth, so as to affect a sinew, not having pressed on one before, such lameness would not have been within the warranty, for it would not have constituted a present lameness at the time of the warranty made. *Tindal, J.*, in *Id.* Some splints cause lameness, and others do not, and the consequences of splints cannot be apparent at the time, like the loss of an eye, or any visible blemish or defect, to a common observer. *Id.*

(1) *Williamson v. Allison*, 2 East, 446.

(2) *Eaves v. Dixon*, 2 Taunt. 343. The price paid for the horse cannot be recovered in an action for money had and received, unless the contract be rescinded by mutual consent, or there is power reserved to the buyer of avoiding it. *Power v. Wells*, Cowp. 818; *Weston v. Downes*, 1 Doug. 23; *Towers v. Barret*, 1 T. R. 133; *Payne v. Whale*, 7 East, 274.

(3) *Garment v. Barry*, 2 Esp. N. P. C. 673.

(4) *Elton v. Jordan*, 4 Campb. N. P. C. 281; 1 Stark. N. P. C. 127.

(5) *Best v. Osborne*, 1 Ry. & Mo. 290. Roaring, if it proceeds from an organic defect, or is permanent, *Onslow v. Eames*, 2 Stark. N. P. C. 81; *Bissett v. Colliss*, 2 Camp. N. P. C. 523.

(6) *Shilletoe v. Claridge*, 2 Chitty, 425. It seems crib-biting is not an unsoundness. *Broennburgh v. Haycock*, Holt's N. P. C. 630. It is disputed whether brushes, splints, or goading be an unsoundness. 2 Campb. N. P. C. 524, n.

NOTE 978.—The question of soundness or unsoundness of a horse is peculiarly fit for the consideration of a jury, and the court will not set aside a verdict for the preponderance of contrary evidence. *Lewis v. Peake*, 7 Taunt. 153. A nerved horse is unsound. *Best v. Osborne*, R. & M. 290; 2 Car. & Payne, 74. Some splints cause lameness, others do not; a splint, therefore, is not one of those defects against which a warranty is inoperative. The defendant, therefore, having warranted a horse sound at the time of the contract, held, that he was not liable; the horse becoming lame from the effects visible when he sold him. *Margetson v. Wright*, 8

Notice.

It is not necessary, in general, to give notice to the seller that a horse warranted sound is unsound; but the omission to give such notice will be a strong presumption against the buyer, that the horse, at the time of the sale, had not the defect complained of; and will make the proof on his part more difficult.(1) It will not, however, destroy his right of action, unless there be some special provision in the contract, as if the engagement on the part of the vendor is to take back the horse, if, on trial, he should have certain specified faults.(2)

On the breach of a warranty upon the sale of a horse, if the horse be returned, the plaintiff may recover the whole price he has paid for it;(3)

Bing. 454. So, in *Joliff v. Bendell* (R. & M. 136), according to the opinion of farmers and breeders, as hereditary disease called the "goggles," and incapable of discovery in sheep until its fatal appearance; held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion that "it existed in the constitution of the sheep at that time."

(1) *Fielder v. Starkin*, 1 H. Bl. 19; *Adam v. Richards*, 2 H. Bl. 573. See *Groning v. Mendham*, 1 Stürk. C. 257, *supra*, p. 358.

(2) *Adam v. Richards*, 1 H. Bl. 573; *Buchanan v. Parnshaw*, 2 T. R. 745.

NOTE 979.—Where the contract is not a mere negotiation for a sale, or offer to sell, if the vendee shall like, as in *De Fouclear v. Shottenkirk* (3 John. R. 170), but a contract is entered into for the sale of a chattel, the price paid, and the article delivered to the purchaser, with the right to return it to the vendor within a stipulated time, provided the purchaser does not in any way injure it whilst in his possession, and the property is returned to the vendor, who accepts and repays the price; held, that an action lies against the purchaser for any misrepresentation or *fraudulent concealment* in respect to an injury done to the property while in his possession. *Taylor v. Tillotson*, 16 Wend. 494. It seems that the *title* to the property is vested during the time in which the option to return be exercised, subject to be divested by its return; and that during *such time* it is at the risk of the purchaser, as well in respect to a partial injury as to a total loss or destruction. *Id.* This last position may, perhaps, deserve further consideration. The general principle is, that a conditional sale, or a sale at the election of the vendee, within a stipulated time, if the latter then makes his election to return the property, is considered a sale *ab initio*. Otherwise it is considered only as a bailment. (See *Bristol v. Tracy*, 21 Barb. N. Y. 236.)

(3) NOTE 980.—"It is, however, extremely difficult, indeed, impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether." *Tenterden, J.*, in *Street v. Blay*, 2 Barn. & Adel. 456. The same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. *Id.*, and cases cited. "If the warranty be *express*, his remedy, either on a fraudulent sale or exchange, must be by an action of deceit or by a special assumpsit." *Parsons, Ch. J.*, in *Kimball v. Cunningham*, 4 Mass. R. 502. * * *Cary v. Gruman*, 4 Hill, 625. * *

If the seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of such affirmation, and they afterwards appear to be different, the purchaser may return the goods, and recover back the money in an action for money had and received; or he may have his action without a return of the goods, if he give notice to the seller where they are deposited. *Rutter v. Blake*, 2 Har. & John. 353.

(In executory contracts of sale with warranty, the vendee having the right to return if it does

and if he keeps the horse, he may recover the difference between the value of such horse perfectly sound, and the value of the identical horse at the time of the warranty.(1) Or the buyer may resell the horse, and recover in damages the difference between the price paid to the seller and the value of the horse in its unsound state, as ascertained on the resale.(2) In a case where a horse had been warranted sound, and afterwards was resold by the purchaser with a warranty, upon which latter warranty damages were recovered against the purchaser, on the horse proving unsound, and the purchaser gave notice of the action to the original seller; it was held that he was liable for the costs of the action.(3)

If the horse is tendered to the seller upon the discovery of an unsoundness, and the seller neglect to take him away, the purchaser may recover for his subsequent keep.(4) But it seems that the plaintiff is entitled to recover for the keep of the horse only for such time as would be required to resell the horse to the best advantage.(5)

Defence by vendor and vendee.

The vendor or vendee of goods may show in defence to the action brought against him, that the contract was immoral or illegal.(6) And a party will, in general, be precluded from recovering upon an illegal contract, though he has yielded no farther assistance, than as respects the sale of the goods towards the accomplishment of the illegal purpose.(7) So any fraud practiced on either party at the time of sale, will avoid the contract;(8) as if goods are falsely described "as the property of a gentleman

not conform to the warranty, must do so within a reasonable time; so if goods are ordered, and do not conform to the order. 1 Seld. 86; Howard v. Hoey, 23 Wend. 350; Beers v. Williams, 16 Ill. 69; Willey v. Warden, 1 Wms. (Vt.) 655. So where the contract expressly provides that the vendee may return the goods within a given time, in case it fails to satisfy the warranty or undertaking. Bristol v. Tracy, 21 Barb. 236; Griswold v. Scott, 13 Geo. 210.

(1) NOTE 981.—Armstrong v. Percy, 5 Wend. 535; Blasedale v. Badcock, 1 John. R. 517. Both of these actions were on implied warranties as to the title of a horse sold; held, that the price paid, interest thereon, and the costs recovered against the purchaser or his vendee, were the measure of damages; the costs of the defence were not recoverable.

* * A warranty of title is not implied, unless the seller have possession of the thing sold when the sale is made. McCoy v. Archer, 3 Barb. Super. C. R. 323. * *

(2) Curtis v. Hannay, 3 Esp. N. P. C. 83; Caswell v. Coare, 1 Taunt. 566; Fielder v. Starkin, 1 H. Bl. 19; Dr. Compton's Case, cited by Buller, J., 1 T. R. 136; Buchanan v. Parnshaw, 2 T. R. 745.

(3) Lewis v. Peat, 7 Taunt. 153; 2 Marsh. 431. In the case of Briggs v. Crick (5 Esp. C. 99), it was held, that in the action by the second purchaser, the original seller was a competent witness for the defendant, to prove the horse sound when sold by himself.

(4) Caswell v. Coare, 2 Campb. 82; 1 Taunt. 566. So, where the vendor rescinds the contract. King v. Price, 2 Chitty, 416.

(5) M'Kenzie v. Hancock, 1 Ry. & Mo. 436, by Littledale, J.

(6) Wilson v. Londonsack, 3 Maule & Selw. 117; Law v. Hodgson, 11 East, 300; Bowry v. Bennet, 1 Campb. C. 348. A variety of other cases have occurred, in which the courts have refused to enforce contracts on the ground that the object of them was immoral or illegal.

(7) Langton v. Hughes, 1 Maule & Selw. 593.

(8) Vide ante, p. 360.

NOTE 982.—No contract can arise out of a fraud; and an action brought upon a supposed contract, which is shown to have arisen from fraud, may be resisted. At the time of discovering the fraud, however, he should elect to repudiate the whole transaction. Thus, if a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and, after discovering the fraud, continue to deal with the article as his own, he cannot recover back the money from the seller. *Campbell v. Fleming*, 1 Adol. & El. 40. The right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud. *Id.*

To avoid a contract on the ground of fraud in the suppression of the truth, or the suggestion of falsehood, there must be a concealment of something which the purchaser is bound to communicate to the seller, or some misrepresentation on a matter material to the contract, which misleads and deceives him, or is calculated to do so. But a purchaser may avail himself of information which affects the price of the article, though it is not known to the seller; though the latter inquires if there is any news which affects the price, the purchaser is not bound to answer, and the contract is binding, though there was news then in the place which raised the price thirty or fifty per cent. *Blydenburgh v. Welsh*, 1 Baldwin's R. 331; 2 Wheat. 195. Deceptive assurances and false representations fraudulently made, are essential to the support of an indictment or civil action for a fraud committed in respect to a purchase; and such proof is equally necessary to the support of an action of replevin by the vendor, who claims the right of rescinding the sale he has made, on the ground of fraud in the vendee. *Mellen, Ch. J., in Cross v. Peters*, 1 Greenl. R. 376. In a policy of insurance, *concealment* is nearly allied to *misrepresentation*; if the fact be material, it avoids the policy; but is not on the *ground of fraud* in the concealment that the contract is void; because, if the concealment be the effect of accident or mistake, negligence or inadvertence, it is equally fatal to the policy as if it were intentional and fraudulent. *Id.*

Fraud in the purchase, will not vitiate the sale; but proof of the fraud must be seasonably made; for if a third person obtain a lien upon the goods, either by purchase or attachments on the confidence of the possession of the goods by the vendor or debtor *bona fide*, and for a valuable consideration, then the original vendor, though defrauded, cannot avoid the sale. *Gilbert v. Hudson*, 4 Greenl. R. 345. The debt, to secure which the attachment is made, must have been contracted subsequent to the fraudulent purchase, and upon the credit of the goods. *Id.*

In *Andrew v. Dietrich* (14 Wend. 31), it was held, that where there is a manual delivery of goods to the purchaser, the point for the jury should be, whether the vendor in parting with the possession intended to transfer his interest in the property.

A conspiracy among brokers for one only to bid at an auction, with a view to a common profit, is a fraud. *Levi v. Levi*, 6 Car. & Payne, 239. Owners of goods at an auction have a right to expect at an auction that there will be an open competition from the public; and if a knot of men go to an auction upon an agreement among themselves that all articles bought by any one of them shall be sold again and the profit divided among them, they are guilty of an indictable offence, and may be tried for a conspiracy. *Id.*

If goods are obtained by fraud, so that they may be recovered in trover, yet the seller cannot maintain assumpsit for the price until after the time of credit has expired. 9 Barn. & Cress. 59; *Strutt v. Smith*, 1 C. M. R. 312.

"No right of action can spring out of an illegal contract." *Ashurst, J., in 8 T. R. 89.* Thus, in respect to a contract for lottery tickets against law (*Hunt v. Knickerbocker*, 5 John. R. 327); for the sale of bricks under the statute measure (*Law v. Hodson*, 11 East, 300); for the price of shingles of less size than was required by the statute (*Wheeler v. Russell*, 17 Mass. R. 258); in respect to bank notes whose circulation is prohibited (*Springfield Bank v. Merrick*, 14 Mass. R. 329); and so also, in respect to the voyage of a ship engaged in the slave trade (*Fales v. Mayberry*, 2 Gall. 560); also in respect to the insurance of a voyage which is prohibited (*Russell v. De Grand*, 15 Mass. R. 39). If a druggist sell Spanish juice, isinglass, ginger and carotics, to be used in the manufacture of beer or ale, with knowledge of the unlawful intent, he cannot recover the price; nor, indeed, have any remedy at law against his partner in the fraud. *Langton v. Haynes*, 1 Maule & Selw. 563.

* * See *Smith's Merc. Law*, p. 427, *et seq.* and notes. And see *Hooker v. Vandewater*, 4 Denio, 349, where a contract to keep up the rates of canal transportation, and share in the profits, was held void, amounting to a conspiracy, injurious to trade, within 2 N. Y. R. S. 691, § 8. * *

deceased.”(1) Or the seller knowingly suffers a person to contract under a deception, as to a point which he is aware that the purchaser thinks material to influence his judgment.(2) Where it is expressed in a contract that goods are sold “with all faults,” it seems that the seller may enforce it, although he knew of latent defects in the commodity at the time of the sale.(3) But if he uses any artifice to conceal the defects, or makes any misrepresentation upon the subject, he will be precluded from recovering on the contract.(4) And a stipulation that a chattel shall be taken “with all faults,” is to be limited to mean such faults as it may have consistently with its being the thing described.(5) The purchaser may prove in his defence, that there has been a breach of warranty(6) or that the contract

(1) By Lord Mansfield, in *Bidwell v. Christie*, 1 Cowp. 395.

(2) *Hill v. Gray*, 1 Stark. N. P. C. 434, where the fraud was committed by the agent of the plaintiff; as to which point, see *Doe v. Martin*, 4 T. R. 39.

(3) *Baglehole v. Walters*, 3 Campb. N. P. C. 154; *Pickering v. Dawson*, 4 Taunt. 779. *Mellish v. Motteaux*, Peake's N. P. C. 156, is contrary. See *Parkinson v. Lee*, 2 East, 314.

(4) *Baglehole v. Walters*, 3 Campb. N. P. C. 154; *Schneider v. Heath*, 3 Campb. N. P. C. 506; *Pickering v. Dawson*, 4 Taunt. 779; *Jones v. Bowden*, 4 Taunt. 847; *Arnot v. Biscoe*, 1 Ves. 95.

(5) *Shepherd v. Kain*, 5 Barn. & Ald. 240.

(6) *Vide supra*, 379.

NOTE 983.—Where goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action for breach of the warranty; or if an action be brought against him by the vendor for the price, to prove the breach of warranty, either in diminution of damages, or in answer to the action, if the goods be of no value. *Poulton v. Lattimore*, 9 Barn. & Cress. 259; 4 Moore & Ryl. 208.* In *Street v. Blay* (2 Barn. & Adol. 456), it was held, that the purchaser may give a breach of warranty in evidence in reduction of damages, as he has a right of action against the plaintiff for the breach of warranty. *Semble*, that the purchaser of a *specific chattel* under warranty, having once accepted, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud or express agreement authorizing the return or consent of the vendor. *There*, the purchaser sold again the horse which had been warranted to him sound; then repurchased; held, that he could not, on discovering that the horse was unsound when he first received him, resist an action for the price; though he was entitled to give the breach of warranty in reduction of damages. However, it has been repeatedly decided in New York, that the defendant may set up a breach of warranty made upon the sale of articles for which a promissory note was given, either in bar or in mitigation of damages to be recovered on such note. *M'Allister v. Reah*, 4 Wend. 489; S. C., 8 Id. 109; *Judd v. Dennison*, 10 Id. 512. In *King v. Paddock* (18 John. 141), Chief Justice Spencer says: The defendant may contest the price in all cases, though he has omitted to return the article sold, excepting the cases of conditional sales, where the thing about to be sold is taken on trial, with liberty to the vendee to return it, if he dislikes it, in a limited period.

It is said by Washington, J., in delivering the judgment of the court, in *Thornton v. Wynn* (12 Wheat. 183), “If the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action on the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time.” However, that was an action upon a promissory note, and the opinion expressed by the court seems to have been extrajudicial, as it was unnecessary to the decision of the cause.

“If the warranty be *express*, the purchaser's remedy, either on a fraudulent sale or exchange, must be by an action of deceit, or by a special assumpsit.” *Kimball v. Cunningham*, 4 Mass. R. 502. See, also, *Conner v. Henderson*, 15 Id. 319.

has been rescinded ;(1) or he may prove payment, as by a bill of exchange, if it has not been dishonored.(2) Or the purchaser may show that the

"The plaintiff may claim to recover the price stipulated in the contract made between the parties, but then he must show the warranty complied with. In such case, it is competent for the defendant to negative that fact. *Poulton v. Lattimore*, 9 Barn. & Cress. 259. The plaintiff, instead of relying on the contract, may claim to recover on a *quantum valebat*, so much as the seed was worth, and prove by parol the actual value of the seed. In answer to that case, it would be competent to the defendant to show by the contract, that he purchased the seed as growing seed, to use for the purpose of sowing; and that it not being good growing seed, was of little or no value to him. *Id.* There, by a contract for the sale of cinq. foin seed, the vendor warranted it to be good new growing seed. Soon after the sale, the buyer was told that it did not correspond with the warranty; and he afterwards sowed part, and sold the residue; held, that in answer to an action by the seller to recover the price of the seed, it was competent to the buyer to show that it did not correspond with the warranty. *Id.* Defendant may show the article to be destitute of value. *Burton v. Stewart*, 3 Wend. 236.

Where the contract is executory only when the chattel is received, as where goods are ordered of a manufacturer, and he contracts to supply them of a certain quality, or fit for a certain purpose, the vendee may rescind the contract if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of an owner over them, as by selling them. *Street v. Blay*, 2 Barn. & Adol. 456.

A. sold to B. for £95, two pictures, representing them as "a couple of Pousons;" they were, in fact, not originals, but very excellent copies; B. did not offer to return them; held, that if the jury thought that B. believed, from the representation of A. that they were originals, he was not bound to pay the price agreed upon; but that as he kept them, he was liable to pay whatever sum the jury might consider to be their value. *Lomi v. Tucker*, 4 Car. & Payne, 15.

A. sold a picture to B., as a Rembrandt; there was contradictory evidence on an accommodation bill given for the price, whether there was a warranty or only a representation. The picture was kept; held, that if the jury thought there was a warranty, and that it was broken, then they should find a verdict for that sum which they considered to be the actual value of the picture. *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343.

* * As to the distinction between executory and executed contracts, see *ante*, notes 969 and 970.

(1) *Gomaery v. Bond*, 3 Maule & Selw. 378; *Salte v. Field*, 5 T. R. 211. Provided the right of third parties have not intervened. *Smith v. Field*, 5 Id. 402.

(2) *Clarke v. Noel*, 3 Campb. 411; *Taylor v. Brigg*, 1 Mo. & M. 28; *Barden v. Halton*, 4 Bing. 454; *Swinyard v. Bowes*, 5 Maule & Selw. 62; *Hebden v. Hartsink*, 4 Esp. C. 46. It seems that the purchaser cannot be sued if the bill is lost, *ante*, p. 157. If goods are paid by a bill, "without recourse to the buyer," the remedy is in tort. *Read v. Hutchinson*, 3 Campb. N. P. C. 352.

NOTE 984.—When it appears that a negotiable note has been given for a prior debt, the court will not suffer the plaintiff to recover on the original consideration, unless he shows the note to be lost, or produces it to be canceled at the trial. *Holmes v. DeCamp*, 1 John. 35; *Burdick v. Green*, 15 Id. 247. Therefore, the mere giving a negotiable note, or its indorsement to a third person, does not distinguish the original consideration; and cannot be plead in bar. So, the note of the vendee of goods, given at the time of sale, is no payment, unless there be an express agreement to receive it as such. *Porter v. Talcott*, 1 Cowen, 359. But the acceptance of the note of a third person on the sale of a chattel, for the consideration money, is payment. *Raymond v. Merchant*, 3 Cowen, 147. It will be otherwise, if there be fraud. *Pierce v. Drake*, 15 John. R. 475; *Wilson v. Force*, 6 Id. 110; *Arnold v. Crane*, 8 Id. 79. Whether a note was received in payment, is for the jury to determine. *Johnson v. Weed*, 9 Id. 319. Counterfeit bank notes received in payment for goods sold, are no payment (*Markle v. Hatfield*, 2 Id. 455), although the holder paid them *bona fide*. *Id.*

A purchaser of goods accepted a bill for the price, which the vendor indorsed over; and the

goods have been lost in the hands of the carrier by whom they were sent, and that the seller has neglected to enter the goods with the carrier according to their value.(1)

It has been considered, in the first volume, in what cases the testimony of agents and servants is admissible, to prove matters concerning contracts which relate to the sale of goods. Where an action was brought for the value of goods furnished on the defendant's credit, to a person who was produced as a witness by the plaintiff, it was held by Lord Ellenborough that he was incompetent, without a release; for he may have misled the

indorsee recovered judgment on the bill against the purchaser, but did not take out execution; afterwards, the vendor took up the bill and received a mortgage from the purchaser from which, however, there were no proceeds; held, that the vendor was not paid for the goods. *Tarleton v. Allhusen*, 2 Adol. & Ell. 32. There is now no doubt that judgment without satisfaction is no payment; the court, therefore, refused to grant a rule to show cause.

P. gave G. an order to permit R. to have goods on credit, and he (P.) would be accountable. R. got goods of G. and gave him his note for them; and in an action by G. against P. for the price, held, that G. was bound to prove that the note given by him had never been negotiated or paid. *Goodman v. Parish*, 2 M'Cord, 259. The acceptance of negotiable paper is *prima facie* evidence of satisfaction. *Pintard v. Tackington*, 10 John. R. 105. The note is but evidence under the general issue, which may be answered by producing and canceling it on the trial. *Hughes v. Wheeler*, 8 Cowen, 77.

By the law of Massachusetts and Maine, the taking of a negotiable security for a debt, amounts to an absolute, and not merely to a conditional payment; subject, however, to the limitation, that the taking of such security is only *prima facie* evidence of being an absolute payment, but the fact is open to explanation, and is not conclusive where the other circumstances qualify or repel the presumption. *Wallace v. Agry*, 4 Mason, 336—Story. The owners of a ship are liable for a bill drawn by the master, in his own name, for a cargo purchased by their order; and where such bill is payable in so many days after sight, the vendee may sell it in the market where he resides, or send it to any other place for sale. He is not bound to send it directly to the country on which it is drawn—the only limitation is, that he shall have it presented within a reasonable time, be the conveyance direct or indirect. *Id.* What is reasonable time, must be governed by the circumstances of the case, always consulting the usage of trade. *Id.*

A vendor who takes in payment a promissory note, and negotiates it, loses his lien, which is not revived by the dishonor of the note which is outstanding in the hands of an indorsee. *Bunney v. Poyntz*, 4 Barn. & Adol. 568.

A. sells to B. rum, lying in the warehouse of C. at L., and delivers to B. an invoice, with marks and numbers. B. accepts the draft of A. for the price, and sells to D. and obtains payment from D. The usage at L. is for the vendor to deliver to the vendee delivery orders, addressed to the warehouseman, who accepts such orders. No delivery order is given by A. to B., except for a small portion of the goods which B. receives. By the permission of B., without the knowledge of A., D. gauges and coopers the casks in the warehouse, and marks them with his initials. Upon B.'s acceptance being dishonored, A. has a lien upon the rum for the price. *Dixon v. Yates*, 2 Nev. & M. 177; 5 Barn. & Adol. 313. *Littledale* said: "There are two general principles of law which must decide the present case; the one is, that so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them; and if they remain in the possession of his agent—*i. e.*, a warehouseman or carrier—he may stop them. The other is, that a second vendee of a chattel cannot stand in a better situation than his vendor."

* * As to when a note or bill amounts to a payment, when received on a sale of goods, see the cases cited *ante*, note 705. * *

(1) *Clarke v. Hutchins*, 14 East, 475.

plaintiff by misrepresenting the conduct of the defendant, and, if that were detected, would still be liable to the plaintiff.(1) A person who is proved to be a partner with the defendant, cannot be called by the defendant to prove, that goods, for the price of which the action is brought, were furnished upon his own credit; as he would be liable to pay a share of the costs to be recovered by the plaintiff;(2) and it seems that he would not be rendered competent by a release.(3) A copartner of the defendant, or the executor of a deceased partner, are competent witnesses for the plaintiff.(4) And a person who is suggested to be a partner with the plaintiff, and is not joined in the action, is competent to negative the partnership.(5)

(1) *Wright v. Wardle*, 2 Campb. N. P. C. 200.

NOTE 985.—When a sale or exchange of articles is legally rescinded on account of fraud in one of the parties, the whole thereby becomes nullified *ad initio*; and, of course, the property sold or exchanged is considered as having never been changed, in respect to the parties themselves or their creditors. *Quincy v. Tilton*, 5 Greenl. 177—Mellen. And if a re-sale or re-exchange is made, whatever was necessary to constitute the original sale or exchange, a legal transfer of the property from one of the parties to the other is equally necessary to constitute a re-sale or re-exchange. *Id.* It must be perfected by a re-delivery; otherwise it will not avail in respect to strangers to the transaction.

If a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit (and thereby in reality becomes the owner), no property in the goods vests in his correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. *The St. Jose Indiano*, 1 Wheat. R. 208.

An agreement between the vendor and vendee of a chattel, that the former may resume the possession if the price be not paid, is a personal contract, not binding on an alienee, or the personal representative of the vendee. *Howes v. Ball*, 1 M. & Ry. 288; 7 Barn. & Cress. 481.

(2) *Goodacre v. Breame*, Peake's N. P. 232; *Evans v. Yeatherd*, 2 Bing. 133.

Robertson v. Mills, 2 Gill & John. 98.

Defendants, A. and B., were sued on a bill of exchange accepted by them while in partnership. B. pleaded bankruptcy and certificate, and the plaintiff entered a *nol. pros.* as to him. Having released his surplus effects, held, he was a competent witness for A. *Affalo v. Fourdrinier*, 6 Bing. 306.

In an action of replevin against a broker, a person who, at the time of the distress, was in partnership with him, but who, at the time of the trial, had ceased to be his partner, is a competent witness for him. *Duncan v. Meikleham*, 3 Car. & Payne, 172.

(3) *Simons v. Smith*, 1 Ry. & Mo. 29. See *Young v. Bairner*, 1 Esp. N. P. C. 103; *Cheyne v. Koops*, 4 Esp. N. P. C. 110. The partnership should be proved, and not barely suggested. *Birt v. Hood*, 1 Esp. N. P. C. 20.

(4) *Blacket v. Weir*, 5 Barn. & Cress. 385; *Robinson v. Hudson*, 4 Maule & Selw. 475; *Burton v. Burchall*, Peake's L. E. 167.

In an action brought to charge A. as a partner of a trading company, a witness, who, by other evidence than his own, appeared to be a shareholder in the company, was held to be competent to prove that A. was a partner. *Hall v. Curson*, 9 Barn. & Cress. 646.

(5) *Parsons v. Crosby*, 5 Esp. N. P. C. 199.

CHAPTER IX.

OF THE EVIDENCE IN THE ACTION OF ASSUMPSIT UPON THE COMMON COUNTS—IMPLIED CONTRACTS.

(It is to be borne in mind that the new practice and rules of pleading have not created any new cause of action, and have not abolished or taken away any that existed at common law. The change in the form of stating the cause of action or defence affects only the procedure, the mode of presenting the facts constituting the cause of action, or the defence; while the general principles of law and evidence remain unchanged, and equally applicable on the trial of the issue presented.

There are many causes of action which arise upon general or implied contracts; as where one man buys goods of another without any special agreement in regard to the price, and the law implies a promise on the part of the purchaser to pay for them what they were reasonably worth; or where one person does work for and at the request of another without any particular agreement for his wages, and the law implies a promise made by the employer to pay for them what the services were reasonably worth; or where money belonging to one man comes into the hands of another, and the law implies a promise by the receiver to pay it over to the owner; or where one man pays money for another as his surety, or lends him money, or is found indebted to him on an accounting, the law implies an agreement by the person indebted to pay the debt. The law considers and treats the obligation of the debtor as a contract, which could be enforced under the old form of pleading, in the action of assumpsit, on the presumption that the defendant being indebted, *promised* to pay. Under the present system of practice, it is sufficient to state the facts without alleging any direct *promise* to pay, which it was never necessary to prove in cases where the law implies a promise.

Combining in the declaration several general statements of causes of action, which were called the common counts, each count stating a distinct cause of action, the plaintiff could under the old practice recover on proving one of them, or showing a state of facts entitling him to a verdict. Keeping in view the difference between the old and the new forms of pleading, it will be seen presently that the rules of evidence remain unchanged.)

The general rule as to the power of resorting to the common counts, in cases where there has been a special agreement, is thus laid down by Chief Justice Mansfield, in the case of *Cook v. Munstone*.(1) "Where a party

(1) 1 N. R. 355; Bull. N. P. 139.

declares on a special contract seeking to recover thereon, but fails altogether in his right so to do, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labor done." But, if the special contract has not been rescinded, and still remains open and inoperative, the plaintiff cannot recover on the common counts, if he fail in the proof of the special contract.(1) And if the plaintiff deviate from a specification contained in his agreement, without the defendant's consent, he cannot resort to the common counts.(2) But where there has been a deviation from the original contract with the acquiescence of the defendant, or where the defendant has voluntarily derived some benefit under the contract (though it has not been strictly performed), the plaintiff may recover upon these counts.(3) Where the terms of a contract have been so entirely abandoned by the parties, as to make it impossible to ascertain how it can be applied to the plaintiff's demand, the case may be considered the same as if no special contract existed.(4) But where the contract has been partially carried into effect, the plaintiff may recover, under a special count, as far as the contract has been acted upon between the parties; and for what has not been done under the contract, he must recover upon the *quantum meruit* counts.(5) In general, wherever the con-

(1) *Hulle v. Heightman*, 2 East, 145; *Weston v. Downs*, Doug. 23.

NOTE 986.—*Tuttle v. Mayo*, 7 John. R. 123; *Russel v. South Britain Society*, 9 Conn. R. 508; *Mead v. Degolyer*, 16 Wend. 632; *Clarke v. Smith*, 14 John. R. 327. It is proper to observe, that, in the two last cases cited, it appeared that the contract was in writing, which was not produced; and in the former, *under seal*, and not *rescinded*. "There being an existing agreement *under seal*, bearing reference to the subject of the contract in question, it is impossible, from anything done under that agreement, to infer or imply the existence of a contract different from the agreement itself." *Lawes on Assump.* 12. See *Young v. Preston*, 4 Cranch, 239; *Wood v. Edwards*, 19 John. R. 205.

An action at law for damages will not lie upon a contract within the Statute of Frauds relating to an interest in lands, although there has been a part performance; since such action is upon the contract itself, and, to sustain it, would be indirectly to give efficacy to a contract which the statute says shall have none. *Kidder v. Hunt*, 1 Pick. 328.

Where defendant contracted to make a bridge of proper materials, and in a workmanlike manner, and executed the work so unfaithfully that the damages for the non-performance exceeded the stipulated price of the work; held, that he was not entitled to recover. *Taft v. The Inhabitants of Montague*, 14 Mass. R. 282.

Plaintiff may recover on the general counts, though the matters proved might have been given in evidence on the special count and pleas to it; he having entered a *nolle prosequi* on the special count, and joined issue on the others. *Hayward v. Kain*, 1 Mood & Malk. 311. It was objected that he cannot recover on the other counts without showing a cause of action, distinct from that in the special count; for all the evidence opened applied to the issues on that count. Lord Tenterden, Ch. J., said, "I do not feel the weight of the objection." *Id.*

(2) *Ellis v. Hamlen*, 3 Taunt. 52.

(3) *Burn v. Miller*, 4 Taunt. 745. See *Streeter v. Sumner*, 19 N. H. 516.

(4) By Lord Kenyon, *Pepper v. Burland*, Peake's N. P. C. 139.

(5) *Pepper v. Burland*, Peake's N. P. C. 141; *Robson v. Godfrey*, 1 Stark. N. P. C. 275; *Dunn v. Body*, 1 Stark. N. P. C. 220; *White v. Oliver*, 36 Maine, 92.

tract has been executed on the part of the plaintiff, and the duty of the defendant, arising upon the execution of the contract, is simply to pay money (the time for payment, when specially provided for, having elapsed), it is competent and usual for the plaintiff to declare upon an *indebitatus* assumpsit. And, in such cases, the plaintiff recovers upon the implied assumpsit resulting from the execution of the contract in the defendant's favor.(1)

Action for goods sold and delivered.

The plaintiff may recover as much as he proves to be due to him, within the sum specified in the declaration, upon the count for goods sold, although there has been no specific contract between the parties. There must be some evidence, however, in this case, from which a contract may be presumed, and proof also of the delivery of the goods.(2) In general,

(1) *Streeter v. Horlock*, 1 Bing. 37; Bull. N. P. 139. It seems that in such cases a count upon an executory consideration is unnecessary. By *Holroyd, J., Studdy v. Sanders*, 5 B. & C. 638, the entire contract must have been performed. *Neal v. Viney*, 1 Campb. N. P. C. 471.

NOTE 987.—*Felton v. Dickinson*, 10 Mass. R. 287; *The Trustees of Far. Academy v. Allen*, 14 Id. 172.

But an allegation of an executory consideration, is not supported by evidence of an *executed* consideration. 1 Stark. Ev. 405. An averment, by way of consideration, that A. had paid a sum of money, is not supported by evidence of a consideration that A. would pay that money. *Amory v. Merryweather*, 2 Barn. & Cressw. 573.

In declaring in assumpsit, a promise should always be specifically alleged whether the contract or promise intended to be given in evidence be express or implied; for the law is not supposed to make the contract, but supposes it to have been made by the defendant; and the facts from which the law supposes that the party made the promise, are but evidence of that promise, and the declaration should state facts, and not merely evidence of them. *Lawes on Assump.* 87. See *Candler v. Rossiter*, 10 Wend. 487.

Assumpsit lies to recover so much as has been expended by the plaintiff in money or labor, in part performance of a contract relating to interest in land, which is void as within the Statute of Frauds. *Kidder v. Hunt*, 1 Pick. 328.

Stating a promise to pay a sum of money, without saying to whom the promise was made, is insufficient. *Price v. Easton*, 1 Nev. & Man. 303. But in the case of a bill of exchange, a promise similarly alleged was held sufficient. *Baucks v. Camp*, 9 Bing. 604. The necessary intentment is, that the promise was made to the plaintiff.

* * See the cases cited in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, pp. 8-32, where the point stated in the text is amply discussed. * * (See as to recovery for services, *Lewis v. Trickey*, 20 Barb. 387.)

2) NOTE 988.—How far the plaintiff's books are evidence of goods sold and delivered. *Case v. Potter*, 8 John. R. 211; *Vosburgh v. Thayer*, 12 Id. 461; *Baisch v. Hoff*, 1 Yeates' R. 198; *Ducoign v. Schreppel*, Id. 347; 4 Id. 341; 2 South R. 809.

In assumpsit, a merchant's clerk testified that the articles contained in the schedule annexed to his deposition were sold by plaintiff to defendant, and swearing also to the delivery of the goods; but as he could not even for a week recollect each article enumerated, he accounted for his recollection by saying that they were entered in the plaintiff's day-book, partly by himself and partly by another clerk, who was since dead, and that he had referred to this day-book; it was held, that this was sufficient evidence of the sale and delivery of the goods. *M'Coul v. Le-kamp*, 2 Wheat. 111. See *vide* *Vance v. Ferris*, 1 Yeates' R. 321.

A clerk to a tradesman entered the transactions in trade, as they occurred, into a waste-book,

proof that the goods have been delivered to the defendant, and that he has used them, is *prima facie* evidence of a contract.(1) A master will be liable for a contract made by his servant, if he has authorized him, in any instance, to buy of the plaintiff upon credit;(2) and a general agency to order goods on credit, may be inferred from repeated recognized instances in which the agent has ordered goods on credit of other tradesmen.(3)

from his own knowledge; and the tradesman copied the entries, day by day, into a ledger, in the presence of the clerk, who checked them as they were copied; held, that the clerk, in an action brought by the tradesman for goods sold and delivered, might use the entries in the ledger to refresh his memory, although the waste-book was not produced nor its absence accounted for, the entries in the ledger being in the nature of entries made by the clerk himself.

In *Poultney v. Ross* (1 Dall. 239), Shippen, J., says: "Though in England the shop-book of a tradesman is not evidence of a debt, without the oath of a clerk who made the entry, yet here, from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book proved by the oath of the principal, has always been admitted, and such book is *prima facie* evidence of the price as well as of the sale and delivery of goods." But the book is not evidence of any collateral matter, as that another person promised to pay for them. 1 Dall. 238, 239. But in *Murphy v. Cress* (2 Whar. R. 33), it was held, that such book was not evidence of the delivery of goods to be sold on commission; the fact that the plaintiff had delivered goods to defendant to sell on commission, must be proved by other evidence than the plaintiff's own books.

An order to deliver the goods retained in the possession of the drawee is not of itself sufficient evidence of the delivery by him, to charge the drawer. *Blount, Ex'r of Ogden v. Starkey's Adm'rs*, 1 Tayl. 110; S. C., 2 Hayw. 75.

The clerk of the plaintiff swore that the account current produced by him against the defendant, was a just and true account current, taken from the books of the plaintiff's intestate; that the goods in question were charged in the day-book of the intestate by the witness and V., who was dead; and the witness delivered them; that before giving his testimony, he had referred to the original entries; held, sufficient proof to sustain the action. *M'Coul v. Lekamp's Adm'rs*, 2 Wheat. 111.

* * See Volumes I and II of the text, and the notes, and also the cases cited in the notes to *Price v. Earl of Torrington*, 1 Smith's Lead. Cas. 139, and 1 Taylor on Ev., pp. 465-469, as to the admissibility of shopmen's books, &c. * *

(1) *Bennett v. Henderson*, 2 Stark. N. P. C. 550.

(2) 1 Show. 95; by Lord Holt, *Hazard v. Treadwell*, 1 Str. 506; *Boulton v. Hellersden*, 1 Lord Ray. 224; *Rusby v. Scarlett*, 5 Esp. N. P. C. 76; *Pearce v. Rogers*, 3 Esp. N. P. C. 214; *Maunder v. Conyers*, 2 Stark. N. P. C. 281; *Stubbing v. Heintz*, Peake's N. P. C. 66.

In an action for bread supplied from week to week; and the baker was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid him; held, that the plaintiff was entitled to recover, as the defendant did not prove that he had given the housekeeper money to make the payments with. *Miller v. Hamilton*, 5 Car. & Payne, 433.

(3) *Gilman v. Robinson*, 1 Ry. & Mo. 226; *Todd v. Robinson*, Id. 217.

NOTE 989.—*Emerson v. The Providence Hat Manuf. Co.*, 12 Mass. R. 237; *Bryan v. Jackson*, 4 Conn. R. 288; *Plant v. M'Ewen*, Id. 544.

The ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with the full knowledge of all the material facts. *Story, J.*, in 9 Peters' R. 607. See also *Fenn v. Harrison*, 3 T. R. 760, and *Peters v. Ballister*, 3 Pick. 49, where the authority of factors was much considered.

The cases of ratification are, where the agent has gone beyond or beside his authority, for the benefit, as he supposes, of his principal; and gives him immediate notice. In such case, silence is construed acquiescence and ratification. But a delay of intelligence until an election to ap-

Where goods are ordered by the wife of the defendant, cohabitation is presumptive evidence of the husband's assent.(1) It would seem, that where the articles furnished are not necessities suited to the situation in life of the defendant's wife, mere proof of cohabitation will not be sufficient to make the husband liable; and the presumption arising from this circumstance may clearly be rebutted by evidence tending to negative the husband's assent,(2) or which shows that the credit was given to the wife.(3) Where the wife is living separate from her husband, it seems to be necessary that evidence should be given by the plaintiff of the circumstances of the separation, to show that they were such as to authorize her to bind her husband, even for necessities suitable to her degree in life.(4)

prove or disapprove would be attended with no advantage to the principal, defeats the right to construe silence into ratification. *Parker, Ch. J.*, in 17 Mass. R. 103. See also *Bredin v. Du Barry*, 14 Serg. & Rawle, 27. A principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own.

* * See Paley on Agency (Dunlap's ed.) for a full collection of the cases as to the adoption and ratification of the acts of agents. * *

(1) By *Bailey, J.* *Montague v. Benedict*, 3 B. & C. 634; *Etherington v. Parrott*, *Ld. Ray.* 1006; *Bac. Ab. Baron and Feme, H*; *Selw. N. P. Baron and Feme*; *Carr v. King*, 12 Mod. 372. So where a woman passes as the defendant's wife. *Watson v. Thraikeld*, 2 Esp. N. P. C. 637; *Robinson v. Nahon*, 1 Campb. N. P. C. 245; *Munro v. De Chemant*, 4 Campb. N. P. C. 215.

NOTE 990.—(*Mitchell v. Treanor*, 11 Geo. 324.)

Dennys v. Sargent, 6 Car. & Payne, 419; *Chaix v. Villejoin*, 7 Lou. R. 276. In *Longfoot v. Lyler* (Salk. 169), Lord Holt ruled that the husband was liable on the wife's contract for tea, in which she dealt, on mere evidence of cohabitation. Proof by the plaintiff that the articles were consumed in the defendant's family, is but presumptive evidence of his assent; and a special verdict for the plaintiff, which does not find the assent of the defendant, is insufficient. 2 Stark. Ev. 392. It is a defence for the husband to prove that the credit was not to himself, but to the wife, and although they lived together, and although the husband saw the wife in possession of the articles for which the action is brought. *Id.* (But the general rule is different. *Furlong v. Hyson*, 35 Maine, 332.)

(2) *Montague v. Benedict*, 3 B. & C. 634; *Holt v. Brien*, 4 B. & Ald. 252.

(3) *Bentley v. Griffin*, 5 Taunt. 356; *Metcalfe v. Shaw*, 3 Campb. N. P. C. 23; *Petty v. Anderson*, 3 Bing. 170.

(4) *Mainwaring v. Leslie*, 1 Mo. & M. 18. In *Clifford v. Latch* (*Id.* 102), however, no such evidence was given; and it was left to the jury to consider, whether the wife had a sufficient maintenance. See *Lidlow v. Wilmot*, 2 Stark. N. P. C. 88; by Lord Ellenborough, *Waitham v. Wakefield*, 1 Campb. N. P. C. 121; *Hodgkinson v. Fletcher*, 4 Campb. 70; *Rawlins v. Vandyke*, 3 Esp. N. P. C. 250; *Todd v. Stokes*, 1 *Ld. Ray.* 444; *Hinleston v. Smyth*, 3 Bing. 127.

NOTE 991.—*McCuthery v. McGahay*, 11 John. R. 281; *Clifford v. Saxton*, 1 Moore & McCord, 101; *Mainwaring v. Leslie*, 2 Car. & Payne, 597; *Reed v. Moore*, 5 Id. 200; *Dennys v. Sargent*, 6 Id. 419. In the last case, the jury found, having made some inquiries respecting the pay of a lieutenant of cavalry, after considering the evidence, 1. That they thought the quantities of wine supplied were not necessities according to the condition in life of the defendant; 2. That the provision made by the defendant for his wife was quite sufficient; and 3. That it was notorious in the neighborhood that the defendant's wife was living in a style of expense beyond what was justified by the condition in life of her husband. *Bosanquet, J.*, said, then I think the verdict should be for the defendant.

If the plaintiff relies on an implied contract, he must show that circumstances exist which raise that implied contract. Thus, where husband and wife live apart, it may be without the default of the husband; this is a fact essential to the liability of the latter, and the onus of

Waiver of tort.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort and sue upon an implied contract, as for goods sold and delivered. Thus, where a person gets goods into his possession by fraudulently procuring the plaintiff to supply them to an insolvent, or to his own son, who is a minor.(1) But in cases where the tort is waived, and an action of assumpsit brought, it is incumbent on the plaintiff to show a clear and indisputable title to the property.(2) And it is not to be understood that an action of trover can be converted into an action for goods sold and delivered at the option of the plaintiff; the rule seems to be principally applicable to cases where the plaintiff has been induced by

the proof lies on the plaintiff. See *Hendley v. Marquis of Westmeath*, 6 Barn. & Cress. 200. (*Wray v. Cox*, 24 Ala. 337, 380. See also *Norton v. Rhodes*, 18 Barb. 100; *Wood v. O'Kelley*, 8 Cush. 406.) If a separation takes place between a man and his wife, in pursuance of a valid agreement, and that contains no provision for her maintenance, the husband must be liable for necessities provided for her. *Littledale, J.*, in *Id.* But a person cannot by law sue a husband for the price of goods furnished to the wife, when living separate and apart from him, unless it can be shown that she was so living with his consent. *Abbott, Ch. J.*, in *Id.* A husband being requested to let his wife return, but he refused, held, that the husband was liable for necessities supplied after such request. *McGahay v. Williams*, 12 John. R. 293.

Defendant's wife was found wandering in distress, and in a deranged state of mind, held, that the husband was liable to the town supplying her with necessities, at common law, and without the aid of the statute. *Alna v. Plummer*, 4 Greenl. R. 258. The defendant, having neglected his wife in her deranged state of mind, was as liable for her necessary support as if he had turned her out of doors. So, in *Hanover v. Turner* (14 Mass. R. 227), the plaintiffs having relieved the defendant's wife, she being settled in another town, brought their action directly against him; it was contended that the action should have been brought against the town where she had her settlement, and that they had their remedy over against the husband. No doubt appears to have been entertained, that this course might legally have been pursued; but to avoid circuitry, the action was sustained. In *Alna v. Plummer* (*supra*), the plaintiffs paid D. (another town) their expenditures, because by statute they were liable so to do; but the court said, in so doing, they were paying the husband's debts; and the law implied an undertaking on his part to refund what they had necessarily expended on his account.

* * The leading case as to the power of the wife to bind the husband, by contract, is *Manby v. Scott* (1 Levinz, 4); and the cases most frequently referred to on the subject, are *Montague v. Benedict* (2 B. & C. 631), and *Seaton v. Benedict* (5 Bing. 28). The authorities are collected, and the law well stated, in the notes to the principal cases, 2 Smith's Lead. Cas. 245-288; in 1 Stephens' N. P., tit. *Baron and Feme*, pp. 712-753; in Chitty on Contr. (7th ed.) pp. 160-177; in 2 Kent C. (6th ed.) pp. 146-149. See also *Billing v. Pilcher*, 7 B. Monroe, 458; *Clement v. Mattison*, 3 Rich. 93; *Shelton v. Pendleton*, 18 Conn. 417; *Blowers v. Sturtevant*, 4 Denio R. 47. * *

(If the husband gives his wife an allowance during the separation, he is not liable for purchases made by her of persons acquainted with the facts. See *Harshaw v. Merriman*, 18 Mis. (3 Bennett), 106; *Renaux v. Zeahle*, 20 Eng. Law & Eq. 345. If the separation be not the fault of the wife, the general rule is that the husband is answerable for necessities furnished to her for her support and suitable clothing. *Breinig v. Meitzler*, 23 Penn. State R. 156; *Allen v. Aldrich*, 9 Foster (N. H.) 63.)

(1) *Hill v. Perrot*, 3 Taunt. 274; *Abbots v. Barry*, 2 Bro. & Bing. 369; *Bedde v. Levy*, 1 Stark. N. P. C. 20.

(2) By *Abbott, Ch. J.*, *Lee v. Shore*, 1 B. & C. 97.

a fraud on the part of the defendant, to make a contract with a nominal party, of which the defendant has derived the whole benefit.(1)

(1) See *Bennet v. Francis*, 2 Bos. & Pul. 550; *Read v. Hutchinson*, 3 Campb. N. P. C. 352; *Thompson v. Bond*, 1 Campb. N. P. C. 4. Payment of money into court will operate as a consent to treat the transaction as a contract. 2 Bos. & Pull. 550.

NOTE 992.—It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it. *Whiting v. Sullivan*, 7 Mass. R. 107. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received. Per *Mellan, C. J.*, in 5 Greenl. 319. In *Cummings v. Noyes, Jackson, J.*: “With respect to goods, it is a long established rule, that the owner from whom they have been tortiously taken, may, in many cases, waive the tort, as it is expressed, and state his demand as arising on contract. It is competent for him to treat the party liable to his action as a purchaser, an agent, or a bailee, whose conversion or disposal of the goods is thereby sanctioned and confirmed; and then the value of the goods, or a fair compensation for the use of them, is recoverable, and to be assessed in damages. Sundry cases to this effect are stated in *Hambly v. Trott* (Cowper’s Reports, 371). As, if one take a horse from another, and bring him back again, the owner may maintain trespass against the wrongdoer; or, after his death, an action for the use and hire of the horse against the executor. So, in the like case, the owner might waive the trespass as against the original taker, and bring trover against him. 1 Burr. 31. So, in *Johnson v. Spiller* (Dougl. 167, note 55), it was holden, that a demand in trover may be proved a debt against a bankrupt, if the demand be of such a nature that it can be liquidated, as for the value of the goods converted by the bankrupt.”

It was accordingly ruled in that case, that a tenant in a real action, against whom the demandant recovers judgment, may, in the event of the reversal of such judgment, sue such demandant for the mesne profits—*Jackson, J.*, saying: “The action of assumpsit is at least equally favorable to the defendant as trespass would be. But there is another reason which operates very powerfully in favor of the action of assumpsit. It is, that it will lie as well against the executor or administrator, as against the party himself in his lifetime. If trespass only could be maintained, the right owner would be without remedy, if his adversary should die before the issues and profits were recovered.”

In a subsequent case, the same court held that assumpsit could not be maintained for trees cut and carried away from land claimed by the plaintiff, and which, it was admitted, he actually owned. In *Jones v. Hoar* (5 Pick. 285), *Parker, C. J.*, observed: “There is no contract, express or implied, between the parties, and, therefore, an action *ex contractu* will not lie. The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him, or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds. No case can be shown where assumpsit, as for goods sold, lay in such case, against the executor of the wrongdoer, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining. Such was the case of *Hambly v. Trott*.”

However, in *Hill v. Davis* (3 N. Hamp. R. 384), where one took the goods of another, and converted them to his own use without the license of the owner, it was held, that the tort may be waived, and assumpsit be supported for the price; although it was agreed in the statement of the facts, that there was no contract. The court said that the defendant is not to be permitted to say that he took them by wrong, and not by contract.

(Under the New York Code the form of the action does not determine the right of recovery. The plaintiff states the facts that constitute his cause of action, and in the case of a breach of an implied contract he may recover his damages therefor. *Trull v. Granger*, 4 Seld. 115. The distinction between actions of tort and assumpsit is not abolished, as respects the foundation of the action. See § 167. Actions on contract, whether express or implied, cannot be united with an action for injury to person or property, or for withholding property. *Id.*; and *Colwell v. N. Y. and Erie R. R. Co.*, 9 How. Fr. 311. See *Budd v. Bingham*, 18 Barb. 494; and *Andrews v.*

Sale or return.

Where goods are delivered on sale or return, and are not returned within a reasonable time, the value of them may be recovered under a count for goods sold and delivered.(1) In general, where goods are to be paid for partly in money and partly by other goods, the plaintiff cannot recover upon this count.(2) But this rule does not appear to be applicable to cases where the goods to be taken in return are valued as money;(3) or where no part of the contract remains to be performed except the payment of money.(4)

The value of fixtures cannot be recovered under a count for *goods* sold and delivered;(5) nor the value of standing trees;(6) or of the materials supplied for the building of a house.(7)

Contract entire.

Where several articles are ordered from a tradesman at the same time, the plaintiff cannot recover for the delivery of a part, if the defendant is desirous of receiving the whole.(8) But if some of the goods contracted for have been delivered, and the purchaser does not return them, he will, in general, be liable for the actual value of the goods delivered, and may maintain a cross action for the breach of contract.(9)

Bond, 16 Id. 633; Decker v. Mathews, 2 Kernan R. 313. Where the law raises an implied contract, the plaintiff may unquestionably recover thereon in an action in the nature of *assumpsit*; but where the law does not imply a promise, such an action is not proper. See *Allen v. Patterson*, 3 Seld. 476; *Sienan v. Lincoln*, 2 Duer, 670. As to a waiver of tort, see *Hinds v. Tweddle*, 7 How. Pr. 278; 16 Barb. 633. See, also, *Van Leuven v. Lyke*, 1 Comst. 515; *Campbell v. Perkins*, 4 Seld. 440. See *Schweizer v. Weiber*, 6 Rich. 159, holding that the tort cannot be waived.)

(1) *Bailey v. Goldsmith*, Peake's N. P. C. 56; *Lyons v. Barnes*, 2 Stark. N. P. C. 39.

(2) *Harris v. Fowle*, cited 1 H. Bl. 287; *Jalon v. West*, Holt, 179.

(3) *Hands v. Bustin*, 9 East, 349.

(4) *Sheldon v. Cox*, 3 Barn. & Cress. 420; *Forsyth v. Jervis*, 1 Stark. N. P. C. 437.

(5) *Lee v. Risdon*, 7 Taunt. 188. See *Pitt v. Shew*, 4 Barn. & Ald. 208.

Fixtures not separated from the freehold, cannot be recovered under a count for goods sold and delivered. *Nutt v. Butler*, 5 Esp. 176. But it was held, that a declaration in trespass for goods, chattels and effects, was supported by evidence of taking fixtures under a distress for rent. *Pitt v. Adam*, cited in 2 Stark. Ev. 878, in note.

(As to what are fixtures, see *Snedeker v. Warring*, 2 Kernan R. 170; *Murdock v. Harris*, 20 Barb. 407; 21 Id. 520.)

(6) *Knowles v. Michel*, 13 East, 249. See *Bragg v. Cole*, 6 B. Moore, 114; *Evans v. Roberts*, 5 Barn. & Cress. 824, *ante*, p. 350.

(7) *Cottrel v. Apsey*, 6 Taunt. 322. (See *Cole v. Swanston*, 1 Cal. 51; *Hutchinson v. Cullum*, 23 Ala. 622.)

(8) *Campson v. Short*, 1 Campb. N. P. C. 52; *Walker v. Dixon*, 2 Stark. N. P. C. 281.

(9) *Shipton v. Casson*, 5 Barn. & Cress. 383.

NOTE 993.—*Oxendale v. Wetherell*, 9 Barn. & Cress. 386. Later cases, however, have overruled this doctrine. *Champlin v. Rowley*, 13 Wend. 258; *Mead v. Degolyer*, 16 Id. 632. In *Champlin v. Rowley*, the contract was to deliver 100 tons of pressed hay, within a given period; and the vendee was to pay the plaintiff at the rate of three shillings and six pence per cwt.—\$100 in advance, and the residue when the whole quantity should be delivered. Defendant delivered fifty tons; held, that plaintiff was not entitled to recover the price for the portion delivered.

Delivery of goods.

The plaintiff must prove that he has delivered the goods purchased to the defendant, or has done something equivalent to delivery; as, for instance, if he has put it in the defendant's power to take away the goods himself.(1) Where goods are to be weighed before the price can be ascertained, the weighing and delivery of a part will not be considered as a constructive delivery of the whole for the purpose of this action.(2) A delivery to a carrier is a sufficient delivery to the defendant,(3) and if the purchaser of goods has recovered the value of them in an action of trover against the carrier to whom they were delivered on his account, he cannot afterwards in an action brought by the vendor for the amount, contend that there has been no delivery to him.(4) Where a person who has contracted for the purchase of goods, offers to resell them as his own, it is a question for the jury whether there has been a delivery to him.(5) An allegation that the goods have been delivered to the defendant will be supported by proof of a delivery to his agent.(6)

Value.

Where goods are sold without any stipulation respecting their price, their value at the time of delivery must be proved: and the plaintiff will be entitled to recover according to their apparent value, notwithstanding latent defects, if the purchaser has had an opportunity of inspecting them; provided no fraud has been practiced.(7) Where there has been a spe-

Where plaintiff agreed to supply defendant with straw for a stipulated time, at the rate of three loads in a fortnight, and defendant was "to pay plaintiff 33s. per load, for each load so delivered on his premises;" held, that the meaning of such a contract was, that each load was to be paid for on delivery. *Withers v. Reynolds*, 2 Barn. & Adol. 882; (*Evans v. Harris*, 19 Barb. Rep. 416.)

(1) By *Holroyd, J.*, *Smith v. Chance*, 2 Barn. & Ald. 753. So where the plaintiff will not suffer the goods to be taken away till paid for. *Goodall v. Skelton*, 2 H. Bl. 316.

(2) *Simmons v. Swift* 5 Barn. & Cress. 865.

(3) *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 Bos. & Pull. 582; *Anderson v. Hodgson*, 5 Price, 630; *Hart v. Sutley*, 3 Campb. N. P. C. 528; *Copeland v. Lewis*, 2 Stark. N. P. C. 33. As to what is sufficient evidence of such delivery, see *Goodall v. Skelton*, 2 H. Bl. 316.

In the case of the vendor and vendee, if the goods are, whilst the carrier has the care of them, to be at the risk of the vendor, he must bring the action against the carrier. *Parke, J.*, in *Freeman v. Birch*, 1 Nev. & M. 420. The bailee of goods, sending them by a carrier to the bailor, may sue the carrier for negligence. *Id.*

(The action for goods sold and delivered can only be maintained by proving sale and delivery; or something tantamount to a delivery. *Gilliam v. Towles*, 15 Ark. 64; *Waldron v. Chace*, 37 Maine, 414; *Evans v. Harris*, 19 Barb. 416; *Love v. Doak*, 5 Texas, 343. But the action for goods sold may be sustained by showing a valid contract. *Doremus v. Howland*, 3 Zab. 390.)

(4) *Groning v. Mendham*, 1 Stark. N. P. C. 299.

(5) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(6) *Biggs v. Lawrence*, 3 T. R. 454.

(7) *Blutt v. Osborne*, 1 Stark. N. P. C. 384.

NOTE 994.—Where a party contracted to supply and erect a warm air apparatus, for a certain

cial contract for the price of the goods, but they have not been furnished agreeably to the terms of the contract, it has been seen that they may be returned within a proper time, and that if they are kept, the plaintiff can only recover their actual value independently of the contract, especially if there has been an express warranty.(1) Where a vendor of goods is only able to prove the delivery of a package, without any evidence of its contents, it will be presumed that it is filled with the cheapest commodity in which he deals.(2)

Credit not expired.

If the action is brought before the credit given for the payment of goods is expired, the plaintiff will be nonsuited. Thus, where a person purchases goods, and agrees to pay for them in three months by a bill at two months, which is not given at the proper time, an action for goods sold and delivered cannot be brought, until the expiration of the five months.(3) But where there is no stipulation as to credit in the contract, and a bill is given in payment, which is dishonored, the seller may bring an action of *indebitatus assumpsit* for the goods immediately;(4) and the

sum, held, in an action for the price (the defence to which was that the apparatus did not answer), that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sums as would enable the defendant to do what was requisite. *Cutler v. Close*, 5 Car. & Payne, 337. But if the apparatus was of no service, not at all answering its purpose, then the verdict ought to be for defendant.

(See *Bristol v. Tracy*, 21 Barb. 236.)

(1) *Germaine v. Burton*, 3 Stark. N. P. C. 32; *King v. Boston*, cited 7 East, 481; *O'Kell v. Smith*, 1 Stark. N. P. C. 107; *Fielder v. Starkin*, 1 H. Bl. 17. In some cases, where the goods are retained by the purchaser, it will be difficult for him to prove that they were not furnished agreeably to the contract, and he will not be allowed to repudiate the contract entirely at the trial. *Hopkins v. Appleby*, 1 Stark. N. P. 477; *Grimaldi v. White*, 4 Esp. N. P. C. 95; *Groning v. Mendham*, 1 Stark. N. P. C. 257; *Ante*, p. 385.

NOTE 995.—*Street v. Blay*, 2 Barn. & Adol. 456. The defendant kept a heifer which he had bought on Sunday of a drover, and afterwards made a promise to pay for her; held, that having kept the beast, he was liable, at all events, on the *quantum meruit*, notwithstanding the contract made on Sunday. *Williams v. Paul*, 6 Bing. 653, *Gaselee, J.* The subsequent promise was sufficient on the *quantum meruit*.

(2) *Clunnes v. Pezzey*, 1 Campb. N. P. C. 8. But if the defendant has been guilty of fraud, the presumption is in favor of the plaintiff's demand. 1 Str. 405.

(3) *Mussen v. Price*, 4 East, 146; *Lee v. Ridsen*, 2 Marsh. 459; and see *Waddington v. Oliver*, 2 N. R. 61; *Price v. Nixon*, 5 Taunt. 338.

(4) *Hicking v. Hardy*, 1 B. Moore, 61; *Mussen v. Price*, 4 East, 146; *Nickson v. Jepson*, 2 Stark. N. P. C. 227. If a person buys on credit with a design of defrauding the owner of goods, the stipulation as to credit is of no avail. By *Eyre, Ch. J.*, *De Symons v. Minchweek*, 1 Esp. N. P. C. 430.

NOTE 996.—*Cromwell v. Lovett*, 1 Hall, 56. So, where a promissory note is received by means of the fraud of the vendee. *Pierce v. Drake*, 15 John. R. 475.

If the vendee contracts to give a note for goods sold, payable on demand, and, then refuses to give the note he may be sued immediately for the price. *Loring v. Gurney*, 5 Pick. R. 15. And

plaintiff may recover in such action, if the bill is returned to him overdue at any time before the trial.(1) When the defence is, that the action has been commenced before the expiration of the credit, the court will look to the filing of the bill as the commencement of the suit; and although the declaration is considered as relating *prima facie* to the first day of the term, that is matter of evidence, and when the writ is produced the presumption is, that the party declared on the day of the date of the writ.(2)

Action for goods bargained and sold.

In an action of *indebitatus assumpsit* for goods bargained and sold,(3)

proof of the usage of the vendor so to deal with his customers, is evidence to prove such contract, provided the evidence is brought home to the knowledge of the defendant. *Id.*

* * Where goods are sold on a credit of six months, by buyer's note, and are delivered, but the note is refused, the seller may reclaim the goods, or treat the sale as for cash, and sue immediately for the price. *Corlies v. Gardner*, 2 Hall, 345; *Woodhull et al. v. Wilson*, in New York Superior Court, 1848, (unreported) S. P. But the count should be special. * *

(1) *Burden v. Halton*, 4 Bing. 454.

NOTE 997.—Where on the sale of goods, the purchaser, instead of giving his own note for the goods, transfers the note of a third person, and guaranties the payment thereof, if the note be not paid when due, the vendor may recover on a count for goods sold. *Butler v. Haight*, 8 Wend. 535. See *Edwards on Bills and Notes*, 192–207.

* * See the cases stated *ante*, note 705. * *

(2) *Bull. N. P.* 137; *Swancott v. Westgarth*, 4 East, 75; *Rhodes v. Gibbs*, 5 Esp. N. P. C. 163; *Howe v. Cooker*, 3 Stark. N. P. C. 138; *Granger v. George*, 5 Barn. & Cress. 152. As to the matter of entitling the record in the different courts, *vide supra*, p. 305.

NOTE 998.—Unless it is perfectly clear that an action is brought for goods sold and delivered before the stipulated credit has expired, the court will not, on motion, set aside the writ. *Lamb v. Pegg*, 1 Dowl. P. C. 447.

Where the cause of action arises in the term, and the memorandum of the bill is of the term generally, the plaintiff may show, in evidence, the suing out of the writ, and elect to consider it the commencement of the action. *Pugh v. Martin*, 3 Dougl. 347. Lord Mansfield said, with the exception, that in penal actions, and in cases on the Statute of Limitations, defendant may always resort to the real time.

(3) NOTE 999.—Goods bargained and sold, will not lie unless there be a sale. *Littledale, J.*, in 8 Barn. & Cress. 277.

To maintain an action for goods bargained and sold, the property must have passed; and the plaintiff cannot sustain this action unless he is in a condition to recover the goods in trover, and must sustain the loss in case of their being stolen or destroyed by fire. *Tindal, Ch. J.*, in *Elliot v. Pybus*, 10 Bing. R. 512. The defendant, who had ordered a machine to be made, without any agreement as to price, paid money on account when he saw it complete; admitted it was made to order; and requested the maker to send it home, but refused to pay the price demanded by him. The maker refused to deliver the machine without receiving the full amount; for which he ordered his attorney to proceed; when he said he would endeavor to arrange if they would give him time; held, a sufficient acceptance to entitle the maker to sue in an action for goods bargained and sold. *Id.* Here the property passed by the assent to the price demanded. The distinctions in the various cases on this subject run extremely fine.

In *Bement v. Smith* (15 Wend. 493), where a carriage built by a mechanic, in pursuance of a contract, is tendered to the customer, and on his refusal to accept and pay for it, it is left in the charge of a third person, of which the customer has notice, the mechanic, instead of selling it for what it may bring, and suing for the difference may forthwith bring his action, declaring

the plaintiff may recover the sum at which they were sold and such damages as he has sustained on account of the defendant's refusal to receive the commodity.(1) It seems that where goods are to be weighed previous to delivery, an action for goods bargained and sold cannot be brought before they are weighed, or at least, before an offer is made to weigh them.(2) It has been held, that crops agreed to be taken by an incoming from an outgoing tenant are properly described as *goods bargained and sold*.(3)

There have been different opinions as to the right of a vendor to bring an action for goods bargained and sold after a resale.(4) It seems, that as

upon the contract, and averring a *delivery*, and is entitled to recover the price agreed upon between the parties at the time of the contract. But see *Maberley v. Sheppard*, 10 Bing. 99, and cases cited.

Where any operation of weight, measurement, counting, or the like, remains to be performed, in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such an operation is performed. But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing, or measuring, or counting afterwards, would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. *Wilde, J., in Macomber v. Parker*, 13 Pick. 175. But "where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain any action for goods bargained and sold, until he has made the selection. But as soon as he appropriates part for the benefit of the vendee, the property of the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price." *Bayley, J., in Rhode v. Thwaites*, 6 Barn. & Cress. 392.

A. having a patent for spinning machinery, received an order from B. to have some spinning frames made for him. A. employed C. to make them, and informed the latter that he had done so. After the machines were completed, and packed up in boxes for B., and C. had informed B. that they were ready, B. refused to accept them; held, that although C. might recover the price in an action for not accepting the machines, he could not recover in an action for goods sold and delivered, or goods bargained and sold; the labor having been bestowed on C.'s own materials, which never became the property of the defendant, the defendant not having assented to C.'s letter. The case was distinguished from *Woods v. Russell* (5 Barn. & Ald.), on the ground, that in that case, portions of the price were to be paid according to the progress of the work. *Atkinson v. Bell*, 8 Barn. & Cress. 278.

There is a distinction between a sale and a contract for a sale; and it is upon this ground that the Statute of Frauds proceeds in requiring written evidence to substantiate such a contract. Thus, in *Penniman v. Hartshorn* (13 Mass. 87), although there was a valid memorandum in writing of the contract; yet the court said: "A mere contract to sell, without a delivery, either actual or symbolical, does not pass the property." (Where an article is made to order, the title passes on delivery; till then the title remains in the manufacturer. *Andrews v. Durant*, 1 Kernan N. Y. R. 35.)

(1) *Hankey v. Smith*, Peake's N. P. C. 57, n.

(2) *Simmonds v. Swift*, 5 Barn. & Cressw. 856.

(3) By *Holroyd, J., Mayfield v. Wadsley*, 3 B. & C. 364; *Evans v. Roberts*, 5 B. & C. 829. And see *Parker v. Staniland*, 11 East, 362; *Poulter v. Killinbeck*, 1 Bos. & Pull. 397.

(4) *Mestens v. Adcock*, 4 Esp. N. P. C. 251; *Hagedorn v. Laing*, 6 Taunt. 162; *Hill v. Perrot*, 3 Taunt. 274; *Browning v. Stalland*, 5 Taunt. 450; *Hore v. Milner*, Peake's N. P. C. 58, n.; *Langfort v. Tiler*, 1 Salk. 113; *Greaves v. Ashlin*, 3 Campb. 426; *James v. Shore*, 1 Stark. 430.

the right of *property* is, in general, vested in the buyer from the time of the bargain,(1) a resale ought not to be a bar to the action for goods bargained and sold, though it may be considered as an unlawful conversion,(2) for which damages may be recovered from the seller, or in case of refusal to redeliver the property, from the second vendee. Where the vendee is expressly entitled to resell the goods if they are not removed before a certain day, the declaration should be special.(3)

Action for work and labor.

There is a great variety of agreements, not under seal, containing detailed provisions regulating the prices of labor,(4) rates of hire, the times and manner in which the contract is to be performed, which are usually declared upon in the general form of a count for work and labor; as contracts of affreightment, builder's agreements, and the like.(5) And where an entire agreement has been entered into for work and labor, and for material supplied, the plaintiff, it seems, may recover his whole demand on the general counts applicable to the several parts of the contract.(6) Where alterations have been made in the original contract by the consent

(1) By Bayley, J., *Bloxham v. Sanders*, 4 Barn. & Cressw. 949.

(2) *Mestens v. Adcock*, 4 Esp. N. P. C. 251. It would seem that in an action for such conversion, the vendor's lien for the price could not be set up.

(3) See *Hagedorn v. Laing*, 6 Taunt. 166.

NOTE 1000.—In *Maclean v. Dunn* (4 Bing. R. 717), it was held, that where the purchaser of goods refuses to take them, the vendor, by re-selling them, does not preclude himself from recovering damages for the breach of contract. Chief Justice Best observed: It is a practice founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference." The same principle is recognized in *New York*. *Clarkson v. Carter*, 3 Cowen, 85; *Sands v. Taylor*, 5 John. R. 410, 411. Though in the latter case, Kent, Ch. J., adds: "It would be unreasonable to oblige him (the vendor) to let the article perish on his hands, and run the risk of the solvency of the buyer." "But" Best, Ch. J. (*supra*), "It is difficult to say what may be esteemed perishable articles, and what not; but if articles are not perishable, price is, and may alter in a few days, or a few hours."

* * As to the sale of stock, not redeemed when pledged, or not accepted on a time contract, see *Vaupell v. Woodward*, 2 Sandf. Ch. R. 143; *Wilson v. Little*, 1 Sandf. Super. C. R. 351; *Allen v. Dykers*, 3 Hill, 594; *S. C.*, in error, 7 Hill, 497. * *

(4) NOTE 1001.—If a party by a fraudulent representation as to his title to land, induce the plaintiff to bestow labor upon it in expectation of enjoying it as joint owner, on discovering the fraud, he is entitled to recover the value of the work done. *Richard v. Stanton*, 16 Wend. 25. (If the party stipulates for compensation for improvements, he can only recover on the contract. *Streeter v. Sumner*, 19 N. H. 516); *Whipple v. Dow*, 2 Mass. R. 415. In the latter case, which was assumpt by a widow to recover pay for the board of her daughter while under age, Parsons, Ch. J., said: "The plaintiff has brought her action upon an implied promise of her daughter to pay for her support during her infancy, she having sufficient estate for her own support. The special agreement being annulled by the daughter, on her arriving at full age, is as if it had never been made." And in *Richard v. Stanton* (*supra*), the contract being by parol, was void at law, upon the principle that money paid on a parol contract may be recovered back, where the contract is void, and there is a failure of consideration.

(5) By Lord Ellenborough, *Clarke v. Gray*, 6 East, 569.

(6) See *Gotterell v. Apsey*, 6 Taunt. 322.

of the parties, the plaintiff may recover as far as the estimate has been acted upon, according to the estimated prices; and beyond the estimate, he is entitled to recover on the footing of a *quantum meruit*, and according to measure and value.(1)

An unstamped proposal on the part of the defendant, containing an estimate of the amount of work to be done, and which has not been finally acceded to, is admissible in evidence for the defendant.(2) And where a parol contract for services to be performed, adopts the terms for a written prospectus previously existing, the prospectus may be read without a stamp.(3)

(1) Robson v. Godfrey, Holt's N. P. C. 236; Pepper v. Burland, Peake's N. P. C. 102. *Vide supra*, p. 400.

NOTE 1002.—Wright v. Wright, 1 Litt. 179; 16 Id. 586; Dubois v. The Delaware and Hudson Canal Co., 12 Wend. 334.

Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol, during the continuance of the first employment, the written contract need not be produced by the plaintiff for the second work. Reid v. Batte, 1 Mood. & Malk. 413. Wherever the contents of the writing are involved in the cause, the writing itself must of course be produced. In this case there was express evidence that the work in question was done under a new order, perfectly distinct from that contained in the written agreement. *Id.* in note.

In Haswell v. Goodchild (12 Wend. 273), which was a contract under the Mechanics' Lien Law in the city of New York, it was held, that the contract must be in *writing*, and the work for which the owner is sought to be charged, must be done *in pursuance* of such contract; still it is not necessary to the enforcement of the remedy given by the statute, that the work should be in literal compliance with the contract, nor will a departure from the prescribed mode in which it was to be done, deprive the mechanic or laborer of his remedy, so long as the work is done upon the house mentioned in the contract. Thus, where the contract was to build a *two story house*, and the house in fact built was a *three story house*, it was held, notwithstanding the variance, that the mechanic or laborer who bestowed work upon the building was entitled to the remedy given by the statute. Haswell v. Goodchild, 16 Wend. 273. (Though not done according to contract, if the departure be by consent, or if the work be accepted, the builder may recover. Bassett v. Sanborn, 9 Cush. 58; Morrison v. Cummings, 26 Vt. 486; 26 Wend. 665.)

(2) Penifold v. Hamilton, 2 Stark. N. P. C. 475.

(3) Edgar v. Blick, 1 Stark. C. 464. Where the agreement is contained in the copy of a prospectus delivered, that identical copy must be stamped. Williams v. Stoughton, 2 Stark. C. 292.

NOTE 1003.—See 1 Phil. Ev. 518.

A. had built a house for B. under a written contract, not admissible in evidence for want of a stamp. A. sued B. for the value of certain work about the house, alleging them to be extras; held, that the court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited. Vincent v. Cole, 3 Car. & Payne, 481.

After the plaintiff has proved by witnesses, a case of implied or oral contract, he cannot be nonsuited by the defendant's producing an unstamped written instrument, purporting to contain the terms of the contract. Fielder v. Ray, 6 Bing. 332; 4 Car. & Payne, 61. But the court granted a new trial upon payment of costs, in order that the defendant might have an opportunity of producing the agreement properly stamped. See the cases of Doe v. Morris, 12 East, 237; Stevens v. Pinney, 8 Taunt. 327; Strother v. Burr, 3 Bing. 144; Reed v. Deere, 7 Barn. & Cressw. 266; Rex v. The Inhabitants of Rawden, 8 Id. 708.

(If the contract remains unrescinded, the builder can only recover on it, making it the foundation of his action. Ladue v. Seymour, 24 Wend. 60; Williams v. Keech, 4 Hill R. 168. If the

Liability of defendant.

The work must be proved to have been done upon the credit of the defendant. Proof that the defendant is registered owner of a ship is *prima facie* evidence of liability for the repairs of the ship; but such evidence may be rebutted by the circumstance that the legal owner has not interfered personally, or by his agent, with the management of the ship.(1) The action for work and labor may be brought on an implied assumpsit against a person who is guilty of a tort which is waived; as for the service of an apprentice who has been harbored by the defendant.(2) The plaintiff cannot maintain an action against the defendant for the performance of services, which he has performed in consequence of directions from the agent of the defendant, but without any privity with the defendant;(3) nor where the person employing the plaintiff has reserved to himself a discretion as to affording or denying remuneration.(4)

contract has not been performed, he may recover the value of his services by showing that the work has been accepted. *Gregory v. Mack*, 3 Hill R. 380. And where a contractor acts in good faith and completes the work, which becomes of value to the owner of the premises, it has been held that he may recover the contract price, deducting therefrom the damages resulting from his failure to fulfill the contract. *Gleason v. Smith*, 9 Cush. (Mass.) 484; *Davis v. Barrington*, 10 Foster (N. H.) 517; *Morrison v. Cummings*, 26 Vt. 486.)

(1) *Briggs v. Wilkinson*, 7 Barn. & Cressw. 30; *Cox v. Reid*, 1 Ry. & Mo. 190; *Jennings v. Griffiths*, 1 Ry. & Mo. 42; *Young v. Brander*, 8 East, 11; *Harrington v. Fry*, 2 Bing. 179; and see 4 G. IV, ch. 41, § 43, 6 G. IV, ch. 110, § 45.

NOTE 1004.—The master is always liable for repairs, made by himself, unless in express terms the credit is confined to the owners; but where the contract is made by the owners themselves, or under circumstances that show that credit was given to them alone, the master is not liable. 2 Stark. Ev. 942. By owners, is meant those whose agent the master is; a mere mortgagee of the acting owner of a share of a ship, who neither takes possession nor interferes at all in the management, is not liable. *Id.*

Though the contract in respect to a seaman's wages provides for a forfeiture thereof in case of disobedience; yet if it appear that such disobedience was the result of misconduct on the part of the owner, the seaman may recover his wages. *Train v. Bennet*, 1 Malk. M. & C. 32. So, in *Sherman v. Bennet* (*Id.* 489), the same principle was recognized; the first fault being in the seaman. *Wages of seamen*.—Seamen have a triple security for the payment of their wages, the ship, the owner, and the master. The owner is bound not by any express covenant or promise in the written contract, but by the decree of the law, named or not named, declared or concealed.

The master makes the contract as well for his owner as himself and the ship, and all are bound by it. *Bronde v. Haven*, 1 Gilp. R. 592. And a sale of the ship subsequent to the execution of the shipping articles, will not discharge the owner from such liability. *Id.* In *Hussy v. Allen* (6 Mass. R. 163), the contract was made and the supplies after the sale.

If the owners have given no authority to the master to act as factor, and the authority is not implied from the course of trade, they are not liable. *Taylor v. Wells*, 3 Watts, 65. The case of *Kemp v. Coughtry* (11 John. R. 107), is founded on usage.

(2) *Foster v. Stewart*, 3 M. & Selw. 191; *Lightly v. Clouston*, 1 Taunt. 112.

(3) *Schmaling v. Thomlinson*, 6 Taunt. 147; *Call v. Backhouse*, 6 Taunt. 148; *Morris v. Burdett*, 2 Maule & Selw. 212; *Guy v. Gore*, 2 Marsh. 273.

(4) *Taylor v. Brewer*, 1 M. & Selw. 299. See *Jewry v. Busk*, 5 Taunt. 302.

Service performed.

Where a person has contracted to serve for a stipulated time as a clerk or a servant, the contract is, in general, entire, and the service for the whole time is a condition precedent for the recovery of the wages or salary.⁽¹⁾ It is sufficient, however for the plaintiff to show that he was

(1) *Cutter v. Powell*, 6 T. R. 326; *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; *Rex v. Whittlebury*, 6 T. R. 467; *Buston v. Callyer*, 4 Bing. 309, where it was held that a general hiring of a clerk was a hiring for a year.

NOTE 1005.—CONDITION PRECEDENT.—See *Mayon v. Carter*, 4 Car. & Payne, 295; *Faxon v. Mansfield*, 2 Mass. R. 147; *Stark v. Parker*, 2 Pick. 267; *M'Millen v. Vanderlip*, 12 John. R. 165; *Jennings v. Camp*, 13 Id. 94; *Reab v. Moor*, 19 Id. 337; *Lantry v. Parks*, 8 Cowen, 63; *Sinclair v. Bowes*, 9 Barn. & Cress. 92. The case last cited was upon an entire contract to repair a damaged chandelier and make it complete for £10; held, that an action will not lie for the value of a partial repair, though such repair was beneficial to the defendant, and consisted partly in a supply of fresh materials, such materials not having been demanded back. In *Bates v. Hudson* (6 Dowl. & Ryl. 3), plaintiff contracted to cure 497 sheep of the scab, and if he did not cure all he was to have no pay; held, that not having cured all, he was not entitled to recover anything.

A different principle has been settled in a late case in New Hampshire. In *Britton v. Turner* (6 New Hamp. R. 481), it was ruled, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties themselves have made, except upon some further transaction between the parties. The facts of the case were these: The contract was to work one year for the sum of \$120. Defendant had evidence to show that plaintiff left after about nine months' service, without consent and without cause; but he proved no damage in consequence of his not performing his contract. The court directed the jury, that although they might be satisfied that plaintiff left defendant's service against his consent, and without sufficient cause, yet the plaintiff would be entitled to recover upon his *quantum meruit* count, such sum as the labor was reasonably worth; and upon exceptions taken, the court affirmed the verdict of the jury for the plaintiff. Id. The technical reasoning, that the performance of the contract is a condition precedent, and the contract being entire, there can be no apportionment, was considered as not properly applicable to this species of contract, where a beneficial service has been actually performed. Id. The principle of this decision was recognized in *Oxendale v. Wetherell* (9 Barn. & Cress. 386), in respect to an entire contract for the sale of goods. That case, however, is denied in *Champlin v. Rowley* (13 Wend. 258), and *Mead v. Degolyer*, (16 Id. 632). See also *Philbrook v. Belknap*, 6 Verm. R. 383; *Hair v. Bell*, Id. 35. See *Siboni v. Kirkman*, 1 Mood. & Malk. 418, as to construction of a building contract, with a penalty for non-performance.

A general employment to do work, will not prevent the mechanic from recovering his pay before the work is completed. Thus, in *Roberts v. Havelock* (3 Barn. & Adol. 404), a ship outward bound with goods, being damaged at sea, put into a harbor to receive some repairs, which had become necessary for the continuance of her voyage, and a shipwright was engaged, and undertook to put her into thorough repair; before this was completed, he required payment for his work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing; held, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage, at the time when the action was brought. Lord Tenterden, Ch. J., said: "There is nothing in the present case amounting to a contract to do the whole repairs and make no demand until they are completed." See *Shaw v. Turnpike Co.*, 2 Penn. R. 454.

Notwithstanding the universality of the position, that performance, when it is the consideration for the payment of the stipulated price, is a condition precedent, yet the conduct of the em-

ready to tender his services, though he was not actually employed during the whole time, or was incapacitated from illness, or was wrongfully dismissed.(1) In domestic service, there is a common understanding that the contract may be dissolved on reasonable notice, as a month's warning or a month's wages; but there does not appear to be any such practice with respect to servants in husbandry, or clerks.(2)

ployer in adopting the contract, when, if he disputed the performance, he had it in his power to rescind it *in toto* by placing the parties in *status quo*, affords, as against him, a conclusive presumption that the work has been already executed, or at all events, excludes the party from taking the objection. 2 Stark. Ev. 945. The cases of Grimaldi v. White (4 Esp. R. 95), Fisher v. Samuda (1 Campb. 190.), and Groning v. Mendham (1 Stark. R. 257), are instances to this effect. The principle extends to all cases of executory contracts of art to be delivered in a complete state. The party receiving the work under a specific contract, must abide by it, or rescind it *in toto*.

Where such a complete return and rescinding of the contract is impracticable, as where the contract is to build a wall, or a house, on the premises of the employer, and the contract cannot be rescinded *in toto*, then, although the defendant has partially availed himself of the plaintiff's labor, and the materials supplied by him, and has not rescinded the contract *in toto*, yet it seems to be now settled, that if the work has been defectively performed, the plaintiff cannot recover but on *quantum meruit* for the labor, and *quantum valebant* for the materials, to the amount of the benefit actually derived. 2 Stark. Ev. 945. See also *infra*.

In Owen v. Bowen (4 Car. & Payne, 93), it was held, that if A. agrees to serve B. as an apothecary's assistant, at such salary as C. should think reasonable, and it appear that no application had been made to C. to fix any salary, A. cannot recover anything for his services in an action for work and labor.

* * See *ante*, note 987. * *

(Where a person engages to work for another for a certain length of time, and is prevented by sickness from fulfilling the contract, he may recover the value of his services to his employer for the time he has worked (Hubbard v. Belden, 1 Wms. (Vt.) 645); unless the employer has suffered damages in consequence of his failure. Patrick v. Putnam, Id. 759. If dismissed, he recovers for services previously performed. Lawrence v. Gullifer, 38 Maine, 532. If the dismissal be without good cause, he may recover for his whole term of service, or for so much of it as he lost, not being able to get other employment. Jones v. Jones, 2 Swan (Tenn.), 605; Fowler v. Armour, 24 Ala. 194; Ricks v. Yates, 5 Ind. 115.)

(1) Rex v. Wintersell, Cald. 298; Rex v. Sutton, 5 T. R. 657; Gandall v. Pontigny, 1 Stark. N. P. C. 198. And see Spain v. Arnott, 2 Stark. N. P. C. 256; Robinson v. Hurdman, 3 Esp. C. 235; Eardley v. Price, 2 N. R. 333; Hulle v. Heightman, 2 East, 145; Chandler v. Greeves, 2 H. Bl. 606.

(2) 6 T. R. 326; 4 Bing. 313. See Eardley v. Price, 2 N. R. 333, as to schoolmasters.

NOTE 1006.—Breston v. Collyer, 12 B. Moore, 552. A general hiring of a clerk, is a hiring for a year, and so on from year to year, for so long as the parties respectively should please, and may be so described in the declaration; and such an implied hiring is not destroyed by the salary being paid monthly; nor is the contract within the Statute of Frauds. Id. The defendant may put an end to such a contract at the expiration of any one year, upon a reasonable notice. Id. But he has no right to dismiss him from his service before the expiration of the current year, unless he has misconducted himself. Id.

If a clerk be engaged at a salary of £100 a year, and having received his wages up to a certain time, serve for some time longer, and then leave the service before the year expires, without due cause, and without any notice; whether he is entitled to recover wages up to the time of his quitting, *quere*; at all events he is liable to a cross action, for leaving without notice. Huttman v. Boulnois, 2 Car. & Payne, 509.

A child at school, for whom payment had been made quarterly, was sent home for illness, four days after the commencement of a quarter, and did not return: held, that the master was en-

It has been before mentioned, that the plaintiff cannot recover in this action, if he has deviated from the plan agreed on between the parties without the defendant's acquiescence;(1) and he will not be entitled to any damages whatever, if no benefit has accrued to the defendant in consequence of the improper or unskillful execution of the work.(2) The defendant may reduce the damages, by showing that the work done, and materials provided, were inferior in value to those stipulated for.(3) Where a specific sum has been agreed to be paid by the defendant, it seems proper to give notice to the plaintiff, if it is intended to dispute his demand on the ground of the inadequacy of the work.(4) The defendant may show, that the employment of the plaintiff was in contravention of the law.(5)

titled to a whole quarter's schooling, although there was no express contract for a quarter's notice, or a quarter's pay, and although the school was a day school, at which the child was the only boarder. *Collins v. Price*, 5 Bing. 130. Although there was no express contract, there was evidence of an implied contract from quarter to quarter.

(1) *Ellis v. Hamlin*, 3 Taunt. 52; *Hayden v. Hayward*, 1 Campb. N. P. C. 180; *Burn v. Miller*, 4 Taunt. 745, *ante*, p. 400.

(2) *Farnsworth v. Garrard*, 1 Campb. N. P. C. 38; *Montrie v. Jefferies*, 1 Ry. & Mo. 317; *Denew v. Daverell*, 3 Campb. N. P. C. 451; *Duncan v. Blundell*, 3 Stark. N. P. C. 6; *Kannen v. M'Mullan*, *Peake's N. P. C.* 59; *Hupe v. Phelps*, 2 Stark. N. P. C. 480. Where the property is capable of a redelivery, it should be returned without delay; otherwise the plaintiff will be liable to the defendant on a *quantum meruit*. *Okell v. Smith*, 1 Stark. N. P. C. 107. *Vide supra*, p. 379.

(3) *Farnsworth v. Garrard*, 1 Campb. N. P. C. 38; *Fisher v. Samuda*, 1 Campb. N. P. C. 190; *Barton v. Butter*, 7 East, 482.

NOTE 1007.—In an action on a special contract for work and labor under the contract, and for work, labor and materials generally, the defendant may give in evidence, that the work has been done improperly, and not agreeably to the contract; and the plaintiff in such case will be entitled only to recover (on the general count) the real amount of the work done, and for materials. *Chapel v. Hicks*, 2 Crompt. & Meeson, 214. (See *Byerly v. Kepley*, 1 Jones' Law, N. C. 35; *White v. Oliver*, 36 Maine, 92.)

(4) *Barton v. Butter*, 7 East, 482; *Brown v. Davis*, 7 East, 479, n.

(5) *Coates v. Hatton*, 3 Stark. C. 61, 62, n.

NOTE 1008.—*Hunt v. Knickerbocker*, 5 John. R. 327; *Wheeler v. Russell*, 17 Mass. R. 258; 15 Id. 39.

In *Spaulding v. Alford* (1 Pick. 33), it was held, that the statute prohibiting unlicensed physicians from recovering for their services, extended to physicians resident out of the state, in respect to their services within; the object of the act being to guard against the evil effects of ignorant and unskillful practitioners.

On an action for washing defendant's clothes, it was held to be no defence that defendant was a prostitute, and that some of the dresses were of an expensive kind, and were used, to the knowledge of the plaintiff, with a view to prostitution; for it was necessary that she should have clean linen, and the court could not take into consideration which of the articles were used for an improper purpose, and which were not. *Lloyd v. Johnson*, 1 Bos. & Pull. 340.

Where the contract is illegal, it makes no difference that the parties thought they were acting legally. *Wilkinson v. Loudonsock*, 3 Maule & Selw. 126.

Courts of justice can give no assistance to the enforcement of contracts that the law has interdicted. Where a provision is enacted for public purposes, it makes no difference whether the thing is prohibited absolutely, or only under a penalty. Mr. Justice Bayley, in 5 Barn. & Adol. 335; *Springfield Bank v. Merrick*, 14 Mass. R. 322. No principle is better settled, than that no action will lie on a contract made in violation of a statute, or of a principle of the common law. *Wheeler v. Russell*, 17 Mass. R. 258, 281. See *Mitchell v. Smith*, 1 Binn. 110; *Hunt v. Knick-*

It has been held, that a person in whose house the plaintiff had done certain repairs, is not a competent witness to prove that he had employed the defendant to do the repairs for a certain sum, and that the defendant was to pay all the persons employed by him, among whom was the plaintiff; such witness having a direct interest in the event of the cause.(1)

Action for money had and received.

In an action for money had and received, the plaintiff will have, in the first place, to prove the receipt of money, or of something which may be readily turned into money.(2) It has been held, that the receipt of stock

erbocker, 5 John. R. 427; Russell v. De Grand, 15 Mass. R. 39; Belding v. Pitkin, 2 Caines R. 149.

* * See Smith's Merc. Law, pp. 427-433; Chitty on Contracts (7th ed.) tit. *Illegal Contracts*. * *

NOTE 1009.—If an agent be *dead* at the time of trial, *original entries* made by him in the *usual course of business*, may be produced in evidence; but mere absence of the witness from the state or beyond the process of the court, will not entitle the party to give such entries in evidence. Merrill v. Ithaca, &c. R. R. Co., 16 Wend. 586. And check rolls or accounts of the number of days' work, are not admissible to show the amount of labor done, unless the same be verified by the oath of the agent who made the entries, if such agent be *living*. *Id.* The superintendents or others making the entries, were agents for both parties. Union Bank v. Knapp, 3 Pick. 96. They were not admissible as books of account, where the plaintiff has clerks and other witnesses of the labor. Merrill v. Ithaca, &c. R. R. Co., *supra*, and cases cited.

Charges for work under a special contract, but which afterwards become matter of account by operation of law, in consequence of a rescission of the contract, cannot be proved by the party's book. There must be a right to charge when the service is done. Bradley v. Goodyear, 1 Day, 104; Slasson v. Davis, 1 Aik. 73, 74; Peck v. Jones, Kirby, 289; Terrill v. Beacher, 9 Conn. R. 344.

When the original entries are produced, and the person who made them, or saw them made by another, knowing them at the time to be true, testified that he made the entries or saw them made, and that he believes them to be true, although, at the time of his testifying, he has no recollection of the facts set forth in the entries, such evidence is admissible, and *prima facie* sufficient to establish the facts evidenced by the entries. Such proof, it seems, will not be received where only a copy of the original entry is produced. Merrill v. The Ithaca, &c. R. R. Co., *supra*. See Gregory v. Taverner, 6 Car. & Payne, 280.

* * See tit. *Original Entries*, ante of the text and notes. * *

(1) New v. Chidgey, Peake's N. P. C. 134.

NOTE 1010.—Martin v. Jackson, 1 Car. & Payne, 17; Goodman v. Lowe, 1 Id. 76. In the last case Lord Giff said: "The witness's interest is equal, for the witness is liable to pay some one, and he is indifferent whether he pays the plaintiff or the defendant."

If, in assumpsit, for work and labor, the defence be, that A. B. was employed to do the work, and not the plaintiff, A. B. is a competent witness to prove this, although he is an uncertified bankrupt; and his assignees have received the amount due for this very work, as work done by him. Wilson v. Gallatly, 2 Car. & Payne, 467.

A. sent to B.'s agent a list of prices at which he would do work. B. wrote a letter to his agent, stating that he would agree to the price, if A. would consent to be paid at stated periods, the first payment to be "in November." The agent showed this letter to A., and said to him that he might consider the £100 to be payable on the "first of November." A. afterwards did the work for B. It was left to the jury to say whether that which the agent said to A. formed a part of the actual contract between the parties, or whether it was mere observation by the agent himself. Knapp v. Harden, 6 Car. & Payne, 745.

(2) NOTE 1011.—In Miller v. Müller (7 Pick. 133), one tenant in common had cut wood and

cannot be considered as the receipt of money.(1) But where provincial notes have been received as money, they may be recovered in this form of action.(2) And it seems that notes of the Bank of England, will, unless produced at the trial, be considered as having been converted into money.(3)

It has been held, that the duty imposed by the 55 G. III, c. 184, "on every receipt or discharge given for, or upon the payment of money," applies only to receipts for the discharge of money antecedently due, and not to an acknowledgment that money has been deposited, to be accounted for.(4) An instrument containing a receipt and an agreement, is admissible in evidence as a receipt, if it has a receipt stamp, though it be not stamped as an agreement.(5)

A demand for money had and received may be transferred from one person to another, by an agreement between all the parties;(6) but in such

sold from the common land; held, that he was entitled to recover, as for money had and received, although it was objected, that the price of some of the wood was received in real estate; the court saying: "We think, as the sale was made for money, the defendant was answerable for the price when he discharged the purchaser, whether he received cash or anything else. He may be considered as the purchaser of the real estate with the money for which he sold the wood. The plaintiff consents to the sale for money, but not that the real estate shall be substituted." (See *Ken. & Port. R. R. Co. v. White*, 38 Maine, 63; *Lary v. Hart*, 12 Geo. 422; *Muir v. Rand*, 2 Carter, 291.)

(1) *Nightingale v. Devisme*, 5 Burr. 2589. See *Breton v. Cope*, Peake's C. 43. Nor goods. *Leer v. Goodson*, 4 T. R. 687. See *Whitwell v. Bennet*, 3 Bos. & Pul. 559.

NOTE 1012.—Money had and received will not lie to recover the value of foreign securities paid to the defendant, where it appears that he had no opportunity of converting such securities into money. *M'Lachlin v. Evans*, 1 Young & Jerv. 380. But a debt incurred in foreign coin is recoverable, as for lawful money of Great Britain. *Harrington v. M'Morris*, 1 Marsh. 33; 5 Taunt. 228. In an action brought in England to recover the value of a given sum, Jamaica currency, upon a judgment in that island, the value is that sum in sterling money, which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. *Scott v. Bevan*, 2 Barn. & Adol. 78.

The holder of bank notes may declare against the bank issuing them for money had and received, and recover for all he holds at the time of the trial. *Goodenon v. Duffield*, Wright, 455.

(2) *Pickard v. Bankes*, 13 East, 20; *Fox v. Cutworth*, cited 4 Bing. 179.

(3) *Noyes v. Price*, Ch. on Bills, 333 (7th ed.) See *Longchamp v. Kenny*, Doug. 137. Case of a masquerade ticket. *Spratt v. Hobhouse*, 4 Bing. 178.

(4) *Tomkins v. Ashby*, 6 Barn. & Cress. 541; *Fisher v. Leslie*, 1 Esp. 426, where it was decided that an I. O. U. was admissible without a stamp; *Calt v. Howard*, 3 Stark. N. P. C. 4.

(5) *Gray v. Smith*, 1 Campb. N. P. C. 387.

(6) *Israel v. Douglas*, 1 H. Bl. 239; *Tatlock v. Harris*, 3 T. R. 180, by Buller, J.; *Glyn v. Baker*, 13 East, 509; *Wilson v. Coupland*, 5 B. & A. 228; *Hennings v. Rothschild*, 4 Bing. 315; *Spratt v. Hobhouse*, 4 Bing. 178; *De Bernales v. Fuller*, 14 East, 590. *Vide supra*, p. 193. The original demand must have been for money had and received. *Wharton v. Walker*, 4 B. & C. 163.

NOTE 1013.—*Owings v. Owings*, 1 Gill & John. 484; *Schermerhorn v. Vanderheyden*, 1 John. Rep. 139; *Com. Dig.* 309 (note *p.*); *Curtis v. Norris*, 8 Pick. 280; *Silley v. Hayes*, 1 Nev. & Payne, 26.

A clerk to justices, verbally agreed to permit B. to act in lieu of him, and to allow him half the fees of the office, if C. and D. should say he ought to do so; C. and D. were consulted, and approved of the arrangement. B. accordingly acted as clerk; held, that he might maintain an

cases, the new and substituted liability will not be incurred, unless the whole debt is extinguished.(1)

And where a party to whom a bill is remitted, repudiates the trust with which the bill is clothed, no right of action for money had and received accrues to the person on whose account the bill is directed to be applied, although the bill be retained; unless it has been received by the defendant in the character of agent for the plaintiff.(2)

An agent who receives money for his principal is himself liable as a principal, until there has been a change of circumstances, by his having

action for money had and received, for half the fees received by A. *Rowland v. Hall*, 1 Scott's Rep. 539.

The plaintiff was the owner of a saw-mill, and agreed with one W. to work the mill, and the plaintiff and W. were to divide the gross earnings of the mill. The work having been performed, the parties agreed that one-half should be paid to each; and defendant paid W. his half; held, that plaintiff was entitled to recover the other half. *Ambler v. Bradley* 6 Vermont Rep. 119; 38 Maine, 63.

(1) *Cuxon v. Chadley*, 3 B. & C. 591; *Wharton v. Walker*, 4 B. & C. 163.

(2) *Yates v. Bell*, 3 Barn. & Ald. 643; *Williams v. Everett*, 14 East, 597; *De Bernales v. Fuller*, 14 East, 590, n.; *Stewart v. Fry*, 7 Taunt. 339.

NOTE 1014.—See *Platt's Adm'r v. Lean's Ex'r*, 3 Car. & Payne, 561.

In *Newcastle v. Bellard* (3 Greenl. R. 369), a treasurer for a town left a demand belonging to the town with an attorney, who sued the same in the name of the treasurer, as he might, by statute; held, that the town might nevertheless sue the attorney to recover the money.

Defendant had in his hands money, which was the proceeds of goods belonging to the plaintiff, which had been intrusted to one K. to sell; plaintiff applied to the defendant for the money, and he promised to pay it to him, and claimed his commission for selling; held, that plaintiff was entitled to recover in this action. 12 Mass. R. 183. K. having been the mere agent of the plaintiff to sell, and having put the goods into the hands of the defendant to sell, can have no claim as factor or agent; whatever right he might have to set off against the plaintiff, having voluntarily parted with it, he cannot call upon the defendant, who will have discharged his trust by paying over the money where it belongs. *Id.*

Where a person assigned his distributive share in an estate, and afterwards collected and used the amount due upon it, assumpsit will not lie against him at the instance of the assignee. *Smith v. Gray's Ex'r*, 1 Dev. & Batt. 42. The case is not analogous to those in which a man has received money as the agent of another, to which his principal had not a legal right. Per *Gaston, J.*, in *Id.* The dictum of *Abbott, Ch. J.*, in *Cooper v. Wrench* (1 Dowl. & Ryl. 482), and the decision in *Allen v. Impott* (8 Taunt. 263), depended upon this proposition for support. In *Smith v. Gray's Ex'r* (*supra*), the court say: "We cannot believe that the action of assumpsit for money had and received may be maintained by the assignee of an unnegotiable chose in action against the assignor, merely because he has collected the money after an ineffectual attempt to transfer the debt."

(See *Finney v. Brant*, 19 Mis. (4 Bennett), 42; and *Frost v. Martin*, 9 Foster (N. H.), 306. Where a contract is entered into in good faith by both parties, and in consequence of a fact not known to either, performance is rendered impossible, the party paying money thereon may recover it back as money had and received. *Briggs v. Vanderbilt*, 19 Barb. 222. So if a party buys a lease for a term of years, and pays money therefor, the purchaser and seller both supposing it to be valid, and the lease turns out to be of no validity, the purchase money may be recovered back as money paid by mistake. *Martin v. McCormick*, 4 Selden N. Y. 331. That the party paying had means of knowledge does not prevent the recovery. *Kelly v. Solari*, 9 M. & W. 54. Both parties acting in good faith on a mistake of fact, a security given for the price of premises will be decreed to be given up. *Hitchcock v. Giddings*, 4 Price, 135.)

paid over the money to his principal, or done something equivalent to it; and merely passing money in account is not equivalent to payment.(1) A payment by an agent to his principal, after notice to retain the money, will render him personally liable, if the principal is not entitled to it.(2) And to make available the defence, that the money has been paid over to another person, it must appear that the money was paid to the agent expressly for the use of that person.(3) A person who has merely conveyed money in the character of messenger or bearer, is not liable to the rightful owner.(4) A stakeholder is in the situation of an arbitrator, and whether the stake be laid upon a legal or illegal wager, it may be recovered back before the event is decided;(5) and, if the wager be illegal, before the stake is paid over.(6) Where money in litigation between two parties has, by mutual consent, been paid over to a stakeholder, in trust for the party entitled, it can only be sued for and recovered from the stakeholder, and not from the party who was originally indebted.(7)

Mistake of law.

The action for money had and received is not maintainable, where money has been paid under a mistake of law,(8) provided the party have knowledge of the facts.(9) This rule does not extend to cases of extor-

(1) *Cox v. Prentice*, 3 Maule & Selw. 345; *Buller v. Harrison*, Cowp. 566; *Horsfall v. Handley*, 8 Taunt 136; *Sadler v. Evans*, 4 Burr. 1986.

(2) *Sadler v. Evans*, B. N. P. 133. And see B. N. P. 153.

(3) *Snowden v. Davis*, 1 Taunt. 359.

(4) *Coles v. Wright*, 4 Taunt. 190.

(5) *Eltham v. Kingman*, 1 B. & Ald. 683; *Brandon v. Hibbert*, 4 Campb. 37.

(6) *Edgerton v. Furzman*, 1 Ry. & Mo. 214, n.; *Cotton v. Thurland*, 5 T. R. 405; *Smith v. Beckmore*, 4 Taunt. 474; *Bate v. Cartwright*, 7 Price, 540; *Lacassau de v. White*, 7 T. R. 535; *Howson v. Hancock*, 8 T. R. 576.

NOTE 1015.—Where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment, he may recover his own stake. *Hastelow v. Jackson*, 8 Barn. & Cress. 21.

* * In *Ruckman v. Pitcher* (1 Comstock's R. 392), it was held by the Court of Appeals, that an action lay by the losing party in an illegal bet or wager, to recover from the stakeholder the sum deposited with him, although immediately after the determination of the wager, the money was paid to the winner by the plaintiff's express direction; and that a previous demand was unnecessary—that the race was legal, did not make the bet valid. *Id.* In *Lewis v. Minor* (3 Denio, 103), the loser recovered the money back after paying it over. The court held, that he could not have recovered it back, at the common law, but that the statute (1 N. Y. R. Stat. 662, §§ 8, 9, 16), gave the right. In *Ruckman v. Bryan* (3 Denio, 340), it was held, that money lent to be bet on a horse race, and paid over by the stakeholder, could not be recovered by the lender in an action against the borrower, even upon a subsequent express promise to pay it. And see *Smith's Merc. Law*, pp. 427–433; *Chitty on Contracts* (7th ed.) tit. *Illegal Contracts*.

(7) *Ker v. Osborne*, 9 East, 377.

(8) *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143; *Gomery v. Bond*, 3 Maule & Selw. 378. Money paid over by a sheriff to an execution creditor, under a mistake as to a bankruptcy, is recoverable, but not the costs in an action of trover, brought by the assignees. *Wilson v. Milner*, 2 Campb. N. P. C. 452. (See *Kennard v. Fiedler*, 3 Duer, 318.)

(9) *Cripps v. Reade*, 6 T. R. 606; *Bize v. Dickason*, 1 T. R. 285; *Cox v. Prentice*, 3 Maule & Selw. 349.

tion;(1) or where the parties are not upon an equal footing;(2) or where the payment is made to obtain possession of things to which a party is entitled.(3) And although, in general, the action for money had and

NOTE 1016.—*Davis v. Watson*, 2 Nev. & Man. 709; *Dickins v. Jones*, 6 Yerg. R. 483. When it is paid under a mistake of the real facts, it may be recovered; there being no neglect to employ the existing means of knowledge. Per Bayley, J., in *Milnes v. Duncan*, 9 Dowl. & Ryl. 731; 6 Barn. & Cress. 671. It is well settled as a general principle, that where a man pays money without any legal obligation to do so, under a mistake of fact, and without the means of ascertaining the truth, or if he be induced to pay it under false representations, he may recover it back. *Potter v. Everett*, 2 Hall, 252; *Garland v. The Salem Bank*, 9 Mass. R. 389; *Martin v. Morgan*, 1 Ball & Beat. 289; *Gooding v. Morgan*, 37 Maine, 419.

Ante, page 188 of the text; *Davis v. Watson*, 2 Nev. & Man. 709; *Cocks v. Masterman*, 4 Man. & Ryl. 676; 9 Barn. & Cress. 902; *Wallis v. Wallis*, 4 Mass. R. 135; *Holmes v. Avery*, 12 Id. 135; *Morton v. Chandler*, 6 Greenl. 142; *Rounds v. Baxter*, 4 Id. 454.

(Money paid under a claim of right, cannot be recovered back, there being no mistake of fact. *Donns v. Donnelly*, 5 Ind. 496. Otherwise if paid under duress, or to get possession of property from a carrier. *Harmony v. Bingham*, 2 Kernan R. 99.)

Where two parties come to an arrangement, and one is ignorant of his rights, the agreement is not in general binding upon him. *Baddley v. Oliver*, 1 Dowl. P. C. 598; 1 Crompt. & Mee-son, 219.

(1) *Dew v. Parsons*, 2 Barn. & Ald. 568; *Parsons v. Blandy*, Wightw. 22.

(2) *Morgan v. Palmer*, 2 Barn. & Cress. 729.

(3) *Astley v. Reynolds*, Strange, 915; *Fulham v. Downs*, 6 Esp. 26; *Shaw v. Woodcock*, 7 Barn. & Cress. 80. Money got by legal process cannot be recovered. *Marriott v. Hampton*, 7 T. R. 269. See *Brown v. McKinnally*, 1 Esp. N. P. C. 279; *Cobden v. Kenrick*, 4 T. R. 432; 2 Kernan, 99.

NOTE 1017.—In *Marriot v. Hampton* (7 John. R. 569), the court say: "After a recovery by process of law, there must be an end of litigation." In *Brown v. McKinnally* (1 Esp. R. 279), the payment made by the plaintiff in a former action, which had been brought against him by the defendant, was a payment made after action brought, but in what stage of the action does not appear. In *Milnes v. Duncan* (6 Barn. & Cress. 679), Mr. Justice Holroyd says: "If the money had been paid after proceedings had actually commenced, I should have been of opinion, that inasmuch as there was no fraud in the defendant, it could not be recovered back." So, in *Hamlet v. Richardson* (9 Bing. 644), the same principle was recognized, that the defendants knowing of the cause of action for which the writ was sued out in the former action before they paid the money, and there being no fraud on the part of the plaintiff in that action, the action was not maintainable. And in *Goodman v. Sayers* (2 Jack. & Walk. 249), where the party has full knowledge of the facts and means of proving them at the trial, held, that there was no remedy in equity for the recovery of money paid on compromise of an action.

In *Loring v. Mansfield* (17 Mass. R. 394), a partial payment had been made on a note of hand, due from the plaintiff to defendant; and being made on an existing debt, it could not be reclaimed by showing that judgment had been afterwards recovered for the full amount of the note, and this the plaintiff was not permitted to show in support of his action, because it directly impeached a judgment to which he was a party. The only ground of complaint was, that the judgment was recovered for too large an amount, and not that the partial payment on the note was wrong. In the subsequent case of *Whitcomb v. Williams* (4 Pick. 229), the plaintiff was permitted to recover an overpayment, although judgment had been recovered for the full amount of the note. Thus, goods had been paid for partly in money and partly by the note in question; it afterwards appearing that there had been an overpayment; held, that the plaintiff was entitled to recover the same in this action, on the ground that the giving the note was payment, and thereupon an action immediately accrued to the plaintiffs to recover back the amount thus overpaid. Id. In such case, an action might have been maintained, although the note had

received can be brought, where the money has been received on a consideration which has wholly failed,(1) or where the money has been obtained by fraud,(2) deceit, or duress; yet this must be understood with a qualification, that the defendant shall not be deprived of the advantages arising from any appropriate form of remedy provided for the particular grievance with which he is charged.(3) Thus it has been held, that money, paid to

never been put in suit, and remained unpaid; the action, therefore, is sustained on ground independent of the judgment. *Id.*

If the money sought to be reclaimed, was paid under legal process, this action cannot be maintained; though it afterwards be discovered not to be due. And in *Morton v. Chandler* (7 Greenl. 44), this principle was considered applicable to the case of a judgment by confession, where by statute a recognizance is taken and execution issued by the magistrate; held, that parol evidence was not admissible to show a mistake in the amount for which the recognizance was taken; the recognizance being a sealed instrument. But in the same case (8 *Id.* 9), on a new trial, the plaintiff proved that the excess was inserted in the recognizance without his consent or knowledge, and by the management and fraud of defendant; and the plaintiff had a verdict.

Assumpsit for money had and received, lies to recover back money paid on an execution issued on a satisfied judgment. *Wisner v. Bulkley*, 15 Wend. 321. So far as defendant was concerned there was no judgment, and he might have been sued as a trespasser; the plaintiff having taken an assignment of the judgment with knowledge of the facts, stands in the place of the original judgment creditor. *Id.*; *Sherman v. Boyce*, 15 John. R. 443; *Jackson v. Cadwell*, 1 Cowen, 662. (See *Gooding v. Morgan*, 37 Maine, 419.)

A. being arrested, gave a bail bond to the sheriff, but did not perfect bail, whereby the sheriff became fixed. Proceedings having been taken out on the bail bond, a judge at chambers made an order, on the application of the bail, that proceedings should be stayed on payment of debt and costs, which were accordingly paid by A.'s attorneys, on the 27th of October. A. had supplied his attorneys with money towards payment of the debt and costs on the 10th October, and on the 14th October he became bankrupt; held, that this was a payment under process of law, and that the assignees of A. could not recover the money back. *Belcher v. Mills*, 2 C., M. & R. 150.

(If money be paid on an erroneous judgment, unreversed, it cannot be recovered back. *Wilburn v. Sproat*, 2 Gray, 431.)

(1) By *Lord Ellenborough*, 4 M. & Sel. 478; *Kempson v. Saunders*, 4 Bing. 5.

(2) NOTE 1018.—Not only good morals, but the common law requires, good faith, and that every man in his contracts should act with common honesty, without overreaching his neighbor by false allegations or fraudulent concealment. Therefore, in *Bliss v. Thompson* (4 Mass. R. 489), where from the evidence it appeared that the defendant was a partner in interest, with the plaintiffs and others, in G.'s warranty in respect of land; that as a partner, he proposed terms to G. to discharge his warranty; that he was to receive \$8,000, on procuring the discharge; that he concealed this negotiation, and falsely affirmed that this warranty was worth nothing, and fraudulently produced A.'s letter written for this purpose, to give credit to his affirmation; and that the plaintiffs thus imposed upon, executed a release, by which the defendant was enabled to fulfill his contract with G., by extinguishing the plaintiff's interest in the warranty; the jury upon this evidence found for the plaintiff, and the court sustained the verdict.

(3) NOTE 1019.—Where trespass or trover will lie, if the wrongdoer has converted the property into money, the plaintiff may waive the tort, and bring his action of assumpsit. *Sturtevant v. Waterbury*, 2 Hall, 449. And the plaintiff is not concluded by having proceeded to judgment in trespass against other persons, no satisfaction of such judgment having been obtained. *Id.* As tenants in common must join for any entire injury done to the common property, so they must join in assumpsit when the tort is waived. *Gillmore v. Wilbur*, 12 Pick. 120. In *Jones v. Hoar* (5 Pick. 285), the point decided was, that where trespass had been committed upon land, and trees cut and carried away, but not sold and converted into money, assumpsit for the timber, as

release goods which have been wrongfully taken as a distress, cannot be recovered in this form of action; (1) nor the amounts of rents, where the defendant claims title to the premises out of which the rents issue. (2) The maxim "*in pari delicto potior est conditio possidentis*," applies where an agreement is no longer executory, but executed, (3) and the transaction is immoral, or a violation of the general laws of public policy, and not merely an infringement of those laws which are calculated for the protection of the subject against oppression. (4)

For money paid.

In order to sustain the count for "money paid" for the use of the defendant, it is, in the first place necessary, to prove the payment of *money*, or at least, of what has been taken in payment for money, as negotiable

for goods sold and delivered, would not lie. The decision, however, proceeded on the assumption, that if the timber had been sold, the plaintiff might have recovered the proceeds, as money had and received. But, in *Bigelow v. Jones* (10 Pick. 161), the court recognize the principle settled in *Sturtevant v. Waterbury* (*supra*), that to maintain such an action there must be a tort to waive. Held, therefore, that a disseizee had not such an interest in trees cut and carried away during the disseizin as would enable him to maintain this action for the proceeds of the sale. See also the case of *Allen v. Thayer*, 17 Mass. R. 299. In *Miller v. Miller* (7 Pick. 133), which was assumpsit by one tenant in common, for the proceeds of wood sold; there being no dispute about the title, it was held that the plaintiff had a right to waive his action of trespass, and to consider the defendant as his agent in disposing of the wood.

In some cases, however, a party by waiving the tort, waives his right of action. See *Whitwell v. Vincent*, 4 Pick. 449. (See *McDonald v. Brown*, 16 Ill. 32.)

It is no objection to this form of action, that it avoids the operation of the Statute of Limitations. *Lamb v. Clark*, 5 Pick. 193.

If the wrongdoer hath sold, or used and then sold the property, the owner may waive the tort, and in assumpsit recover the net proceeds received both for the use and by the sale. *Hambly v. Trott*, Cowp. 371; *Cummings v. Noyes*, 10 Mass. R. 436; *Chancey v. Yeaton*, 1 N. H. R. 151. (See also *Wilder v. Aldrich*, 2 R. I. 518.)

The case of *Lindon v. Hooper*, cited in the text, decides only, that in some cases, money had and received is not the appropriate remedy; and the court there decide on the nature of the remedy by distress, which depends on a peculiar system of strict positive law. Upon this case, *Weston, J.*, in *Chase v. Dwinal* (*supra*), observes: "From a case of this peculiar character, decided upon this special ground, no general principle can be extracted which can govern cases where the law of distress does not apply."

(1) *Lindon v. Hooper*, Cowp. 414; *Knibbs v. Hall*, 1 Esp. N. P. C. 84; *Lothien v. Henderson*, 3 Bos. & Pul. 530. See *Snowden v. Davis*, 1 Taunt. 112.

(2) By *Wilson, J.*, *Cunningham v. Lawrentz*, 1 Bac. Ab. 260 (5th ed.) *in notis*. See *Arris v. Stukely*, 2 Mod. 260.

(3) *Tappenden v. Randall*, 2 Bos. & Pul. 467; *Walker v. Chapman*, cited in *Lowrie v. Bourdieu*, Doug. 471; *Wilkinson v. Kitchen*, 1 Ld. Ray. 89; *Howson v. Hancock*, 8 T. R. 575; *Mack v. Abel*, 3 Bos. & Pul. 36. See *Norman v. Cole*, 3 Esp. C. 253.

(4) *Jacques v. Withey*, 1 H. Bl. 65; *Williams v. Hedley*, 8 East, 378; *Thistlewood v. Cracroft*, 1 Maule & Selw. 500; by Ld. Mansfield, *Smith v. Bromley*, Doug. 696; *Lowrie v. Bourdieu*, Doug. 471; *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Lomas*, 4 T. R. 166; *Leicester v. Rose*, 4 East, 372; *Turner v. Howle*, 1 Dow. & Ry. 27. An agent receiving money to the use of his principal, cannot retain it, on the ground that it was paid on an illegal consideration. *Tenant v. Elliott*, 1 Bos. & Pul. 3.

securities.(1) It is not sufficient, to show that the plaintiff has entered into a bond, or given a warrant of attorney on account of the defendant.(2) And it has been held that an under-tenant, where goods have been distrained and sold for the rent of the original tenant, cannot maintain an action for money paid; because the money vested in the landlord, immediately on the sale of the goods, and could not be considered as having passed from the under-tenant.(3)

Request of defendant.

It will be necessary to prove either a previous request on the part of the defendant, or his subsequent assent to the payment of the money.(4) The defendant's assent will be implied in all cases, where, through his default, the plaintiff has been obliged to pay money, as where the plaintiff is a surety for the defendant;(5) or has accepted a bill for his accommoda-

(1) *Barclay v. Gouch*, Esp. N. P. C. 271. *Vide infra* (2).

NOTE 1020.—*Power v. Butcher*, 10 Barn. & Cress. 329; *Dole v. Hayden*, 1 Greenl. 152; *M'Lellan v. Crofton*, 6 Id. 331, 332, 333; *Douglass v. Moody*, 9 Mass. R. 553; *Cornwall v. Gould*, 4 Pick. 444; *Witherby v. Mann*, 11 John. R. 516. So, the conveyance of land, received in discharge of a money debt, to the same effect as if money had been actually paid. *Ainslee v. Wilson*, 7 Cowen, 668; *Bonney v. Seeley*, 2 Wend. 481; *Randall v. Rich*, 11 Mass. R. 498. In *Craig v. Craig* (5 Rawle, 91, 98), *Gibson, C. J.*, says: "Proof of payment in money is not absolutely indispensable to a count for money expended to the defendant's use; though it must be admitted that the only exception recognized in the books, is the case of payment in negotiable paper."

(2) *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & Ald. 51.

NOTE 1021.—*Craig v. Craig*, 5 Rawle, 91. The count for money paid cannot be maintained without proving actual payment, or that which is equivalent to payment. *Per Parke, J.*, in *Power v. Butcher*, 10 Barn. & Cress. 329. The giving of a security to pay is not equivalent to actual payment. In *Spencer's Administrator v. Brooks* (*Wright*, 178), it was held, that the evidence must show money paid to or for the defendant.

The law does not imply a promise from all who may become actually benefited, in consequence of payment by a surety, but only by the person whose debt is thereby discharged. *Tom v. Goodrich*, 2 Johns. R. 213. Thus, by the acceptance of one partner for custom duties, the claim of the government becomes confined to that bond, and the debt, if any previously existed in favor of the government against all the copartners for those duties, is extinguished. When the plaintiff became the surety in such bond, the promise of indemnity, and the promise upon the payment of the money, are implied against the obligor of such bond only. There is no privity between the parties but what arises from the bond. Id.

(3) *Moore v. Pyrke*, 11 East, 52.

(4) 1 Saund. 264, n. (5th ed.); *Stokes v. Lewis*, 1 T. R. 20; *Child v. Morley*, 8 T. R. 614; *Lightfoot v. Creed*, 8 Taunt. 268; *Edmiston v. Wright*, 1 Campb. C. 88.

(5) By *Lord Kenyon*, 8 T. R. 310. Bail may recover the expenses of taking their principal in execution. *Fisher v. Fellows*, 5 Esp. N. P. C. 171. An action lies for contribution between co-sureties. *Cowell v. Edwards*, 2 Bos. & Pul. 268. In actions between joint bail, the judgment must be proved. *Belldon v. Tankard*, 1 Marsh. 6.

NOTE 1022.—When one subscribes, with others, a sum of money to carry on some common project, lawful in itself, and supposed to be beneficial to the projectors, and money is advanced upon the faith of such subscription, an action for money paid, laid out and expended, may be maintained to recover the amount of the subscription, or such portion as will be equal to the subscriber's proportion of the expense incurred. *Holmes v. Dana*, 12 Mass. R. 190; *Trustees of Farmington Academy*, 14 Id. 172; *Bryant v. Goodnow*, 5 Pick. 228.

tion ; (1) or where damages have been recovered against the plaintiff, on account of a debt for which the defence was jointly liable ; (2) or where the plaintiff has paid money, in order to redeem his own goods from a distress for rent, for which the defendant was liable. (3) And, in general, this count may be supported by proof that the money was paid for the defendant from a reasonable cause, and not officiously. (4)

Illegal payments.

The law will not raise an implied assumpsit to repay money advanced in furtherance of an illegal object. (5) It is immaterial, that the person

* * See *Stewart v. Trustees of Hamilton College* (2 Denio, 403), where it was held that a subscription to the funds of a literary and religious institution, on condition that the aggregate amount of subscription should amount to \$50,000 (which amount was subscribed), was without consideration ; and judgment was given against the institution, in a suit to recover the subscription. *S. P.*, *Hamilton College v. Stewart*, 1 Comst. R. 581. * *

(As to money paid towards a fund, the object of which is abandoned as a failure, see *Murray v. McHugh*, 9 Cush. (Mass.) 158.)

An action for money paid to the use of the defendant may be maintained by a sheriff's officer who has paid the debt and costs on attachment against the sheriff, bail above not having been put in through the misconduct of the defendant in imposing insufficient bail on the sheriff, and the defendant having promised to indemnify the officer, both before and after the payment ; but the officer cannot recover beyond the debt. *White v. Leroux*, 1 Mood. & Malk. 347.

(1) *Howes v. Martin*, 1 Esp. N. P. C. 162.

(2) *Merryweather v. Nixon*, 8 T. R. 186 ; *Bayne v. Stone*, 5 Esp. C. 13. The record will be evidence in an action for contribution. 2 Bos. & Pul. 270. It seems that it is not necessary to prove actual payment of the plaintiff's attorney's bill. *Bullock v. Lloyd*, 2 C. & P. 119. There is no contribution among tortfeasors. 8 T. R. 186.

(3) *Exall v. Partridge*, 8 T. R. 308 ; *Dawson v. Lenton*, 5 B. & A. 521.

(4) *Brown v. Hodgson*, 4 Taunt. 189. See *Sills v. Laing*, 4 Campb. N. P. C. 81.

NOTE 1023.—An order drawn by the defendant on the plaintiff for the payment of the money, and by him retained, is evidence that the money was advanced agreeably to the directions of the order. *Blunt, Ex'r of Ogden, v. Starke's Adm'rs*, 1 Taylor, 110 ; *S. C.*, 2 Hayw. 75. In an action for money paid by a surety in a bond given for duties to a United States collector against his principal, the possession of the bond by the surety, and the collector's receipt, were held sufficient evidence of payment. *Sluby v. Champlin*, 4 John. R. 461. In an action for money paid by the plaintiff for the defendant's testator's passage to Europe, the declarations of the owner and captain of the ship made about the time of the testator taking passage, were held admissible in evidence for the plaintiff. *Holladay, Ex'r of Littlepage v. Littlepage*, 2 Munf. 316.

(5) *Booth v. Hodgson*, 6 T. R. 405 ; *Sullivan v. Graves, Park on Insur.* 8 ; *Mitchell v. Cockburn*, 2 H. Bl. 379 ; *Stokes v. Twitchen*, 8 Taunt. 492.

NOTE 1024.—Where the use to which the property may have been put, was one which the law prohibits, the plaintiffs cannot recover the money received for that use. And such are the proceeds of voyages performed in violation of good morals and wholesome statutes. *Chauncey v. Yeaton*, 1 N. H. R. 151 ; *Norman v. Cole*, 3 Esp. R. 252 ; *Belding v. Pitkin*, 2 Caines, 147 ; *Hanney v. Eve*, 3 Cranch, 242 ; 1 Binn. 120 ; 5 John. R. 434 ; 2 Gall. R. 560. In *De Begnis v. Armistead* (10 Bing. 107), held that plaintiff being participant in the concern, could not recover money he had paid at the request of the defendant, in the conduct of an unlicensed theatre. *Tindal, Ch. J.* : "The principle by which the present case is to be decided, is that which is very clearly expressed by *Holt, Ch. J.*, in *Bartlett v. Vinor* (Carth. 252) : 'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void con-

advancing the money was no party to the transaction, if it was advanced for the express object of accomplishing an illegal purpose.(1) In considering the illegality of a transaction, the distinction between "*mala prohibita*," and "*mala in se*," is no longer recognized by the courts."(2)

Action for money lent.

In order to recover under a count for money lent, it will not be sufficient merely to prove the receipt of money from the plaintiff by the defendant, since the presumption of law is that money, when paid, is in liquidation of an antecedent debt.(3) Accordingly, it has been held, that a debt cannot be established by proving that the defendant has received money under the plaintiff's check on his banker, unless there is also evidence of money transactions from which a loan might be inferred, or an application by the defendant to borrow money at the time.(4) Where a

tract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.' The same principle is more briefly expressed by Lord Ellenborough, in the case of *Langton v. Hughes* (1 Moore & Scott, 596): 'What is done in contravention of the provisions of an act of Parliament, cannot be made the subject of an action.' (See, also, *Boutelle v. Malendy*, 19 N. H. 196; and *Pepper v. Haight*, 20 Barb. 429; 4 Hill R. 624.)

* * See *ante*, note 1015. * *

(1) *Canaan v. Brice*, 3 B. & Ald. 179.

(2) 3 B. & Ald. 179; *Aubert v. Maize*, 2 Bos. & Pull. 371.

(3) *Welch v. Seaboard*, 1 Stark. N. P. C. 474.

(4) *Cary v. Gerrish*, 4 Esp. N. P. C. 9; *Aubert v. Walch*, 4 Taunt. 293.

NOTE 1025.—There is a distinction between the security and the contract of lending; therefore, although the security itself be void, the lending money not being declared void, it may be recovered. *The Utica Ins. Co. v. Scott*, 19 John. R. 1; *Utica Ins. Co. v. Kip*, 8 Cowen, 20. The action for money lent, lies in such case to recover the money of the borrower. *Id.* In *Sutton v. Toomer* (7 Barn. & Cress. 416), there was proof of a deposit of money and a promise to pay that money on certain terms, contained in a paper in the form of a promissory note. That paper was produced. It contained the terms on which the money was deposited, and it had a stamp required for a promissory note of that amount. Some years afterwards, the plaintiff consented that an alteration, for the benefit of the defendant, should be made in the terms of the instrument. The effect of that alteration was to render it invalid as a security; held, that it was competent to the plaintiff to give the paper in evidence to prove the terms of the loan; the debt created by the loan remained.

A party may recover the amount of an I. O. U. on a count for money lent. *Childers v. Boulnois*, 1 Dowl. & Ry. N. P. C. 8. So upon an account stated. *Payne v. Jenkins*, 4 Car. & Payne, 324. An instrument, "nine years after date, I promise to pay," &c., is no evidence of money lent. *Morgan v. Jones*, 1 Car. & Payne, 162; 1 Tyr. 21. The words, "value received with interest," in an instrument which is not negotiable, do not of themselves import a money consideration so as to satisfy an averment that money was lent by plaintiff to defendant. *Morgan v. Jones*, *supra*.

Plaintiff engaged to let defendant land on building leases, and to lend him £4,000 to assist him in the erection of twenty houses; the money to be repaid by June, 1828. Defendant agreed to build the houses, to convey them as security for the loan, and repay the money; when six houses were built, and £1,168 had been advanced, plaintiff requested defendant not to go on with the other fourteen houses; defendant desisted; held, that after June, 1828, the plaintiff might recover the £1,168 on a count for money lent; and that it was not necessary

parent advances money to a child, it will be presumed, in the absence of evidence to the contrary, that it is by way of gift.(1) It is not necessary, in an action for money lent, for the plaintiff to prove that he has returned or tendered goods deposited with him by way of security, for the repayment of the money.(2)

It has been before considered in what case a bill of exchange or promissory note is evidence of the loan of money in favor of the parties who may sue upon it.(3) A bill of exchange is also evidence for the acceptor against the drawer, if proved to have been paid by the plaintiff as acceptor, or, where it is produced by him, if proved to have been in circulation after the acceptance.(4) A receipt indorsed on the bill is no evidence of its being paid, unless it is proved to be in the handwriting of the defendant, or of some person authorized to receive payment.(5) The fact of

to sue on the agreement. *James v. Cotton*, 7 Bing. 266. The plaintiff could not have declared on the agreement, for the agreement was rescinded by mutual consent.

In *M'Rae v. Boast* (3 Rand. R. 481), it was said, that the giving a check is a matter of equivocal character; and where it is shown, that defendant, long subsequent, gave to plaintiff his note, as matter of accommodation, the presumption of law is that the check had been settled.

Action by Craig's Administrators agt. Patton's Administrators, for money lent by the plaintiff's intestate to the defendant's intestate. The plaintiffs proved a check drawn by Craig, payable to Patton, which bore the mark of having been canceled at the bank; and Craig's bank book was also proved; and that both were found among his papers by his administrators. Held admissible; but that the handwriting of the bank clerk who make the entries must be proved by himself, or if dead, by some one who knew his hand. *Patton's Adm'rs v. Craig's Adm'rs*, 7 Serg. & Rawle, 126.

(1) By *Bailey, J.*, *Hicks v. Keats*, 4 B. & C. 71.

(2) *Lawton v. Newland*, 2 Stark. N. P. C. 72.

(3) *Vide supra*, pp. 186, 227; *Story v. Atkins*, 2 Str. 719.

NOTE 1026.—The unstamped slips of paper, with "I. O. U." £400, and "I. O. U. £250," written thereon, are neither promissory notes or receipts, and therefore may be received in evidence on an assumpsit for money lent. *Childers v. Boulnois*, Dowl. & Ryl. N. P. Cas. 8.

A bank, finding the security upon which a loan has been made, had failed by reason of the forgery of the names of the indorsers, commenced an action declaring for money had and received, and money lent and accommodated; held, that the plaintiffs were entitled to recover, although the term of credit agreed upon the loan had not expired. *Man. & M. Bank v. Gore et al.*, 15 Mass R. 75; *Young v. Adams*, 6 Id. 182. And the action exists against an innocent copartner—the money having gone to the use of the partnership—for one partner has full authority to bind the firm to any extent in contracts for the use of the partnership. *Man. & M. Bank v. Gore*, *supra*.

(4) *Pfiel v. Vanbatenberg*, 2 Campb. N. P. C. 439.

(5) *Id.*

NOTE 1027.—In *Lehn v. Lehn* (9 Serg. & Rawle, 57), which was an action for money lent, plaintiff having proved the loan of the money; the defendant offered in evidence a bond from the plaintiff to L. (dated subsequent to the loan) for a larger sum than the plaintiff had proved (and this bond was admitted to have been executed by the plaintiff). The defendant also gave in evidence a receipt indorsed on said bond for the sum of \$85, and another indorsement, by which it appeared that the suit had been brought on the bond. The plaintiff objected to all this evidence. But the court said that the bond with a receipt was evidence, and proper to prove the defence of payment; but the evidence in respect to the suit brought was inadmissible; the record was better evidence. To prove payment, it is enough to show it paid into the hands of

payment of a sum of money may be proved by the lender producing a check drawn by him upon his bankers in favor of the borrower, and which the borrower has indorsed; but without the indorsement the check is not available in evidence.(1)

Shipowners are liable for money advanced to the captain in cases of necessity, even in an English port.(2) And the captain of a ship is competent to prove that the money, which the plaintiff seeks to recover, was borrowed for the use of the defendant's ship, and was so applied.(3) An infant is not liable for money lent, though it has been laid out in necessities.(4) And money, knowingly lent for the accomplishment of an illegal object, cannot be recovered.(5)

Action for interest.

Interest is, in many cases, recoverable by way of damages, as in the instance of bills of exchange; and the jury may refuse to allow interest where the delay of payment has been occasioned by the default of a holder of a bill.(6) It seems that interest may be recovered under a count for goods sold;(7) but not under a count for money had and received.(8)

Interest, according to late authorities, is not allowed in every case where a demand is liquidated.(9) It is given if there be an express or implied contract for the payment of it. A contract for the payment of interest may be implied from the course of dealing between the parties, as where it has been charged and paid in former and similar accounts;(10) or from the usage of trade; and bankers will be allowed to charge compound interest by making rests in their accounts, where their practice in this respect is known to their customers.(11)

one who had authority to receive and discharge the debt, even though no receipt at all be taken. *Gardiner v. Callender*, 12 Pick. 374.

(1) *Egg v. Barnett*, 3 Esp. N. P. C. 196.

(2) *Robinson v. Lyall*, 7 Price, 592; 1 Stark. N. P. C. 27.

(3) *Rocher v. Busher*, 1 Stark. N. P. C. 27; *Evans v. Williams*, cited 7 T. R. 481.

(4) *Darby v. Bender*, 1 Salk. 279; *Probart v. Knouth*, 2 Esp. 472, n.

(5) See *Tracy v. Talmage*, 4 Kernan R. 162; and *Curtis v. Leavitt*, 1 Smith (15 N. Y. R.) 9-297, and cases there cited; *Nellis v. Clark*, 4 Hill, 424.

(6) *Cameron v. Smith*, 2 B. & Ald. 305; 5 Taunt. 626; 8 Taunt. 660; *Du Belloin v. Lord Waterpark*, 1 D. & R. 16.

(7) *Marshall v. Poole*, 13 East, 98. See *Slack v. Lowett*, 3 Taunt. 159; *Mountford v. Willis*, 2 Bos. & Pull. 337.

(8) *Tappenden v. Randall*, 2 Bos. & Pull. 472; *Walker v. Constable*, 1 Bos. & Pull. 306, which relates to a deposit at a sale. See by *Lawrence, J.*, 3 Taunt. 159; 5 Taunt. 626.

(9) By *Le Blanc, J.*, *De Bernales v. Fuller*, 2 Campb. N. P. C. 427. The general rules for the allowance of interest are laid down in *De Haviland v. Bowerbank*, 1 Campb. N. P. C. 50; *Calton v. Bragg*, 15 East, 226; *Gordon v. Swan*, 2 Campb. N. P. C. 430, n.

(10) *Nicholl v. Thompson*, 1 Campb. N. P. C. 52; 15 East, 223; 3 Campb. 467, 496; 4 Taunt. 346. Interest is recoverable from the time when the debt became due. See *Edwards on Bills and Notes*, 708-725.

(11) *Eddowes v. Hopkins*, Doug. 375; *Bruce v. Hunter*, 3 Campb. 467; *Moore v. Voughter*,

Interest is also allowed upon written securities for the payment of money, as on bills of exchange and promissory notes; (1) the interest on bills and notes generally accrues from the time they become due. (2) If they are expressed to be payable on demand, or at a certain time after date "with interest," the interest is to be calculated from the date. (3) The drawer or indorser of a bill, or indorser of a note, are only liable to pay interest from the time they receive notice of dishonor. (4) The interest is calculated to the time of final judgment. (5) Where goods are sold, to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest, as damages, from the time the bill, if given, would have become due. (6) To entitle a party to interest on a bill or note, the instrument should be produced at the trial. (7)

Interest is allowed, if the principal has been used by the defendant. Where money has been remitted to an agent, which he does not suffer to remain dead in his hands, but pays it into his bankers, and makes use of it as his own, he shall be liable for interest. (8)

Interest is not allowed upon a mere loan of money, (9) nor upon a de-

1 Stark. N. P. C. 487; *Dawes v. Pinner*, 2 Campb. N. P. C. 486, n.; *Eaton v. Bell*, 5 Barn. & Ald. 40.

NOTE 1028.—*Bainbridge v. Wilcocks*, 1 Bald. R. 636. And accounts between merchants may be settled every half year, on the principle of compound interest. *Id.*; 9 Vesey, 223, 224.

If a party show, in an action for money lent, that it was the course of dealing between him and the defendant, to calculate the interest every year, and add that to the principal, and the next year to calculate upon the total, he may recover interest, calculated in the same year, for the years subsequent to the striking of the last balance between the parties. *Newell v. Jones*, 4 Car. & Payne, 124.

(1) The plaintiff may recover interest, though the particular only contains a demand on the note. *Blake v. Lawrence*, 4 Esp. N. P. C. 147.

(2) *Chitty on Bills*, 472 (7th ed.)

NOTE 1029.—On a promissory note, payable on demand, where there is no proof of any agreement for the payment of interest, the plaintiff is only entitled to it from the day of issuing the summons. *Pierce v. Fothergill*, 2 Bing. N. C. 167. (See *Francis v. Castleman*, 4 Bibb, 282; 2 Id. 469; 5 Cowen R. 611; 21 Wend. 186.)

(3) *Chitty on Bills*, 472 (7th ed.); *Doman v. Dibdin*, 1 Ry. & Mo. 381.

(4) *Walker v. Barnes*, 5 Taunt. 240.

(5) *Chitty on Bills*, 422, n. (7th ed.)

(6) *Marshall v. Poole*, 13 East, 98; *Porter v. Palsgrave*, 2 Campb. N. P. C. 472; *Bechier v. Jones*, 2 Campb. N. P. C. 428; *Boyce v. Warburton*, 2 Campb. N. P. C. 480, in which cases the agreement was in writing; *Middleton v. Gill*, 4 Taunt. 298; *Lowndes v. Collins*, 17 Ves. 27.

(7) *Fryer v. Brown*, 1 Ry. & Mo. 145. In *Thompson v. Morgan*, 3 Campb. C. 101, interest was not allowed, because the note was produced merely as evidence under the common counts.

(8) *Rogers v. Taylor*, 2 Esp. N. P. C. 701; *Thompson v. Morgan*, 3 Campb. 102; *De Haviland v. Bowerbank*, 1 Campb. N. P. C. 50. It seems that interest is allowed on a sum awarded. *Swinford v. Bunn*, Gow, 9.

* * For a large collection of cases, showing the rule as to interest at law, and in equity, see 1 Conn. R. (2d ed.) p. 35. See also *Chitty on Contracts* (7th ed.), tit. *Interest*. * *

(9) *Vide supra*, p. 428.

mand for money paid,(1) or money had and received,(2) though it was fraudulently obtained;(3) nor upon a policy of insurance;(4) nor, in general, upon a demand for work and labor,(5) or for goods sold and delivered, although purchased at a limited credit.(6) And it seems that interest is not due upon an account stated, unless the balance be awarded to be paid at a particular time and place.(7)

Action upon an account stated.

It is now held unnecessary to prove the balance admitted upon the statement of an account, precisely as it is laid in the declaration.(8) And on the other hand, an account stated is not considered conclusive of the amount due to the plaintiff, as was formerly the case.(9) It is not neces-

(1) Interest is to be allowed upon money, paid at the request and to the use of another, from the time of payment. *Gibbs v. Bryant*, 1 Pick. 118; *Rensselaer Glass Factory v. Reid*, 5 Cowen, 602.

(2) NOTE 1030.—*Fruhlong v. Schroder*, 2 Bing. N. C. 77.

In Massachusetts there has not been any distinction made between the cases of money had and received, and the other money counts. There it is allowed, where it is grounded on a misapplication of money paid in trust, from the time the money is received to the verdict. *Fowler v. Shearer*, 7 Mass. R. 24; *Wood v. Robbins*, 11 Id. 504. In the latter case, the question was much considered; and the point decided was, that where defendant has fraudulently or wrongfully detained the money, interest was to be allowed from the receipt of the money.

(3) *Crockford v. Winter*, 1 Campb. N. P. C. 129; *De Bernales v. Fuller*, 2 Campb. N. P. C. 426; *Carr v. Edwards*, 3 Stark. N. P. C. 132; *Gwyn v. Godby*, 4 Taunt. 346. As to the point whether interest is recoverable on a deposit, and whether an auctioneer can be sued for interest, *vide supra*. *De Bernales v. Wood*, 3 Campb. 258; *Lee v. Mann*, 8 Taunt. 45.

(4) *Kingston v. Mackintosh*, 1 Campb. N. P. C. 518; by *Le Blanc* in *De Bernales v. Fuller*, 2 Campb. N. P. C. 427; by *Ld. Ellenborough* in *De Haviland v. Bowerbank*, 1 Campb. N. P. C. 50.

(5) *Trelawney v. Thomas*, 1 H. Bl. 305; *Blaney v. Hendrick*, 3 Wils. 205. See 3 Price, 134.

(6) *Gordan v. Swan*, 2 Campb. N. P. C. 429, n.; 12 East, 419. See *Mountford v. Willes*, 2 Bos. & Pull. 337; *Blaney v. Hendrick*, 3 Wils. 204.

(7) 6 Esp. 45; *Pinkorn v. Tuckington*, 3 Campb. N. P. C. 468; *Nicholl v. Thompson*, 1 Campb. N. P. C. 52. See *Blaney v. Hendrick*, 2 Bl. 267. Interest is allowed on a composition for tithes, only where a time for payment is specified. *Shipley v. Hammond*, 5 Esp. C. 114.

(8) *Thompson v. Spencer*, B. N. P. 129.

(9) Per Lord Mansfield, *Trueman v. Hurst*, 1 T. R. 42.

NOTE 1031.—A settled account is only *prima facie* evidence of its correctness, at law or in equity. It may be impeached by proof of fraud, or omission, or mistake; and if it be confined to particular items of account, concludes nothing as to other items not stated in it. *Perkins v. Hart*, 11 Wheat. 237, 256.

An account stated is not conclusive, but may by either party be modified by other evidence. Thus, the items of a balance struck in favor of one (the plaintiff) may be shown by the defendant to be due to the plaintiff and another as partners. *Barger et ux. ex'x v. Collins*, 7 Har. & John. 213.

Held, that a settled account for seamen's wages, &c., is not conclusive, but it may be surcharged and falsified. *Harden v. Gordon*, 2 Mason, 541, 561.

(Though not conclusive between the parties, an account stated can only be impeached by proof of fraud or mistake. *Lockwood v. Thorne*, 1 Kernan N. Y. R. 170, and cases there cited.)

sary to give evidence of the several items constituting the account;(1) and it need not comprise more than a single item.(2) The account may relate only to the plaintiff's demand, without making deduction for a counter claim on the part of the defendant.(3) And it seems, that where there is an admission of a debt for which assumpsit may be brought, but the amount is not stated, the plaintiff is entitled to nominal damages;(4) unless it be doubtful in what character the debt was acknowledged to be due to the plaintiff.(5) The award of an arbitrator, under a parol submission, is evidence upon a count on an account stated.(6) And it has been seen, that a promissory note may be evidence to the same effect.(7) But the acknowledgment of the plaintiff's claim to support this count must be absolute; a qualified acknowledgment is not sufficient.(8)

An action of *indebitatus* assumpsit may be brought for a balance due from one partner to another, upon an account closed, and an agreement to pay the amount.(9) But it seems there must, in such a case, be a final balance struck, and an express promise to pay the amount.(10) An infant is not liable upon an account stated, nor is it evidence, after he has attained his full age, to show that he has been provided with the necessaries mentioned in the account.(11) It has been held, that the defendant is liable on account stated between his wife and the plaintiff, which he has

(1) *Bartlet v. Emery*, 1 T. R. 42, n. The stating of the account is the consideration of the promise. *B. N. P.* 129; *Buller, J., Trueman v. Hurst*, 1 T. R. 40.

(2) *Knowles v. Michel*, 13 East, 249; *Highmore v. Primrose*, 5 M. & S. 65.

(3) *Stuart v. Rowland*, 1 Show. 215.

(4) * * In the *New York Dry Dock Bank v. McIntosh* (5 Hill, 290), it was held, that where the issue is on a plea of payment, and no proof is offered by either party, the plaintiff is entitled to a verdict, but only for nominal damages; and that if the defendant prove the payment of any sum, however small, he will be entitled to a verdict, unless the plaintiff show that it was less than the debt. And see the cases in the notes to Vols. I and II, relative to proof of the points in issue. * *

(5) *Dixon v. Deveridge*, 2 C. & P. 109; *Green v. Davis*, 4 Barn. & Cress. 235. See *Teal v. Auty*, 2 Bro. & Bing. 99.

(6) *Keen v. Batshore*, 1 Esp. N. P. C. 194.

(7) *Ante*, p. 186. It seems the note must be properly stamped to be evidence under the money counts. *Green v. Davis*, 4 Barn. & Cress. 235. An I. O. U. has been admitted on an account stated. *Payne v. Jenkins*, 4 Car. & Payne, 404.

* * *Vide supra*, note 929, for cases in which awards have been received as evidence of an account stated. * *

(8) *Evans v. Veny*, 1 Ry. & Mo. 239.

(9) *Foster v. Allanson*, 2 T. R. 479; *Coffee v. Brian*, 3 Bing. 54.

(10) *Fromont v. Coupland*, 2 Bing. 172. Where weekly accounts had been rendered preparatory to a final account, and the opinion of Chief Justice Gibbs, in *Rackstraw v. Imber* (Holt's N. P. C. 368), that an express promise was not necessary, questioned. See *Moravia v. Levy*, 2 T. R. 483, n.; *Smith v. Barrow*, 2 T. R. 476; *Clark v. Glennie*, 3 Stark. N. P. C. 10; *Robson v. Curtis*, 1 Stark. N. P. C. 78.

(11) *Trueman v. Hurst*, 1 T. R. 40; *Ingleden v. Douglas*, 2 Stark. N. P. C. 36.

(If the infant agrees to an arbitration, and accepts the award on coming of age, it binds him. *Jones v. Phoenix Bank*, 4 Selden R. 228.)

promised to pay.(1) The plaintiff may recover upon an account stated with the defendant, which includes debts due from the defendant alone, and from the defendant together with a deceased partner.(2) But this action cannot be sustained, where the defendant has accounted partly in his own, and partly a representative capacity.(3)

If the defendant account with the plaintiff, as invested with a certain character, and receive credit from him as such, he cannot afterwards object to the plaintiff's recovery upon this general count, though he might not be able to recover on a special count, in consequence of the defective proof of his title.(4) An account stated alters the nature of the debt.(5) Thus, an action of *indebitatus assumpsit* may be brought upon an account stated, where the subject of the account is rent;(6) or a sum due for the purchase of growing trees,(7) or of fixtures as stated upon an inventory containing a valuation of them. In these cases of an account stated upon

(1) Bull, N. P. 129; 1 Shower, 215. See *Duce v. Thorne*, Alleyn, 72, commented on by Buller, J., 2 T. R. 483.

(2) *Richards v. Heather*, 1 Barn. & Ald. 29. It seems that an account stated with a new firm may sometimes include debts due to a former one. *Morr v. Hill*, Peake's Ev. 257. See *David v. Ellice*, 5 Barn. & Cress. 205; *Gough v. Davis*, 4 Price, 214.

NOTE 1032.—It is a disputed point whether one partner can, after a dissolution, bind his co-partner by acknowledging an account. It has been held that he cannot. *Hackley v. Patrick*, 3 John. R. 536; *Walden v. Sherburne*, 15 Id. 409.

On the contrary, it has been held, that the power of partners, with respect to rights created pending the partnership, remains after the dissolution; the partnership is not dissolved with regard to things past, but only with regard to things future. *Wood v. Braddick*, 1 Taunt. 104; *Martin v. Root*, 17 Mass. R. 227; *Hunt v. Bridgham*, 2 Pick. 583; *White v. Hale*, 3 Id. 291; *Parker v. Merrill*, 6 Greenl. 41; *Cady v. Shepherd*, 11 Pick. 400; *Ault v. Goodrich*, 4 Russ. 430.

In *Geddes v. Simpson et al.* (2 Bay, 533), the plaintiffs produced a letter from Simpson, one of the copartners and defendants, acknowledging the receipt of an account current from the plaintiff, and that the balance was justly due to the plaintiff as stated; and upon exception taken that the letter did not bind the other partner, as it was written since the dissolution of the co-partnership, and without his knowledge or approbation; the court overruled the objection, inasmuch as this was no new contract or undertaking since the partnership was dissolved. See also *Bulkeley v. Landon*, 3 Conn. R. 76. But after dissolution, one party cannot bind the other to pay costs by giving a cognovit for debt and costs as between attorney and client. *Rathbone v. Drakeford*, 6 Bing. 376.

(The general doctrine in this country is, that one partner cannot, after dissolution of the firm, bind his late partners by contract, or by the admission or renewal of a contract. *Bell v. Morrison*, 1 Peters' R. 361; *National Bank v. Norton*, 1 Hill R. 572; *Stub v. Jennings*, 1 McMullen, 297; *Belote's Ex'rs v. Wynne*, 7 Yerger, 534; *Muse v. Donelson*, 2 Humph. 166; *Levy v. Cadet*, 17 Serg. & R. 126; *Yander v. Lafaveur*, 2 Blackf. 371; *Lowther v. Chappel*, 8 Ala. 353; *Eten Bank v. Sullivan*, 6 N. H. 124.)

* * As to the several acts and admissions by which a partner can bind the firm, after dissolution, see *Oolyer on Partn.* (Perkins' ed.), §§ 422, 430, and notes. * *

(3) *Herronden v. Palmer*, Hob. 88; *Stafford v. Clark*, 2 Bing. 377; 2 Car. & Payne, 403.

(4) *Peacock v. Harris*, 10 East, 104. And see *Prouting v. Hammond*, 8 Taunt. 690.

(5) *Ventr.* 268; *Allen*, 73; 2 Lev. 110.

(6) *Roll. Ab.* 9; *Ray*, 211; 2 Keb. 813.

(7) *Knowles v. Michel*, 13 East, 249; *Teal v. Auty*, 2 Bro. & Bing. 99.

executed agreements, where there has been a neglect, in the original contract, to comply with the provisions of the Statute of Frauds or of the stamp acts, the consequences of the omission will be obviated.(1)

CHAPTER X.

OF THE EVIDENCE IN ISSUES JOINED UPON PLEAS IN ASSUMPSIT.

THE pleas to an action are divided into pleas dilatory, of which pleas in abatement are of the most ordinary occurrence; and pleas peremptory, which afford a substantial and conclusive answer to the action, and which are commonly called pleas in bar. The necessary proofs in issues joined on these several kinds of pleas, are now to be considered.

I. Of the evidence in issue joined on pleas in abatement.

1. Joint contract.

On issue joined upon a plea of abatement that the contract, which is the subject of the suit, was made with other persons besides the defendant, proof that an order for the goods, the amount of which is sought to be recovered, was given to those persons jointly, will support the defendant's plea.(2) And if the defendant show that such has been the course in

(1) *Salmon v. Watson*, 4 B. Moore, 73; 2 Bro. & Bing. 99.

(2) NOTE 1033.—*Legal Interest*.—Two persons each advance money for a third; they *must* sue severally, unless the money is taken from a joint fund, or raised on joint credit. In *Smith v. Sayward* (5 Greenl. 504), D. S. acted as agent for defendants in a purchase of land, and defendants procured plaintiff to become his surety; and the latter having paid the money; held, that he might sue defendants alone; D. S. having paid nothing, and of course had no right of action, although it appeared that the plaintiff signed the notes as surety.

Effect of.—Upon issue of non-joinder of a joint partner, the judgment is final, instead of a judgment of *respondet oster*. *Dodge v. Morse*, 3 N. H. R. 232; *Jewett v. Davis*, 6 Id. 518. For it is well settled, that if issue be taken upon a plea in abatement, and the jury find for the plaintiff, they must assess damages in the same manner as when an issue is found for the plaintiff upon a plea in bar.

(Under the new practice in New York, it has been disputed whether pleas in abatement and in bar can be interposed in the same answer. At common law, the defendant could plead, *first*, to the jurisdiction; *second*, in abatement, and *third*, in bar. Pleading in abatement admitted jurisdiction, and pleading in bar was a waiver of the right to plead either to the jurisdiction or in abatement. Per W. F. Allen, Justice, in *Gardner v. Clark*, 6 How. Pr. 449. In this case it was ruled that a plea to the merits could not be united with a plea in abatement, such as the pendency of another action. The same was held in respect to non-joinder of parties, in *King v. Vanderbilt*, 7 Id. 385. In *Bridge v. Payson* (5 Sand. R. 210), and in *Mayhew v. Robinson* (10 How. Pr. R. 162), directly the contrary was held, namely, that the non-joinder of persons jointly liable with the defendant, may be set up in the same answer with a general denial. See also *Sweet v. Tuttle*, 10 How. Pr. 40, and remarks of Denio, J., 3 Kernan, 337. But all the cases agree that the objection of non-joinder of parties must be pleaded; and in *Zabriskie v. Smith*. (3 Kern. 322), it was held, that in actions sounding in tort, the non-joinder of proper parties as

former dealings, or that payments have been made by himself, and the other persons jointly, such proof would raise a presumption of a joint undertaking as to the dealing in question.(1) A plea of abatement that the defendant contracted along with certain other persons, imports that he contracted along with the persons specified, and not with a greater number; if there were more joint contractors, the plea is disproved.(2) When it appears from the plaintiff's bill of particulars, that a part of the plaintiff's demand is chargeable to the defendant along with another person, a plea of abatement for the non-joinder of that person will be supported, although the defendant may be liable alone for the residue of the demand.(3) Where the non-joinder of the assignees of a bankrupt is pleaded, it is not sufficient to prove that they have acted as such; the assignment must be produced, or evidence be given of the plaintiff's admission that they were duly appointed.(4)

After proof of a joint undertaking in support of a plea of abatement, it will not be a sufficient answer for the plaintiff to show, that the person named in the plea, died before the commencement of the suit, for this does not disprove the joint undertaking which is in issue; and as the plea must positively aver the fact of his being alive, the plaintiff might have taken issue upon that averment. If the person, named in the plea, as a joint contractor, was an infant at the time of the joint undertaking, the plaintiff may reply his infancy, but if, instead of replying this, he deny the joint undertaking, it has been held that it will not avail him, at the trial, to prove the infancy.(5) Joint contractors must be all sued, though some may have become bankrupts, and obtained their certificates.(6)

plaintiffs must be pleaded, unless the defect of parties appears on the face of the complaint, when a demurrer is the proper remedy.)

(1) The plaintiff may compel the defendant to give him a description of the places of residence of the persons named in the plea. *Taylor v. Harris*, 4 Barn. & Ald. 93.

(2) *Godson v. Good*, 6 Taunt. 587.

(3) *Colson v. Selby*, 1 Esp. N. P. C. 451.

(4) *Pasmore v. Bontfield*, 1 Stark. N. P. C. 296.

(5) *Burgess v. Merrell*, 4 Taunt. 468; *Gibbs v. Merrell*, 3 Taunt. 307. The plaintiff would not be allowed to join the infant as a defendant, and enter a *nolle prosequi*. *Chandler v. Parkes*, 3 Esp. N. P. C. 76.

(6) *Bovill v. Wood*, 2 M. & S. 23; *Hawkins v. Ramsbottom*, 6 Taunt. 179.

(When one of a firm is sued for a copartnership debt, he must plead the non-joinder of his partners in abatement, if he wishes to interpose that defence. *Potter v. McCoy*, 26 Penn. State R. 458; *Paschel v. Hoover*, 16 Ill. 340. And on the trial of that issue he must prove the facts stated, strictly. *Hawks v. Munger*, 2 Hill R. 200. If the plaintiff had no knowledge or means of knowing of the existence of a partnership, the plea of non-joinder of the other partners cannot be sustained by showing its existence. *Peck v. Conring*, 1 Denio, 222. And notwithstanding it appears on the face of the complaint that there are other persons jointly indebted with the defendant who are not sued, the defendant must interpose such non-joinder by plea in abatement. *Burgess v. Abbott*, 1 Hill R. 476; 6 Id. 135. Under the New York code, the defendant must in such a case demur. § 144. And if the defect of parties do not so appear, it must be pleaded. *Fowler v. Kennedy*, 2 Abb. Pr. R. 351.)

Partner.

The proof of a partnership subsisting between the defendant, and a person named in his plea, is more frequent than the proof of an express joint undertaking. It is necessary to prove a partnership subsisting at the time of the joint undertaking, and in the course of the dealing in which the debt in question was contracted. The most satisfactory proof in support of the plea would be by showing, that the plaintiff had, in former dealings of the same kind, treated the persons as partners. It would be good proof also to show, that before the transaction in question, they carried on business together, openly and publicly as partners, with those external marks and signs which usually accompany an acknowledged partnership. The mere proof that the other person has occasionally acted in the business as partner, without tracing this to the observation or knowledge of the plaintiff, would be very slight; for the necessity of joining other persons in the suit against the defendant, seems to depend on the mutual understanding of the parties at the time of the contract.(1) It appears to be the better opinion, that the non-joinder of a dormant partner cannot be pleaded in abatement.(2) Promises of payment by the defendant, contained in letters, without mentioning any partners, are strong evidence of the defendant's sole liability.(3) A person who makes a several promise in a written instrument, will be liable individually, though he sign the instrument as for himself and partners.(4)

If the defendant pleads that the promises in the declaration were made jointly with another person, the latter will be a competent witness for the plaintiff;(5) but it seems that he would not be a competent witness for the defendant;(6) and that his competency could not be restored by a release.(7) On a plea of abatement for the non-joinder of a person as a

(1) * * It is not necessary that a *dormant partner* should join with the ostensible partner of a firm, in an action against a person who dealt only with the ostensible partners. Colyer on Partn. (Perkin's ed.) §§ 660, 661, and notes. And his non-joinder cannot be pleaded in abatement, unless from the use of "& Co.," in the title of the firm, and it is reasonable to infer, the plaintiff knew the parties not joined belonging to the firm. Id. § 719; De Mautort v. Saunders, 1 Barn. & Adol. 396, overruling Dubois v. Ludert, 1 Marsh. 248. * *

(2) Mullet v. Hook, 1 Mo. & M. 88. See Dubois v. Ludert, 5 Taunt. 609; Doo v. Chippenden, Lord Tenterden on Shipping (5th ed.) 96; Baldney v. Ritchie, 1 Stark. N. P. C. 338; Stansfield v. Levy, 3 Stark. N. P. C. 8.

(3) Murray v. Summerville, 2 Campb. 99, n.

(4) Hall v. Smith, 1 B. & C. 407; March v. Ward, Peake's N. P. C. 130; Clark v. Blackstock, Holt's N. P. C. 474. As to the evidence of partnership in joint stock companies, see Perring v. Hone, 4 Bing. 28; Lawler v. Kershaw, 1 Mo. & M. 93; Vice v. Anson, 7 Barn. & Cress. 409.

(5) Cosseam v. Goldney, 2 Stark. N. P. C. 414. See Hudson v. Robinson, 4 M. & Selw. 475. A person may prove that he is not a partner, though the business has been carried on in his name. Parsons v. Crosby, 5 Esp. N. P. C. 199.

(6) Evans v. Yeatherd, 2 Bing. 133; by Lord Ellenborough, Ch. J., and Bayley, J., in Hudson v. Robinson, 4 Maule & Selw. 475; Goodacre v. Breame, Peake's N. P. C. 232.

(7) Simons v. Smith, 1 Ry. & Mo. 29; Chyne v. Kooops, 4 Esp. N. P. C. 112. See Young v. Bairner, 1 Esp. N. P. C. 103.

defendant, his declarations are evidence in support of the plea; for whatever would be evidence against him, if he had been joined in the action, is admissible to prove his liability in an issue joined upon a plea of abatement.(1)

2. Misnomer.

Upon issue joined on a plea of misnomer, where the defendant unnecessarily avers that he was baptized by a particular name, he must give evidence of his baptism.(2) It has been held that a defendant will be estopped by a recognizance entered into for him in the name by which he is sued, although he was no party to the recognizance.(3)

3. Coverture.

In cases where it is not necessary to plead coverture in abatement, as where the plaintiff marries after suing out the writ, and before the declaration;(4) or where the defendant marries subsequently to making the

NOTE 1034.—In *Duke v. Pownall* (1 Mood. & Malk. 430), Lord Tenterden held, that several persons having agreed to bear equally the expenses of a joint undertaking, in an action brought against one alone, another of the contractors was competent to testify for the defendant if released by him, though the rest do not join in the release. In *Hall v. Cecil* (6 Bing. 181), liability to contribute to the costs was considered sufficient to exclude the witness; but the court say nothing about a release. *Slegg v. Phillips*, 6 Nev. & Man. 360. But it has been often ruled that in an action against one, another joint contractor is admissible if released. *Ames v. Withington*, 3 N. H. R. 115; 5 Id. 199; *Jewett v. Davis*, 6 Id. 518. In *Gibbs v. Bryant* (1 Pick. 118), the court say, "his being a party to the contract is of no consequence, if he is not interested in the event of the suit. If the plaintiff recover against his partner, it would be a bar to an action against him, because, there being a joint contract, his partner could not be sued again, neither could he be sued alone. He was interested only because he was liable to a contribution to his partner; but being released by his partner, he was rendered a competent witness." See also *Bagley v. Osborne*, 2 Wend. 527; *Willings v. Consequa*, 1 Pet. C. C. R. 306.

The incompetency of a witness interested as a member of a corporation, is not removed by a release of such interest executed by him to the corporation. 2 Lev. 231, 236; 1 Vent. 351; 3 Young & Jerv. 19

(1) *Clay v. Langlow*, 1 Mo. & M. 45. On the competency of partners as witness, see Vol. I.

(2) *Welcker v. Le Pelletier*, 1 Campb. N. P. C. 479; Com. Dig. Abatement, F, 17. See Code of N. Y. § 175.

(3) *Meredith v. Hodges*, 2 N. R. 453, where the fact was replied.

(4) *Morgan v. Painter*, 5 T. R. 265. And in actions of tort, at least, coverture must be pleaded in abatement, wherever the wife might have been joined. *Milner v. Milnes*, 3 T. R. 627.

NOTE 1035.—*Gerard v. Pierce*, 1 Murph. R. 161.

Coverture after suit brought, may be pleaded after a plea in bar, if the matter has arisen since the plea in bar; for the plea in bar waives only matter in abatement then existing. *Wilson v. Hamilton*, 4 Serg. & Rawle, 238. A plea *puis darrein continuance* waives all former pleas; for if well pleaded, issue must be taken on it. Id. It cannot be pleaded after a continuance has intervened, except the court, for extrinsic reasons, may receive the plea, even after a continuance between the happening and the pleading the new matter. Id.

In *Oxnard et al. v. The Propri. of the Ken. Purchase* (10 Mass. R. 179), to a writ of right sued by heirs for lands descended from a common ancestor, the tenants pleaded: "That since the last continuance of the writ, viz: on the first day of July last past, the said C. F., one of the demandants in the said writ, intermarried with J. P. and is now covert of the said P. her husband, who

contract,(1) the plea will be sustained by proof of an actual marriage or of cohabitation.(2) It seems that evidence of an unequivocal admission on the part of the plaintiff of her marriage, will be admitted to prove the fact; but ambiguous acknowledgments have been held insufficient.(3)

Right to begin.

It appears that, on an issue taken upon a plea of abatement, the defendant ought to begin, and prove the truth of his plea; and that the onus of proving damages does not give the plaintiff a right to begin.(4) In a case where the plaintiff began, it was considered that, besides proving the damages, he ought to go through his whole case in answer to the plea.(5)

II. Of the evidence in issues joined on pleas in bar.

1. Non-assumpsit.

The defendant, under the general issue of non-assumpsit,(6) may give in

is yet living, viz: at A. aforesaid, and this, &c.; wherefore, inasmuch as the said J. P. is not joined in said writ, the said proprietors pray judgment of the said writ, and that the same may be quashed, and for their costs." Upon demurrer, the plea was held sufficient. But there are exceptions to the rule, that a disability in one of the plaintiffs shall stop the proceedings when advantage is taken seasonably. The exceptions at common law are when the party disabled has been previously summoned and severed. Per Jackson, J., in *Id.*

In *Alexander v. Fink* (12 John. R. 218), it was held, that the plea *pais darrein continuance* of the marriage of the plaintiff, cannot avail after verdict. See 2 R. S. 387. There is no distinction between a *feme sole*, commencing an action in her own right, or as executrix or administratrix; her marriage pending the suit abates it in either case. *Swan v. Wilkinson*, 14 Mass. Rep. 295.

* * On the subject of plea *pais darrein continuance*, see 1 Burrill's Pr. pp. 232, 423, 424, and the cases there cited. * *

(1) Bac. Ab. Abatement; Com. Dig. Pleader.

(2) *Leader v. Barry*, 1 Esp. N. P. C. 353; *Kay v. Duchess of Pienne*, 3 Campb. N. P. C. 723; *Best v. Barlow*, Doug. 166.

(3) *Wilson v. Mitchell*, 3 Campb. N. P. C. 393; *Mace v. Cadell*, Cowp. 232.

(4) See *Bedell v. Russell*, 1 Ry. & Mo. 293; *Hodges v. Holder*, 3 Campb. N. P. C. 366; *Jackson v. Hesketh*, 2 Stark. N. P. C. 518. According to the cases of *Lacon v. Higgins*, 3 Stark. N. P. C. 178; *Stansfield v. Levy*, 3 Stark. N. P. C. 8, which are, perhaps, authorities more strictly in point, the beginning or not, is optional with the plaintiff. And see *Young v. Bairner*, 1 Esp. N. P. C. 103.

(5) *Lacon v. Higgins*, 8 Stark. N. P. C. 178.

(6) NOTE 1036.—The court will not allow a party to plead in assumpsit matter which may be given in evidence under the general issue, unless the plea be simple, and not likely to perplex the plaintiff. *Hammond v. Teague*, 6 Bing. 197. In assumpsit, the general issue, and matters which may be given in evidence under it, are not several matters; nevertheless, it has been the practice of the court to permit a party to plead matters which might be given in evidence under the general issue, where such matters are simple and single.

In *The Farmers and Mechanics' Bank v. Rayner* (2 Hall, 195), it is decided that *nul tiel corporation* is bad on special demurrer, amounting to the general issue, on the principle that whatever the plaintiff is bound in the first instance to prove, in order to support his cause of action, cannot be specially pleaded by the defendant. In *The Bank of Auburn v. Weed* (19 John. R. 300), Spencer, J.: "Though there are precedents of the plea 'of no corporation,' yet it is opposed to the principle of good pleading in modern times, and ought not to be allowed." It was settled in

evidence not only whatever shows that the plaintiff never had cause of action,(1) but also most matters in discharge of the action. The manner

Kennedy v. Strong (10 John. R. 289), that a plea which amounts to the general issue is bad on special demurrer. With some exceptions, perhaps, a special plea amounts to the general issue, when it shows a state of facts, from which it clearly appears that the plaintiff at no time had any cause of action. Per Oakley, J., in *Richards v. Sherman*, 2 Hall, 201. But when a plea is overruled as equivalent to the general issue, it must be very clear that it is so. Id. See *Dicken v. Neale*, 1 M. & W. 556.

(Under the present system of pleading many defences which might formerly be interposed under the plea of the general issue, must be pleaded specially. *Catlin v. Gunter*, 1 Duer R. 253; S. C., 1 Kernan R. 368. If the defendant avers performance of a covenant, he cannot under that averment give evidence to excuse a performance. *Oakley v. Morton*, 1 Kern. R. 25. See *Brazill v. Isham*, 2 Id. 9; and *Esselstyn v. Weeks*, Id. 636.)

(1) NOTE 1037.—WANT OF CONSIDERATION.—Some consideration there must be as between the parties. To be sufficient, it must be either a benefit to one party or a damage to the other. Thus, a deed executed by a *feme covert* is *ipso facto* void; and the consideration secured by a promissory note may be avoided in an action thereon under the general issue. *Fowler v. Shearer*, 7 Mass. R. 14. *Bliss v. Negus* (8 Id. 46) recognizes the same principle. The action was assumpsit on a promissory note, given for the assignment of *all the plaintiff's right* under a certain patent, with a covenant to warrant the same to the defendant; and it was proved that the plaintiff *had no right*, and that nothing passed by the assignment; and there being nothing on which the assignment could operate, it was a dead letter, and could not form a consideration for the note. See also *Winter v. Livingston*, 13 John. R. 54, where notes were given as the consideration for a covenant to convey land; but the condition was, that the covenant was to be void if the notes were not paid at the time they fell due; the notes were not paid; and the promisee elected to avoid the agreement, and sold the land; held, that no consideration was paid for the notes.

Partial failure of consideration, it is said by Mr. Starkie, cannot be inquired into where the contract is still open and unrescinded, and may be the subject of an action for unliquidated damages. Thus, in an action on the bill or note, as that the goods delivered are of bad quality; and in general, a party who has given a bill of exchange for the amount of a tradesman's bill, is precluded from disputing the reasonableness of the charges. 2 Stark. Ev. 170. In England, a distinction is taken between a suit upon the original contract, and a suit upon the security taken for the contract price; in the latter case, the full amount is to be recovered unless it goes to the whole consideration. *Day v. Nix*, 17 Com. Law, 121.

It was said by Woodworth, J., in *Hills v. Banister* (8 Cowen's R. 31): "If the plaintiff had refused to recast the bell, I incline to think a partial failure of consideration might be a defence in mitigation, *although there be no fraud*." It has since been settled in the case of *M'Allister v. Reab* (4 Wendell, 483; 8 Id. 109), in an action of assumpsit, to recover the price of an article sold, that the defendant may give evidence showing the true value of the article sold in the case of a *breach of warranty*, in mitigation, as well in cases of a *sale with warranty* as in cases of *fraud*; such evidence being allowed to avoid circuity of action. And it seems, that the defendant would be allowed to give such evidence in a case of warranty, although the vendor has not returned the article sold.

The courts in New York have not adopted the distinction between suits upon the original contract of sale, and suits upon a bill or note, as to a partial or total failure of consideration; but they seem to follow the English cases, in admitting a breach of warranty in reduction of damages. *Reab v. M'Allister*, *supra*; *King v. Paddock*, 18 John. R. 141.

Though there be a special contract to pay for the goods at a certain price, defendant may show that the goods delivered were not such as contracted for, or that the work was done in an unworkmanlike manner; and the plaintiff can then recover only on the *quantum meruit*. *Thomas v. Morgan*, 2 C., M. & R. 496.

* * On the subject of consideration, its total or partial failure, see 2 Sm. Lead. Cas. in the

of proving such defences has been before considered in treating of the different species of actions, and therefore a few general remarks upon the subject will suffice in this place. The defendant, under the general issue, may prove that the contract stated in the declaration was made with the plaintiff and other persons not named in the action.(1) And it will be no answer to such defence, that the other parties to the contract were deceased before the commencement of the suit.(2) The defendant may, likewise, prove that the co-plaintiffs, who sue as partners, on a contract made between some of them only and himself, were not all in partnership when the contract was made;(3) or that some of the persons joined as defendants did not contract in the manner alleged, as that they were infants.(4)

The coverture of the defendant at the time of the contract may be given in evidence under the general issue;(5) and it will be sufficient proof of the fact, if the defendant shows that her husband was alive within seven years.(6) So the defendant may avoid the contract by showing that he

notes to *Cutter v. Powell*; 2 Gr. Ev. §§ 136, 136 *a*, and the notes. And see further, *Gregory v. Mack*, 3 Hill, 380; *Van Epps v. Harrison*, 5 Id. 64; *Still v. Hall*, 20 Wend. 51; *Batterman v. Pierce*, 3 Hill, 172; and the cases cited on the subject of *Recoupment*, *supra*. * *

(The party suing on a contract must, as a general rule, allege and prove a sufficient consideration. *Smith v. Wheeler*, 9 Foster (N. H.), 334.)

(1) The want of proper parties in actions on contract, is an exception to the merits, and is to be taken advantage of, either on demurrer, in bar, or on the general issue, and not by plea in abatement. *Baker v. Jewell*, 6 Mass. R. 460. (But see as to actions sounding in *tor*, *Zabriskie v. Smith*, 3 Kern. 322.)

(2) *Jell v. Douglass*, 4 Barn. & Ald. 374.

NOTE 1038.—To entitle himself to recover upon a promise, the plaintiff must prove a promise, either express or implied, by the parties who are alleged in the declaration to have made it. *Holmes & Drake v. De Camp*, 2 John. R. 36. Thus, a promise proved is by three persons only, when the promise laid in the declaration is, by those three persons and another, whom they have survived. *Tom v. Goodrich*, 2 Johns. R. 213. A plea in abatement is not necessary, where the contract is stated to have been jointly made by more persons than are proved upon the trial to have assumed; but the plaintiff in such case must fail, upon the general issue *non assumpsit simul cum*. Id. (See *Chappell v. Spencer*, 23 Barb. 584, and cases cited there.)

(In such cases the parties not jointly liable may be discharged, and the cause proceed against the others. *Bonsteel v. Vanderbilt*, 21 Barb. 26. So where one of the defendants was an infant. *De Costa v. Davis*, 4 Zabr. N. J. 319. Discontinuance as to one, does not prevent the cause from proceeding. *Medcalf v. Secomb*, 36 Maine R. 71.)

(3) *Wilsford v. Wood*, 1 Esp. N. P. C. 183. See as to variance in proof of contract, Vol. I.

(4) By *Mansfield, C. J.*, in *Gibbs v. Merrill*, 3 Taunt. 313; *Burgess v. Merrill*, 4 Taunt. 468.

(5) *Cowley v. Robinson et ux*. (3 Campb. 438), where the wife had married again, her husband being living. (The wife cannot bind herself by contract. *Van Steenburgh v. Hoffman*, 15 Barb. 28.)

(6) *Hopewell v. De Pinna*, 2 Campb. N. P. C. 113. The wife of an *Englishman* resident abroad, cannot be sued alone. *Marsh v. Hutchinson*, 2 B. & P. 226. See *De Gaillon v. L'Aigle*, 1 B. & P. 357; *Walford v. Duchess de Pienne*, 2 Esp. 554, 587; *Kay v. Duchess de Pienne*, 3 Campb. N. P. C. 123. Nor a wife possessing a separate maintenance (*Marshall v. Rotton*, 8 T. R. 547); or one divorced *a mensa et thoro*. *Lewis v. Lee*, 3 Barn. & Cress. 291. Unless

was an infant at the time of making the promise ;(1) or that he was made to sign the supposed written agreement in such a state of intoxication as not to know what he did.(2) The plaintiff's bankruptcy may be given in evidence under the general issue.(3)

The defendant may prove, under the general issue, that the plaintiff's demand has been discharged by accord and satisfaction ;(4) if the accord be executed,(5) and the satisfaction be reasonable.(6) He may also prove a release ;(7) or a former recovery, for the same cause of action.(8) And where the declaration in the second action is framed in such a manner, that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show that they are not the same ;(9) but the judgment in the former action will not be conclusive, unless pleaded.(10) Payment before the issuing of the writ may be given in evidence under the general issue.(11) The person paying money

the husband is *civiler mortuus*. Carrol v. Benclow, 4 Esp. C. 27; Lean v. Schultz, 2 W. Bl. 1195.

(1) Howlett v. Haswell (4 Campb. N. P. C. 118), whether articles supplied to an infant, are necessaries, is a mixed question of law and fact. Maddox v. Miller, 1 Maule & Selw. 738. The *onus* is upon the plaintiff, to show the necessity of the articles furnished. Ford v. Fothergill, Peake's C. 303, n. A promise after age, is a new liability, and the defendant is not liable beyond it. Thornton v. Illingworth, 2 Barn. & Cress. 824.

(2) Pitt v. Smith, 3 Campb. N. P. C. 33.

(3) 1 Tidd, 696.

(4) Com. Dig. Accord, A, 1.

(5) Peytoe's Case, 9 Rep. 796. It seems that a party is not permitted to allege the want of satisfaction, to whom it has been tendered according to the terms of the accord. Bradley v. Gregory, 2 Campb. N. P. C. 385.

(6) Acceptance of a less sum is no satisfaction. Fitch v. Sutton, 5 East, 230. Unless the payment is secured. Steinman v. Magnus, 11 East, 390; Lewis v. Jones, 4 Barn. & Cress. 513; Boothby v. Sowden, 3 Campb. N. P. C. 175; Wood v. Roberts, 2 Stark. N. P. C. 417; Cranley v. Hillary, 2 Maule & Selw. 120; Walker v. Seaborne, 1 Taunt. 526; Butler v. Rhodes, 1 Esp. N. P. C. 236; Cork v. Saunders, 1 Barn. & Ald. 46.

NOTE 1039.—* * The cases as to *accord and satisfaction*, are well collected in the notes to Cumber v. Wane, 1 Smith's Lead. Cas. (Marg. p.) 146, *et seq.* And see Chitty on Contr. (7th ed.) tit. Accord and Satisfaction; 2 Gr. Ev. §§ 28—33, and notes. The case of Cumber v. Wane has recently been limited to the naked case of the acceptance of a less sum in discharge of a greater. Sibree v. Tripp, 15 M. & W. 23. In the latter case, a larger sum was held to be discharged by the acceptance of the negotiable promissory notes of the debtor for a smaller sum. And this is in accordance with the spirit of the American decisions, which hold any change in the character of the security, which may, by any possibility, be beneficial to the creditor, is a sufficient consideration to uphold the accord. See the cases in the notes to Cumber v. Wane, *supra*. Dissatisfaction with the doctrine of Cumber v. Wane, and Pinnel's Case (5 Rep. 117), has frequently been expressed; and the disposition shown in the more recent cases, especially in the United States, is to limit it to cases standing upon the same circumstances. * * (See St. John v. Purdy, 1 Sand. R. 9; Hawley v. Foot, 19 Wend. 516.)

(7) Bull. N. P. 152.

(8) Stafford v. Clark, 2 Bing. 377.

(9) Lord Bagot v. Williams, 3 Barn. & Cress. 239.

(10) Vooght v. Winch, 2 Barn. & Ald. 668.

(11) Holland v. Jourdine, Holt's N. P. C. 6; Francis v. Crywell, 5 Barn. & Ald. 886. A remit-

may appropriate it at the time of payment; (1) if he does not, the creditor may in general, make the appropriation at any time. (2) Where payments

tance by the post is good if warranted by the course of business. *Warwicke v. Noakes*, Peake's N. P. C. 98. Payment to the attorney of a party in a cause is good, but not to his agent or clerk. *Coore v. Callaway*, 1 Esp. N. P. C. 115; *Yates v. Freckleton*, Doug. 623.

(1) NOTE 1040.—*The person paying money may appropriate it at the time of payment.* It has been held, that the appropriation of a part payment of principal, or of payment of interest, to a particular debt, may be shown by any medium of proof, and does not require an express declaration of the debtor, at the time of the payment, to establish it; it may, therefore, be proved by previous or subsequent declarations of the debtor; although the fact of the payment must be proved by independent evidence. 3 *Young & Jerv.* 518; 1 *Stark. R.* 488; *Waters v. Tompkins*, 2 C., M. & R. 723; 1 *Tyr. & G.* 137. See 9 *Cowen*, 409, 420, and note *b* to last case.

* * The cases relating to the *appropriation of payments*, are well collected in 1 *Am. Lead. Cas.* pp. 123–158; and 2 *Gr. Ev.* §§ 529–536, and notes; *Chitty on Contr.* (7th ed.) pp. 753–760. * * See *Edwards on Notes and Bills*, 554–565.

(2) NOTE 1041.—*Mitchell v. Dall* (4 *Gill & John.* 361; S. C., 2 *Har. & Gill*, 159) held, that the application of the payment need not be expressly directed at the time by the party paying the money, but his intention may be inferred from the circumstances of the particular case. As in the case put by the chief justice in *Naylor v. Sandford* (7 *Wheat.* 20), of a positive refusal to pay one debt, and an acknowledgment of another, accompanied by the delivery of the sum due upon it.

In *Stone v. Seymour and Bouck* (15 *Wend.* 31), which was a decision in *dernier resort*, affirming the judgment of the Supreme Court in an action against *sureties*, on a bond conditioned that the principal, a collector of tolls, should pay over all moneys received by him; it was held, that the intention of the collector might be inferred from circumstances, and that the jury were authorized to make appropriations accordingly, and apply payments in extinguishment of defalcations existing previous to the liability of the sureties, although large portions of the payments thus appropriated, arose from tolls collected after the accruing of the liability of the sureties and the payments were credited at the accounting office on a general account; no direction being given by the collector, at the time of the payments, and no specific appropriation having in fact been made by the accounting officer.

Two demands.—A general payment must be applied to a prior legal, and not to a subsequent equitable demand. *Goddard v. Hodges*, 1 *Crompt. & Meeson*, 33; 3 *Tyr.* 259.

A., the acceptor of two bills for £25 and £50, both overdue, paid £22 10s. to B., the holder, "on account." B. said he wished to have the full amount of the £25 bill. A. replied, "he had no more money then, but would pay some more soon." B. then indorsed on the £25 bill, "received £22 10s. in part of two bills;" held, that B. might appropriate the payment to the £25 bill; though void for want of a stamp. *Biggs v. Dwight*, 1 *Moore & Ryl.* 308. The evidence in this case was sufficient to show that the defendant made the payment specifically on account of that bill.

In *Simons v. Ingham* (2 *Barn. & Cress.* 65), *Bayley, J.*, laid down the rule: "Ordinarily, the party who pays in money, has the liberty of applying it specifically to whichever two accounts he chooses, either the old or the new; where he makes no election, but pays the money in generally, the party to whom it is paid becomes entitled to the same liberty, unless the exercise of it is calculated to work injustice." And see 16 *Vin. Abr.* Payment, m.

A party to whom sums are due, the one for spirituous liquors, supplied in quantities, and not amounting to 20s. at a time, the other for board and lodging, may apply payments made generally, to the account for spirituous liquors. *Crookshanks v. Rose*, 1 *Mood. & Rob.* 100.

(The law will apply a payment where no application has been made to the parties, and there are several debts to which it may be applied, to the first in order of time (*Shedd v. Wms.* (Vt.) 478; *Harrison v. Johnston*, 27 *Ala.* 445); without regard to the fact that the creditor has security for the earlier items of the indebtedness. *Truscott v. King*, 2 *Selden N. Y.* 147; *Thompson v. Phelan*, 2 *Foster (N. H.)* 339.)

are made upon an entire account, the law will appropriate the payments to the earlier items.(1)

Special pleas.

But the defendant cannot, under the plea of non-assumpsit, give in evidence the Statute of Limitations;(2) and though it appear on the face of the declaration that the cause of action did not arise within six years before the commencement of the action, yet the defendant can only take advantage of this by pleading the statute.(3) A tender must also be pleaded;(4) and a set-off, where the subject matter of the set-off accrues by reason of a penalty contained in a specialty, or where notice of a set-off has not been given.(5) The defendant's bankruptcy must be pleaded;(6) and in support of the plea, a certificate obtained since the

(1) *Bodenham v. Purchas*, 2 B. & Ald. 46; *Williams v. Rawlinson*, 3 Bing. 76; *Simson v. Ingham*, 2 B. & C. 65; *Brooke v. Enderby*, 2 Bro. & Bing. 71; *Bosanquet v. Wray*, 6 Taunt. 597; *Clayton's Case*, 1 Mer. 572; *Wright v. Laing*, 3 Barn. & C. 165. See *Dawe v. Holdsworth*, Peake's C. 91, n.

(2) *NORR* 1042.—Matter in *avoidance* may avail in defence, either under the general issue or a special plea. Where the matter relied on as an answer to the action, admits the existence of the contract, defendant *may* defend himself under the general issue, or plead the matter in avoidance or discharge *specialty*. See the observations of Gibson, Ch. J., in *Lewis v. Morgan*, 11 Serg. & Rawle, 234, as to the nature of the plea of payment.

(Under the present practice, new matter, or matter in avoidance, must be pleaded. *Radde v. Ruckgaber*, 3 Duer R. 684; Code, § 149. If two persons declare against the defendant, for the unlawful taking of goods, a denial that the plaintiffs were joint owners of the property, is new matter and material. *Walrod v. Bennett*, 6 Barb. 144. Whether payment is to be deemed new matter that ought to be pleaded specially, may depend upon the allegations of the complaint; if plaintiff set forth the note and aver that it has not been paid, a general denial will put the fact of payment in issue. See on this point, *Van Geisen v. Van Geisen*, 12 Barb. 520. An issue distinctly framed by the parties on a material fact must be tried. *Seeley v. Engell*, 3 Kernan R. 542.)

(3) Bull. N. P. 152.

(4) 1 Saund. 53, n. 2.

(5) *NORR* 1043.—The right to set-off in New York, depends upon statute. 2 R. S. 354. In *Smith v. Van Loan* (16 Wend. 659), it was held, that in an action by a *bona fide* holder of a note, obtained before maturity by transfer, the *maker* cannot set off a demand he had against the payee at the time of the transfer, although the holder accepted the note in *payment of a pre-cedent debt*, unless the note was originally made for the accommodation of the *payee*, or was *satisfied* whilst in his hands, and fraudulently put by him into circulation. Even then, the set-off is not allowable if the holder can prove that he received it in the usual course of trade, paid value, parted with property, or gave credit on the faith of the paper at the time of the transfer. The case of *Rosa v. Brotherson* (8 Wend. 85), though seemingly *contra*, yet according to the facts in the *original papers* decides nothing beyond the principles stated above.

In *Ford v. Bernard* (6 Bing. 534), demand of particulars of a notice of set-off delivered after a plea which was a nullity; held, no waiver of the plaintiff's right to sign judgment. The action was debt, and the plea of non-assumpsit to such action is a nullity. *Perry v. Fisher*, 6 East, 549.

(Under the New York Code, where the defendants are jointly and severally liable, one of them may interpose as a set off debts due to him individually (*Briggs v. Briggs*, 20 Barb. 477); it is allowed as a counter claim, on the ground that a separate judgment might be had against such defendant. Code, §§ 149, 150. See also *Wales v. Nash*, 8 How. Pr. 454.)

(6) *Gowland v. Warren*, 1 Campb. 363; *Westcott v. Hodges*, 5 B. & Ald. 12.

commencement of the action, is admissible, if before plea pleaded.(1) Upon the issue joined on this plea, the plaintiff may give in evidence any matter which render the certificate void.(2)

And the defendant will not, in general, be allowed to give in evidence, by way of defence, matters arising after the commencement of the action, although before the time of plea pleaded.(3) But it has been held, that where the defendant has paid the debt after action brought, and taken a receipt for it, as also for the costs of the action, the plaintiff can recover no more than nominal damages.(4)

Nor will the defendant be allowed to prove, under the general issue, that the contract was not with himself alone, as stated in the declaration, but jointly with other persons; such an objection can only avail when the fact is pleaded in abatement.(5) And although it should appear, on the evidence produced on the part of the plaintiff, that other persons are liable as joint contractors with the defendant, this is not a material variance, and the plaintiff will be entitled to recover.(6)

2. Tender.

The plea of tender admits the defendant's liability as to the whole, or part of the amount claimed by the plaintiff; and with respect to the sum admitted to be due, avers a tender, and offer to pay before the exhibiting

(1) *Harris v. James*, 9 East, 82; *Langmead v. Beard*, cited 9 East, 85. The certificate must be entered of record. 6 G. IV, c. 16, §§ 95, 96.

(2) *Wilson v. Kemp*, 2 M. & Selw. 549; *Hughes v. Morley*, 1 B. & Ald. 22.

(3) *Le Bret v. Papillon*, 4 East, 502; *Lee v. Levy*, 4 Barn. & Cress. 393. And see *Page v. Bauer*, 4 Barn. & Ald. 345, where the plaintiff, a provisional assignee, had assigned the bankrupt's estate, after the issuing of a latitat, and before declaration.

NOTE 1044.—Although a plaintiff has actually purchased a writ with an intention to have it served, yet if he conceals the fact from the defendant, and by his conduct induces a belief that nothing is claimed as costs, giving no intimation that any had accrued, or was exacted, this will amount to a waiver of all claim to any costs; a tender under such circumstances will be good, although the plaintiff refuses to accept the money, saying, "it was of no use to make the tender, as he should not accept of it." *Haskell v. Brewer*, 2 Fairf. R. 258. (As to a waiver of a strictly formal tender, see *Stone v. Prague*, 20 Barb. 509.)

(4) *Holland v. Jourdain*, Holt's N. P. C. 6; Bull. N. P. 185.

(5) *Rice v. Shute*, 3 Burr. 2611; *Abbott v. Smith*, 2 W. Bl. 947; *Richards v. Heather*, 1 Barn. & Ald. 29, where the defendant was surviving partner.

NOTE 1045.—The principle is, that a contract made by copartners, is several, as well as joint, and the assumpsit is made by all, and by each. *Barry v. Foyles*, 1 Peters' R. 311, overruling 3 Wash. C. C. R. 112. In the case last cited, Judge Washington supposed, that if defendant had no notice of the proceedings, which might inform him of the nature of the action, he was guilty of no negligence in failing to plead in abatement, and ought not to be deprived of his defence at the trial. But the declaration never gives this notice, where the suit is brought against one only of the partners. He is always proceeded against as if he were the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. Per Marshall, C. J., in *Barry v. Foyles*, *supra*.

(6) *Germain v. Frederick*, and *Evans v. Lewis*, 1 Saund. 291 c, d, in notis. See *Mountstephen v. Broke*, 1 Barn. & Ald. 224.

of the bill or commencement of the suit.(1) The language of the plea plainly imports an actual production of the money, accompanied with an offer of payment. Counting out the money, and offering it to the plaintiff; taking out a pocket-book, the defendant, at the same time, declaring himself ready to pay the money, and offering to pay it, if the plaintiff would go with him into a neighboring house;(2) laying down upon the table, for the defendant to take up, the exact sum, or a larger sum in moneys numbered.(3) These are instances of express and actual tenders.

Money not produced.

It is not enough, that the defendant should merely declare himself ready and willing to pay the money.(4) And though he should have the money in his pocket, this circumstance would not alter the case; for as far as respects an act done by one party, or information given to the other (which are the material things to be considered), the case remains

(1) A tender dispenses with proof that a contract within the Statute of Frauds is in writing, *Middleton v. Brewer*, Peake's N. P. C. 15. As to the effect of a tender pleaded generally to the declaration, see *Cox v. Brain*, 3 Taunt. 95.

NOTE 1046.—PLEA OF TENDER.—A plea of *tender* before suit brought, must contain a *proferet in curia* of the money tendered; and must be pleaded in bar of the *damages ultra*, &c., and not in bar of the action. *Ayres v. Pease*, 12 Wend. 393. The rule is general, that if a debt or duty is not discharged by a tender and refusal, the tender must be pleaded with a *proferet in curia*. *Carley v. Vance*, 17 Mass. R. 389. A plea of tender, pleaded to a promissory note, made payable at a particular time, as well as place, if the defendant was ready with his money at the time and place stipulated, he may plead it as a matter of defence; but he must plead it with a *proferet in curia*. *Id.*

In an action of debt, the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into court; judgment having been on that account signed as for want of a plea, the court set aside the judgment for irregularity. *Chapman v. Hicks*, 2 Dowl. P. C. 641. If the defendant plead a tender, without paying the money into court, the plaintiff may sign judgment. *Anon.* 1 Tidd's Pr. 612.

Money deposited in court in lieu of bail, cannot be transferred to the account of a payment into court on a plea of tender. *Stults v. Heneage*, 10 Bing. 561.

(A tender to an attorney for the creditor is good (*McIniffe v. Wheelock*, 1 Gray R. 600); but to be available, it must be pleaded as a tender (*Huntington v. Zeigler*, 2 Ohio (N. S.), 10) by the debtor. *McDougald v. Dougherty*, 11 Geo. 570. In New York, as well as in some of the other states, the defendant may serve upon the plaintiff an offer to allow judgment for a certain amount with costs, on which judgment may be entered; and if the plaintiff fail to recover a more favorable judgment, he fails also to recover costs from the date of the offer. Code, § 385; 12 How. Pr. 552. See *Smith v. Anres*, 21 Ala. 782; *Wentworth v. Lord*, 39 Maine R. 71, 474. To give such offer effect, it must comply strictly with the statute. *Ranney v. Russell*, 3 Duer Rep. 689.)

(2) *Read v. Goldring*, 2 Maule & Selw. 86. And see *Alexander v. Brown*, 1 C. & P. 288.

(3) *Holland v. Phillips*, 6 Esp. N. P. C. 46. That the tender of a larger sum is sufficient, see *Wade's Case*, 5 Rep. 115 c; *Betterbee v. Davis*, 3 Camp. N. P. C. 70; *Harding v. Davies*, 2 C. & P. 77. See *Watkins v. Robb*, 2 Esp. N. P. C. 711. On the mode of making and pleading a tender, where there are several creditors, see *Strong v. Harvey*, 3 Bing. 304; *Black v. Smith*, Peake's N. P. C. 88; *Douglas v. Patrick*, 3 T. R. 683.

(4) *Dickenson v. Shee*, 4 Esp. N. P. C. 68, cited by Bayley, J., in *Thomas v. Evans*, 10 East. 103. See *Kraus v. Arnold*, 7 B. Moore, 59.

entirely the same.(1) The tender of a larger sum requiring change, is not a tender of a smaller sum.(2)

A tender in bank notes, it has been held, is good, unless it be specially objected to.(3) And it seems that a tender in provincial notes(4) may be sustained, where the plaintiff refuses to receive them, not on account of the form in which the tender is made, but upon some other ground.(5) But if the plaintiff give a simple refusal without alleging any reason for refusing, it is doubtful if the tender of provincial notes will be sufficient.(6)

A tender of money to be accepted as the whole balance due;(7) or a tender accompanied with a counter claim;(8) or even with a protest against

(1) Bull. N. P. 156; *Ryder v. Ld. Townsend*, 7 D. & R. 119.

(2) *Robinson v. Cook*, 6 Taunt. 336; *Betterbee v. Davis*, 3 Camp. N. P. C. 70; *Watkins v. Robb*, 2 Esp. N. P. C. 710; *Brady v. Jones*, 2 D. & R. 305.

(3) *Wright v. Reed*, 3 T. R. 554; *Grigby v. Oates*, 2 Bos. & Pull. 526; *Brown v. Saul*, 4 Esp. N. P. C. 267; *Holland v. Phillips*, 6 Esp. N. P. C. 46.

NOTE 1047.—It may be shown, that the creditor *before the day* of payment had agreed to accept bank bills as cash, and had dispensed with a tender in gold and silver. In such case, a tender in bank bills at the day stipulated for payment, is good by reason of the previous waiver. *Warren v. Mains*, 7 Johns. R. 476.

In an action by a banking company against a debtor, the bank notes issued by the bank cannot be tendered in payment if objected to; the only course being for the defendant to obtain a judgment upon the bank notes, and set off such judgment against the plaintiff's judgment. *Hallowell and Aug. Bank v. Howard*, 13 Mass. R. 235.

It is the common sense of the people, and must be the understanding of the court, that when the word *bills* is used as a medium or subject of payment, the parties intend bank notes of some description. Per *Parsons, Ch. J.*, in *Jones v. Fales*, 4 Mass. R. 245. The import of the words "foreign bills," is not cash, but something differing in value from cash; and when used in a note, the note is not a cash note, and so is not negotiable. *Id.*

An agreement made at the time a note is given, that that and the defendant's note should balance and be set off, one against the other, so far as the smaller would pay the larger, if available at all, was an executory contract, requiring some further act to be done, before the one would operate as a payment of the other. Neither, in such a case, can the smaller note support a plea of tender. *Cary v. Banckroft*, 14 Pick. 215.

Proof of a tender of £20 9d., in bank notes and silver is sufficient to support a plea of tender of £20. *Dean v. James*, 4 Barn. & Adol. 393.

(4) As to a tender in *depreciated* paper money, see *Williamson v. Bacott*, 1 Bay, 62.

The statutes of the United States, under which treasury notes issued, (1814), provided that all such notes should be receivable in payment to the United States for duties, taxes and sales of public lands, to the full amount, &c. Held, that they were a legal tender in payment of such debts, and public officers were bound to receive them. *Thorndike v. United States*, 2 Mason, 1.

See *Searight v. Galbraith*, 4 Dall. 325, as to tender in reference to a contract made abroad.

(A tender in bank bills, current in ordinary business transactions, will be good, unless objection is made on the very ground that they are not money. *Cummings v. Putnam*, 19 N. H. 569. So if the creditor absents himself to avoid a tender, he cannot complain that it was not made (*Southworth v. Smith*, 7 Cush. 391); or otherwise prevents its being made. *Holmes v. Holmes*, 12 Barb. 137.)

(5) *Lockyer v. Jones*, Peake's N. P. C. 239, n.

(6) *Mills v. Safford*, Peake's N. P. C. 240, n.

(7) *Evans v. Judkins*, 4 Campb. N. P. C. 156; *Cheminant v. Thornton*, 2 C. & P. 50; *Strong v. Harvey*, 3 Bing. 304.

(8) *Brady v. Jones*, 2 D. & R. 305; *Huxham v. Smith*, 2 Camp. N. P. C. 21.

the party's liability;(1) or with the demand of a receipt;(2) will not avail the defendant, because they are accompanied with a condition, and a tender must be absolute.

Formal tender excused.

But, if on a tender being made, the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender, on account of the debtor having required a receipt.(3) And the tender of a sum requiring change will be good, if it is refused for the like reason.(4) And in such cases, it seems to be unnecessary to produce the money.(5) It must, however, be ready to be produced, and must be expressly offered.(6)

A tender to one of several partners is sufficient;(7) or to a person in the habit of receiving money for the plaintiff, though in the particular instance, he may have been directed not to accept money, if offered.(8) Where the money alleged to be tendered, was delivered to the plaintiff's servant, at his house, who retired, and appeared to go to his master, and brought back an answer that the plaintiff would not receive it, it was held to be evidence for the jury, from which they might infer a legal tender.(9)

(1) *Simmons v. Wilmot*, 3 Esp. N. P. C. 94; *Peacock v. Dickenson*, 2 C. & P. 51.

(2) *Glascoot v. Day*, 5 Esp. N. P. C. 48; *Laing v. Meador*, 1 C. & P. 257; *Cole v. Blake*, Peake's N. P. C. 177; *Ryder v. Lord Townsend*, 7 D. & R. 119. The debtor ought to bring a receipt with him, and require the creditor to sign it, who is subject to a penalty, if he refuses. 43 G. III, c. 126, §§ 4, 5.

(3) *Cole v. Blake*, Peake's N. P. C. 229.

(4) *Cadman v. Lubbock*, 5 D. & R. 289; *Sanders v. Graham*, Gow, 121.

(5) *Black v. Smith*, Peake's N. P. C. 88. See *Harding v. Davis*, 2 C. & P. 77; *Evans v. Judkins*, 4 Camp. N. P. C. 156; *Douglas v. Patrick*, 3 T. R. 683.

(6) *Thomas v. Evans*, 10 East, 101; *Kraus v. Arnold*, 7 B. Moore, 59. See *Harding v. Davis*, 2 C. & P. 77; *Glascoot v. Day*, 5 Esp. N. P. C. 48.

(7) *Douglas v. Patrick*, 3 T. R. 688.

(8) *Moffat v. Parsons*, 5 Taunt. 307; *Goodland v. Blewitt*, 1 Camp. 477.

NOTE 1048.—TENDER TO A PERSON IN THE HABIT OF RECEIVING MONEY FOR THE PLAINTIFF.—*Hoyt v. Byrnes*, 2 Fairf. R. 475. Where it was held, that a clerk being a person to whom a legal tender may be made, must, from the nature of his employment, have a discretionary authority to receive current bills of a bank in *payment*; for the same reason, he could *consent* that a *tender* should be made in such bills, either expressly or by implication. The tender in that case was held good, though the account had been left with an attorney for collection. *Id.* The tender may be made to an attorney, or his clerk in the absence of the former, where a demand is left for collection, except the attorney expressly disclaim authority to receive the money. *Wilmot v. Smith*, 3 Car. & Payne, 453; *Bingham v. Allport*, 1 Nev. & Man. 398.

The plaintiff's attorney, before bringing the action, wrote to the defendant to say, that unless the debt, together with his (the attorney's) charge for that letter, were paid at his office by the next Wednesday at 12 o'clock, proceedings would be commenced. On the Wednesday at 10 o'clock, an agent of the defendants went to the attorney's office and there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it, unless the charge for the letter was also paid. It appeared that the writ was issued at 11 o'clock that day; held (*Parke, B., dubitante*), that this was a good tender. *Kirton v. Braithwaite*, 1 M. & W. 310.

(9) *Anon.*, 1 Esp. C. 348. It seems that a tender to a collector, employed by a solicitor to a bank-

A tender may be made by an agent on behalf of his principal; and it will not invalidate the tender, though it be made of a larger sum than that with which the principal has supplied the agent for the purpose.(1)

It has been held, in one case, that where the declaration was entitled generally of a term, the defendant could not give evidence of a tender made after the first day of term, though subsequently to the suing out of the writ;(2) but this decision seems contrary to the general rule in similar cases.(3) The tender will be made in time, if the writ is not actually sued out, though it may have been applied for;(4) and unless the suing out of a writ is specially replied to a plea of tender, it seems that it will be considered merely as process, and not as the commencement of the suit.(5) When a writ has been issued previous to the making of the tender, but not proceeded upon, it must be shown to be connected with the writ which is afterwards proceeded upon, otherwise the tender will not be avoided.(6)

The defendant, in his plea of tender, must aver that he has always, from the time of making the promise alleged in the declaration, been ready to pay the sum tendered.(7) Such an averment is essential, since if the

rupt commission, is bad. *Blow v. Russel*, 1 C. & P. 365. And see *Coore v. Callaway*, 1 Esp. C. 115; *Pimm v. Grevil*, 6 Esp. C. 95.

(1) *Read v. Goldring*, 2 Maule & Selw. 86.

(2) *Rolfe v. Norden*, 4 Esp. N. P. C. 72.

(3) *Vide infra*, p. 451.

(4) *Briggs v. Calverly*, 8 T. R. 629.

NOTE 1049.—*Suffolk Bank v. Worcester Bank*, 5 Pick. 106. Though a tender after the day is not technically good as a defence, it is a legal and equitable shield against interest at the rate of twenty-four per cent., as provided by statute in respect to a bank neglecting to redeem its bills on demand. Thus a demand having been made by the plaintiffs on defendants for \$20, defendants on the next day tendered and offered to pay the same with the costs and one day's interest; and upon the refusal of plaintiffs to accept the same, deposited the money in another bank in Boston, subject to the order of the plaintiffs whenever they should choose to take it; held, that the plaintiffs were not entitled to recover even simple interest, after they might have received their money and refused; the plaintiffs having brought the money tendered into court under a rule of court. *Id.* Interest in such cases is damages for detention; the defendants had not detained, but the plaintiffs voluntarily deprived themselves of their debt. *Id.* In *Dent v. Dunn* (3 Campb. 296), Lord Ellenborough recognized the same principle.

(5) *Foster v. Bonner*, Cowp. 454.

(6) *Stratton v. Savignac*, 3 Bos. & Pull. 330. *Vide infra*, 450.

(7) *Giles v. Harris*, 1 Lord Raym. 254; *Sweatland v. Squire*, 2 Salk. 623; *Willes*, 632; 8 East, 169.

NOTE 1050.—PLEA OF TENDER MUST AVER THAT HE HAS ALWAYS BEEN READY TO PAY THE SUM TENDERED.—A tender of the amount of a promissory note payable at a bank, if made on the next day after due, should be accompanied with one day's interest. *City Bank v. Cutter*, 3 Pick. 414. Indeed, that case seems to decide, that after a demand of payment on the day a note becomes due, no subsequent tender can avail in bar of the action. *Id.* And in *Dewey v. Humphrey* (5 Id. 187), a tender of rent after the day of its becoming due, was held not to be pleadable as a tender.

In Connecticut, tender after the day appointed for payment, if properly pleaded and pursued up, by bringing the money into court, is a strict legal defence, not subject (like the proceedings

defendant has at any time refused to pay, it would be unjust to the plaintiff to preclude him from recovering the amount of damages sustained by him, as well between a refusal and subsequent tender, as between a tender and subsequent refusal. The plaintiff, therefore, may reply to the plea of tender, either a prior demand of the debt, and a refusal or neglect to pay; or a subsequent demand. The burden of proof, in either case, will be upon the plaintiff.

The demand may be made either by the plaintiff, or by a person authorized by the plaintiff to give a discharge to the defendant.(1) A demand by the plaintiff's attorney is sufficient; and a written demand by the plaintiff's attorney, in a letter delivered at the defendant's house to a clerk, who carried the letter back into the house, and returned with an answer that the demand should be settled, has also been held sufficient evidence for the jury in support of the issue.(2) But it seems that, in general, a demand conveyed in a letter will not be effectual, as the defendant should have an opportunity of paying the sum demanded at the time of the demand.(3) A demand made by one of several co-plaintiffs on one of several co-defendants, is as good as a demand by all the plaintiffs on all the defendants.(4) In support of the replication of a prior or subsequent demand, the demand must be proved to have been made of the precise sum alleged to have been tendered.(5)

3. Statute of Limitations.

UPON the issue joined on a plea of the Statute of Limitations, it will be necessary for the defendant to show that the statute, in the particular instance, has attached. The period after which the Statute of Limitations is a bar to the recovery of a debt upon simple contract, is to be reckoned from the time of the breach of the promise and undertaking, and not from the time when it is discovered, or the special damage arising from it is

under the common rule for bringing money into court) to terms, or to any discretionary control by the court. *Tracy v. Strong*, 2 Conn. R. 659.

* * On the subject of tender, generally, see *Chitty on Contr.* (7th ed.) tit. *Tender*; 2 Gr. Ev. §§ 600-611 a, and the notes; *Stephen's N. P.* 2599-2611; 1 *Burrill's (N. Y.) Pr.*, pp. 140, 408; and the New York Code of Practice (1849), which allows a tender after suit brought without payment into court, and charges all costs in the suit, subsequent to the tender, upon the plaintiff, if he fail to recover more than the amount tendered. * *

(1) *Colts v. Bell*, 1 Campb. N. P. C. 478; *Coore v. Callaway*, 1 Esp. N. P. C. 115; *Strutt v. Rogers*, 7 Taunt. 213.

(2) *Hayward v. Hague*, 4 Esp. N. P. C. 93.

(3) *Edwards v. Yates*, 1 Ry. & Mo. 360.

(4) Although the tender may have been joint, *Pierse v. Bowles*, 1 Stark. N. P. C. 323.

(5) *Rivers v. Griffiths*, 5 Barn. & Ald. 630; *Coore v. Callaway*, 2 Esp. N. P. C. 115; *Spybey v. Hide*, 1 Campb. N. P. C. 181. The acceptance of the sum tendered does not preclude the plaintiff from suing for more. *Id.* Tender after the day of payment of a bill of exchange, cannot be pleaded, but it will stop the running of interest. *Hume v. Peploe*, 8 East, 168; *Dent v. Dunn*, 3 Campb. N. P. C. 296.

suffered.(1) Where a promissory note is payable on demand, it has been held that the statute begins to run from its date.(2) But with respect to notes payable within a certain time after demand or sight, a presentment must be made, and the specified time must elapse, before the debt will be barred by the statute.(3) A factor is liable to account to his principal whenever a demand to that effect is made upon him. And the Statute of Limitations begins to run from the time of the demand being made; though such a demand will be presumed to have been made after a reasonable time has elapsed.(4) It has been before mentioned, that, where a person, whose

(1) *Short v. M'Carthy*, 3 Barn. & Ald. 626; *Dyster v. Battye*, 3 Barn. & Ald. 448; *Howell v. Young*, 5 Barn. & Cressw. 259; *Batley v. Faulkener*, 3 Barn. & Ald. 288; *Brown v. Howard*, 2 Bro. & Bing. 73. In cases of fraud, it has been said that the statute only runs from the time the fraud is discovered, but that the fraud must be specially replied. *Bree v. Holbech*, 2 Doug. 654; 4 B. Moore, 508; *Macdonald v. Macdonald*, 1 Bligh, 315; *Clarke v. Hougham*, 2 Barn. & Cressw. 153.

(2) *Christie v. Fonsick*, Selw. N. P. 131; *Mann. Index*, 202; *Buckler v. Moor*, 1 Mod. 89. See n. 3. See *Harris v. Ferrand*, Hardr. 36.

NOTE 1051.—(*Young v. Weston*, 39 Maine, 492.)

Action against an attorney must be within six years from the receipt of the money. *Stafford v. Richardson*, 15 Wend. 302.

* * But the money must be demanded of the attorney, before a suit can be maintained, as he is not in default until after such demand, and a refusal or neglect to pay over. *Wabradt v. Maynard*, 3 Barb. Supr. C. R. 584; *Rathbun v. Ingalls*, 7 Wend. 320. * *

If an insured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been. Thus, in cases where an injured party has his election of remedies, as where there has been a tortious taking of his property, he may bring trespass or trover, or he may waive both, and bring assumpsit for the proceeds when it shall have been converted into money. *Lamb v. Clark*, 5 Pick. 193. In that case, defendant had obtained possession of certain notes wrongfully; held, that the plaintiff had only to prove that the defendant had received the amount of certain notes which were made payable to the plaintiff's testator, and had never been transferred by indorsement to the defendant. The statute attaches when the money was received.

(Where a note is payable a certain time after demand, the statute runs from demand. *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267.

When the defence is based on the Statute of Limitations, it must be pleaded specially. *Code of N. Y.*, § 74; *Leferts v. Hollister*, 10 How. R. 383.)

(3) *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, 1 Ry. & Mo. 388; *Savage v. Aldren*, 3 Stark. N. P. C. 232. See *Gould v. Johnson*, 2 Salk. 422; *Wittershein v. Countess of Carlisle*, 1 H. Bl. 631.

(4) *Topham v. Braddick*, 1 Taunt. 572. Fourteen years has been considered a reasonable time. *Id.*

NOTE 1052.—If property is committed to a friend, he is not liable to an action for it until there is a demand, and the demand may be postponed to any convenient time; and yet within six years after a demand, although that may have been twenty years or more after the bailment, the action will be sustained. Per *Parker, C. J.*, in *Lamb v. Clark*, 5 Pick. 193.

(So where an agent collects money, the statute does not commence to run in his favor till after demand thereof by the principal. *Merle v. Andrews*, 4 Texas, 200; 9 Id. 151. The statute begins to run against a surety from the time his cause of action accrues against his principal, namely, from the day of payment. *Scott v. Nichols*, 27 Miss. (5 Cush.) 94. And the general rule is that the statute begins to run from the time the cause of action accrued. *Young v. Mackall*, 3 Md. Ch. Decis. 398; *Barker v. Cassidy*, 16 Barb. 177. Where, however, the debtor resides

tenancy has never been formally determined, has done no acts from which a tenancy might be inferred for six years, the statute is a good defence.(1) There is no cause of action until there is a party capable of suing, and, therefore, when a bill of exchange, payable to a person who died intestate, was accepted after his death, it was held that the Statute of Limitations began to run from the time of the grant of letters of administration, and not from the time the bill became due.(2)

The plaintiff's demand having been shown by the defendant to be within the operation of the statute, the plaintiff may prove that, in fact, the proceedings in the action originated within six years of the making of the defendant's promise. If, indeed, the form of the plea states that the plaintiff did not file his bill within six years, it will be necessary for him to make a special replication; but this is not necessary where the plea is in the common form.(3) If the action has been actually commenced within six years, it will be sufficient, though the proceedings may have been irregular, as where the first process was a *testatum capias ad respondendum*.(4) And the continuance may be supplied at any time.(5) Where more than one writ has been sued out, it will not be sufficient to show that the first writ has been sued out in time; it must also be proved to have been returned, for it is the return which gives possession of the cause to the court.(6) However, if the return is indorsed on the writ in time, it need not be proved to have been delivered out of the sheriff's office returned.(7)

out of the state when the cause of action accrues, and dies there, the statute only begins to run from the granting of letters of administration. *Davis v. Garr*, 2 Seld. 124. It is otherwise where he leaves the state after the cause of action has accrued. *Christopher v. Garr*, Id. 61.)

(1) *Leigh v. Thornton*, 1 Barn. & Ald. 625. See *Hughes v. Thomas*, 13 East, 474. *Vide supra*, p. 300.

(2) *Murray v. East India Co.*, 5 Barn. & Ald. 204.

(3) *Beardmore v. Rattenbury*, 5 Barn. & Ald. 452. A latitat is a good commencement of an action; (*Morris v. Pugh*, 3 Burr. 1243; *Day v. Church*, 1 Sid. 53); or a *capias ad respondendum*, in the Common Pleas. *Leader v. Moxon*, 2 Bl. 294; *Carver v. James, Willes*, 255. It has been said that a latitat must be specially replied. See *Foster v. Bonner*, Cowp. 454.

(4) *Leadbeter v. Markland*, 2 W. Bl. 1131; 5 Barn. & Ald. 452.

(5) Id. See *Smith v. Bower*, 3 T. R. 662; *Gregory v. Hurril*, 1 Bing. 334; 5 Barn. & Cress. 341; *Beardmore v. Rattenbury*, 5 Barn. & Ald. 452.

(6) *Harris v. Woolford*, 6 T. R. 617; *Thistlewood v. Cracroft*, 1 Marsh. 497; *Stanway v. Perry*, 2 Bos. & Pul. 167, where there is only one writ, and the declaration is filed within the time prescribed by the rules of the court, the writ and declaration are sufficiently connected; by *Gibbs*, Ch. J., 1 Marsh. 497; *Hutchinson v. Piper*, 4 Taunt. 555. As if the declaration is filed within a year. *Parsons v. King*, 7 T. R. 6.

(7) *Taylor v. Hipkins*, 5 Barn. & Ald. 489. A bailable writ is a good continuation of a non-bailable bill of Middlesex (*Plummer v. Woodburne*, 4 Barn. & Cress. 625), but not an attachment of privilege. *Smith v. Bower*, 3 T. R. 662. An action of assumpsit is not a continuance of a trespass *qu. cl. fr.* *Brown v. Babington*, 2 Lord Raym. 610. Proceedings in an inferior court removed by *habeas corpus*, or commenced by a testator, or a *feme sole*, may be connected with proceedings in the court above, or by the executor, or by husband and wife. *Matthews v. Phillips*, Salk. 424; *Forbes v. Lord Middleton*, Willis, 259.

The time of suing out a writ may be proved in opposition to its teste, as where it is sued out in vacation, and bears date of the preceding term.(1) And if a declaration is filed in vacation, and entitled of the preceding term, or is generally of a term, but filed after the commencement of it, the defendant will be allowed to prove the time when the action was, in fact, commenced.(2)

Replication of a promise within six years.

Where the plaintiff replies to a plea of the Statute of Limitations, that the defendant undertook and promised within six years, he may give in evidence any acknowledgment on the part of the defendant, that the debt is still subsisting.(3) The courts, on recent occasions have been in the habit of considering that the effect of an acknowledgment of the debt made by the defendant, is to create a fresh promise, and not to revive the promise which is barred by the statute;(4) and, therefore, they have held that a promise to pay, when of ability, will not be binding upon the defendant, without

(1) *Johnson v. Smith*, Burr. 260; *Granger v. George*, 5 Barn. & Cress. 149.

(2) *Snell v. Phillips*, Peake's C. 209; *Granger v. George*, 5 Barn. & Cress. 149; *Howe v. Cooker*, 3 Stark. C. 138.

(3) *Heylins v. Hastings*, Carth. 471. See by Best, Ch. J., *A'Court v. Cross*, 3 Bing. 420; *Gaselee, J.*, 3 Bing. 638. On the form of declaration, see *Leaper v. Tatton*, 16 East, 420.

NOTE 1053.—*Sands v. Gelston*, 15 John. R. 511; *Beil v. Morrison*, 1 Pet. R. 351; *Stafford v. Richardson*, 15 Wend. 302; *Gold v. Whitcomb*, 14 Pick. 188. To take a case out of the statute, there must be an acknowledgment of indebtedness, or a promise, absolute or conditional, to pay. But the latter includes the former. A promise is an acknowledgment of indebtedness, by necessary implication. *Barrett v. Barrett*, 8 Greenl. 353; *Allen v. Webster*, 15 Wendell, 284. An agreement not to plead the statute, it seems, may be replied, where such agreement is made previous to the attaching of the statute. *Gaylord v. Van Loan*, 15 Wend. 308.

By the new statute in England, "no acknowledgment or promise by word only shall be deemed sufficient evidence of a *new or continuing contract*," unless in writing. In *Fearn v. Lewis* (4 Car. & Payne, 173), Tindal, Ch. J., said: "It becomes, therefore, the duty of the party who is to take a case out of the statute, to show affirmatively the acknowledgment distinctly of the debt; the defendant is not bound to show negatively that there is any other debt to which it can apply." He, therefore, directed a nonsuit.

The principle, that an acknowledgment is only evidence of a new promise, has often been recognized. *Exeter Bank v. Sullivan et al.*, 6 N. H. R. 124; 1 Pet. R. 351; 8 Pick. 206; 15 John. R. 511; 5 Binn. 573.

(The old cause of action is *revived* by the new promise; so that the new promise need not be treated as the creation of a new cause of action. *Philips v. Peters*, 21 Barb. 351, 448. See *Esselestyn v. Weeks*, 2 Kernan R. 635. In New York, a debt barred by the statute can only be revived by a written acknowledgment or promise (sec. 110 of the Code); but the statute does not alter the effect of any payment of principal or interest. The promise or acknowledgment need not be made to the creditor. 4 Sand. 427.)

(4) *Tanner v. Smart*, 6 Barn. & Cress. 606, where also the cases of a contrary import are collected. And see *Pittam v. Foster*, 1 Barn. & Cress. 248; *Hurst v. Barker*, 1 Barn. & Ald. 93; *Ayton v. Bolt*, 4 Bing. 105; *Collyer v. Willock*, 4 Bing. 313; *A'Court v. Cross*, 3 Bing. 329; *Scales v. Jacob*, 3 Bing. 638. It has been held, that evidence may be given of an acknowledgment after action brought. *Yea v. Fouraker*, 2 Burr. 1099, recognized in *Thornton v. Illingworth*, 2 Barn. & Cress. 826. And see, by Best, Ch. J., *Perham v. Raynal*, 2 Bing. 306; and *Thompson v. Osborne*, 2 Stark. N. P. C. 98.

proof of his ability.(1) The courts also hold, that where there is anything said, at the time of an acknowledgment, to repel the inference of a promise, the acknowledgment will not take a case out of the Statute of Limitations.(2) Accordingly, where the principal debt was paid by the defendant after it had been due more than six years, but the defendant at the time of paying the principal, refused to pay the interest which had accrued, it was held, that he was not bound in consequence of his acknowledgment of the debt, to pay the interest.(3) The payment of money into court upon a declaration which does not contain any special contract, will not prevent the

(1) *Tanner v. Smart*, 6 Barn. & Cress. 603; *Ayton v. Bolt*, 4 Bing. 105; *Scales v. Jacob*, 3 Bing. 638.

(2) *A'Court v. Cross*, 3 Bing. 332. The decisions on this point have not been uniform. See *Swan v. Sowell*, 2 Barn. & Ald. 759; *Dowthwaite v. Tebbut*, 5 M. & S. 75; *Frost v. Bengough*, 1 Bing. 266; *Laurence v. Worral*, Peake's N. P. C. 93; *Rowcroft v. Lomas*, 4 M. & S. 457; *Coltman v. Marsh*, 3 Taunt. 380; *Hellings v. Shaw*, 1 B. Moore, 240.

NOTE 1064.—The admission of a debt does not take a case out of the statute. It is only evidence from which a jury may infer a promise that will take a case out of the statute. *Stanton v. Stanton*, 2 N. H. R. 425; *Exeter Bank v. Sullivan et al.*, 6 Id. 124. The admission and offer to pay a part, are to be taken together, and are evidence only of the amount admitted. *Atwood v. Coburn*, 4 N. H. R. 315; *Exeter Bank v. Sullivan et al.*, *supra*; *Fearn v. Lewis*, 6 Bing. 349. A kind of conditional offer to pay, as that if he is allowed time to arrange his affairs, but if he is proceeded against by his creditors, his exertions will be abortive, held, not sufficient to imply a promise. *Fearn v. Lewis*, *supra*. *Gaselee, J.*: Can this be called an unqualified acknowledgment, when the defendant threatens that he will do nothing if the creditors proceed?

If the debt be admitted, but the debtor at the same time refuses to pay, no promise can be raised by implication. *Exeter Bank v. Sullivan et al.*, 6 N. H. R. 124. In *Lindsell v. Bonsor* (2 Bing. N. C. 241), defendant having accompanied an acknowledgment of debt with an assertion that he should have nothing to do with the claim; that he wished the claimant would make him a bankrupt; and that he would rather go to jail than pay the claimant; held, that it was properly left to the jury to consider whether the acknowledgment was one from which a promise to pay could be implied. *Tindal*, Chief Justice: "But why should an acknowledgment be construed as a promise, when it is accompanied with what is a contradiction of any promise?" And *Gaselee, J.*, added: "There is no branch of the law on which there have been so many decisions as on the Statute of Limitations. At one period the courts went so far as to say, I won't pay, was a sufficient acknowledgment to take a case out of the operation of the statute. Some time ago, however, the tide of authority changed, and the courts required, if not a promise, at least something from which a promise might be implied."

(One of two joint promisors cannot bind the other by a new promise, so as to revive a debt barred by the statute. *Van Keuren v. Parmelee*, 2 Comst. 523. But if one of them, being applied to for the payment of interest, refers him to the other, who pays the interest due; this will be sufficient to prevent the running of the statute from an earlier day. *Winchell v. Bowman*, 21 Barb. 448. See also *Reed v. McNaughton*, 15 Id. 168. An unqualified acknowledgment of an indebtedness has been usually held sufficient to take the case out of the statute (*Delvach v. Turner*, 6 Rich. 117; *Webber v. Cochrane*, 4 Texas, 31); but will not be sufficient, if accompanied with expressions showing an unwillingness to pay (*Zacharias v. Zacharias*, 23 Penn. State R. 452); or only a conditional willingness to pay (*Beck v. Beck*, 25 Id. 124); nor will it be sufficient if there be any uncertainty as to the identity or amount of indebtedness admitted. *Buckingham v. Smith*, 23 Conn. 453; *Shitler v. Bremer*, 23 Penn. State R. 413.)

(3) *Collyer v. Willcock*, 4 Bing. 313.

defendant from insisting upon the Statute of Limitations, in answer to the residue of the plaintiff's demand.(1)

It has been said, that where the defendant claims a discharge under a written instrument, to which he refers with precision, the plaintiff will be allowed to recover, if he can show that the instrument referred to is not an effectual discharge.(2) And an acknowledgment may be inferred from the conduct of a party.(3) But where the defendant merely refers the plaintiff to his attorney,(4) or expresses a want of recollection respecting the debt, without signifying that anything is due,(5) the case will not be taken out of the statute. The acknowledgment must afford an inference of a promise, which agrees with the original promise stated in the declaration; and, therefore, an acknowledgment of the defendant's negligence within six years, will not make him liable for a breach of a promise to use proper diligence, made more than six years before.(6) Where the expressions of the defendant are ambiguous, it is a question for the jury to determine, whether they amount to an acknowledgment of the debt.(7) If the acknowledgment is general, and a preceding debt is proved, it will be presumed that the acknowledgment refers to the debt which is in evidence, unless the defendant can show that it applied to a different demand.(8)

The evil experienced from the numerous and contradictory decisions respecting the nature and effect of acknowledgments by debtors, which have been thought to avoid the operation of the Statute of Limitations, is likely, for the future, to be greatly diminished, in consequence of a bill recently introduced by Lord Tenterden.(9) By this bill an acknowledgment or promise, which shall deprive a party of the benefit of the Statute of Limitations, must be in writing, and signed by the person to become chargeable thereby.(10) It is provided, however, by the act, that the ef-

(1) Long v. Greville, 3 Barn. & Cress. 10.

(2) By Gibbs, Ch. J., Hellings v. Shaw, 1 B. Moore, 344. See Beale v. Rind, 4 Barn. & Ald. 572; Partington v. Butcher, 6 Esp. N. P. C. 66; De la Torre v. Salkeld, 1 Stark. N. P. 7; Easterly v. Pullen, 3 Stark. N. P. 186.

(3) East India Company v. Prince, 1 Ry. & Mq. 407.

(4) Bicknell v. Keppel, 1 N. R. 20; Miller v. Caldwell, 3 D. & R. 267. See Bailey v. Lord Inchiquin, 1 Esp. N. P. C. 435.

(5) Hellings v. Shaw, 7 Taunt. 611; Craig v. Cox, Holt's N. P. C. 380; Snook v. Mears, 5 Price, 636; Knott v. Farren, 4 D. & R. 179.

(6) By Holroyd, J., Short v. M'Carthy, 3 Barn. & Ald. 632.

(7) Lloyd v. Maund, 2 T. R. 760; Racker v. Hannay, 4 East, 604, n.; Bicknell v. Keppel, 1 N. R. 20; Frost v. Bengough, 1 Bing. 266; Colledge v. Horn, 3 Bing. 121.

(8) Baillie v. Inchiquin, 1 Esp. N. P. C. 435; Frost v. Bengough, 1 Bing. 266.

(9) 9 G. IV, c. 14. Before the statute a written guaranty might be revived by a verbal promise. Gibbons v. M'Casland, 1 Barn. & Ald. 690.

(10) NOTE 1055.—Lord Tenterden's act requires the acknowledgment to be *signed by the person to be chargeable* thereby. It must be signed by the debtor himself; that of an agent of the debtor will not retrieve a debt barred by the Statute of Limitations. Dobble v. Napier, 2 Bing. N. C.

fect of any payment of any principal or interest shall not be taken away, altered, or lessened.

It has been held, that an acknowledgment is sufficient to take a case out of the Statute of Limitations, when made by an agent;(1) or by a person to whom the defendant refers.(2) In the case of *Whitcomb v. Whiting*(3) it was held, that the payment of interest, and part of the principal by one of several drawers of a joint and several promissory note, took it out of the Statute of Limitations against the others; and the authority of this case has been supported by a late decision in the Common Pleas.(4) And an admission by one of several partners, after the dissolution of the partnership, concerning joint contracts that took place during the partnership, has been received for the same purpose.(5) It has been held, in one case, that even the receipt of a dividend upon a note, under a commission of bankruptcy against one of two joint makers, was sufficient to revive the liability of the other maker.(6) But the authority of this

761. Form of acknowledgment: *Lechmore v. Fletcher*, 3 Tyr. 450; 1 C. & M. 623. See *Whipp v. Hillary*, 3 Barn. & Adol. 399; 5 Car. & Payne, 209.

* * In Massachusetts (Rev. Stat. ch. 120, § 13), and in Maine (Rev. Stat. ch. 146, § 19,) there are statutory provisions similar to those of Lord Tenterden's Act (9 Geo. IV, c. 14). * * (See also Code of N. Y., § 110.)

(1) As by the wife of the defendant, acting as his agent. *Gregory v. Parker*, 1 Campb. N. P. C. 394; *Anderson v. Saunderson*, 2 Stark. N. P. C. 204; *Palethorp v. Furnish*, 2 Esp. N. P. C. 511, n.

(2) *Burt v. Palmer*, 5 Esp. N. P. C. 145.

(3) *Whitcomb v. Whiting*, Doug. 652. See the observations on this case, *Atkins v. Tredgold*, 2 Barn. & Cress. 23; *Brandram v. Wharton*, 1 Barn. & Ald. 463; *Perham v. Raynal*, 2 Bing. 306.

(4) *Perham v. Raynal*, 2 Bing. 306, where the note was joint.

(5) *Wood v. Braddick*, 1 Taunt. 104.

NOTE 1056.—An administratrix sued for a debt due to the intestate. It appeared that the debt accrued more than six years before the commencement of the action; but that within six years, the defendant and the agent of the administratrix went through the amount together, and struck a balance; held, that the administratrix was entitled to recover upon an account stated with her, and that the Statute of Limitations was no bar. *Smith's Adm'r v. Fortz*, 4 Car. & Payne, 126.

In an action against several executors, pleas, general issue and Statute of Limitations; held, that neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, took the case out of the statute; there must be an express promise by all. *Tullock v. Dunn*, R. & M. 416.

A promise in writing, signed by the party charged thereby, to pay his proportion of a joint debt more than six years old, is a sufficient compliance with the provisions of the statute (9 Geo. IV, c. 14, § 1) to take the case out of the Statute of Limitations, though no amount is specified in the promise, and a plaintiff on such promise is not confined to nominal damages, but may recover the whole of such proportion, upon proving the amount by extrinsic evidence. *Lechmere v. Fletcher*, 1 Crompt. & Meeson, 623. See *supra*, note 1054.

(An express promise by an administrator takes the case out of the statute; an acknowledgment of the debt does not (*Bunker v. Athearn*, 35 Maine, 364); unless made before the debt is barred. *Griffin v. Justices, &c.*, 17 Geo. 96. As to the effect of a promise by a sole acting executor, see *Pitt v. Wooten*, 24 Ala. 474.)

(6) *Jackson v. Fairbank*, 2 H. Bl. 340.

decision has been questioned, and the principle of it has been held not to extend to a case, where a dividend has not been paid on the instrument itself, though it has been exhibited, under the commission, as a security.(1)

A payment by a joint maker of a note, is not receivable as an acknowledgment to take the case out of the Statute of Limitations as against the other makers, unless it is clearly proved by the plaintiff, that the payment was made on account of the note; the acknowledgment in such a case ought to be express and unequivocal.(2) An acknowledgment of a debt by an executor will not revive it; there must be an express promise.(3) And the payment of interest by a surviving maker of a note, will not affect the executor of the deceased maker;(4) nor will a promise by one of several executors avail the plaintiff; there ought to be a promise by all.(5) A promise will not be revived after six years, as against a married woman and her husband, in consequence of a payment, made during the coverture, on account of a note by a person who was a joint maker of the note with the woman when sole.(6)

The effect of acknowledgments or promises made by one of several joint contractors or the representatives of any contractor, where there has been no payment of principal or interest, is materially varied by the 9 Geo. IV, c. 14.(7) This statute, after enacting that acknowledgments or promises which take a case out of the operation of the Statute of Limitations must be in writing and signed by the party to be charged, preserves to joint contractors and the representatives of contractors the benefit of the statute, notwithstanding any acknowledgment or promise made and signed by other joint contractors or representatives. But where the plaintiff is entitled to recover against one or more joint contractors or representatives of contractors, by virtue of a new acknowledgment or promise, or otherwise, he is allowed by the act, to recover judgment and costs against them; though judgment with costs shall pass against him for the others. And the non-joinder of such as the act declares not to be liable, is not pleadable in abatement. It is, however, provided, that nothing contained in the act shall alter, or take away, or lessen the effect of any payment of any principal or interest, made by any person whatsoever.

(1) *Brandram v. Wharton*, 1 Barn. & Ald. 463.

(2) *Holme v. Green*, 1 Stark. N. P. C. 448. (See 15 Barb. 168, and *Winchell v. Bowman*, 21 Barb. 448.)

(3) *Tullock v. Dunn*, 1 Ry. & Mo. 416.

(4) *Atkins v. Tredgold*, 2 Barn. & Cress. 23.

(5) *Tullock v. Dunn*, 1 Ry. & Mo. 417.

(6) *Pittam v. Foster*, 1 Barn. & Cress. 248.

(7) * * The point stated in the text is well settled in England, but must be taken with qualifications in the United States. The English and American cases are collected in the notes to *Whitcomb v. Whiting*, 1 Smith's Leading Cases, 318, *et seq.*; *Chitty on Contr.* (7th ed.) 361, n. 4; 3 Kent C. (6th ed.) p. 50, and notes; *Collyer on Partn.* (Perkins' ed.) § 757 and notes. * *

An acknowledgment made to a stranger, or contained in a letter to a third party, has been held sufficient evidence of a promise to the plaintiff.(1) But it will be a variance, if the promise is stated to have been made to a testator, and it was in fact, made to the executor.(2) And, an acknowledgment, in order to have the effect of a promise made within six years, must be alleged and proved to have been made to a person who was in existence to receive it. Thus, in a declaration by an executor, where the promises were laid as having been made to his testator, it was held insufficient for him to prove an acknowledgment to himself, that the testator always promised not to press the defendant for the debt; though the testator had been alive within six years.(3) An acknowledgment by the acceptor of a bill of exchange, of his liability to the payee, accompanied with a denial of his liability to the drawers, will not deprive him of the benefit of the statute, in an action brought by the drawers, upon the bill.(4)

By the recent statute introduced by Lord Tenterden, it is enacted, that "no indorsement, or memorandum of any payment, written or made after the time appointed for the act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment should be made, shall be deemed sufficient proof of such payment, so to take the case out of the Statute of Limitations."(5) Previous to

(1) *Peters v. Brown*, 4 Esp. N. P. C. 46; *Clarke v. Hougham*, 2 Barn. & Cress. 153; *Mountstephen v. Brooke*, 3 Barn. & Ald. 141; *Halliday v. Ward*, 3 Campb. 32. At the time of these decisions the opinion of the courts was less decisive, than at present, as to the point, whether an acknowledgment was evidence of a fresh undertaking, or whether it revived the original promise. *Vide supra*, p. 451.

NOTE 1057.—Under the new statute in England, it has been held, that it is the duty of a party who would take the case out of the statute, to show affirmatively that such acknowledgment applies directly to the debt. In *Fearn v. Lewis* (4 Car. & Payne, 173), the defendant was not bound to show the application negatively.

(The action is brought upon the original undertaking, and the new promise is proved by way of showing that the presumption of payment raised by statute does not arise; and hence a promise made to a third person will be sufficient. *Carshore v. Huyck*, 6 Barb. 583; *Philips v. Peters*, 21 Barb. 351.)

(2) *Sarell v. Winc*, 9 East, 409; 2 Saund. 63, n.

(3) *Ward v. Hunter*, 6 Taunt. 210; 1 Barn. & Cress. 251.

(4) *Easterly v. Pullen*, 3 Stark, N. P. C. 186.

(5) NOTE 1058.—INDORSEMENTS OF PAYMENT.—The statute 9 Geo. IV, c. 14, § 1, has this proviso; "Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." Since that statute, as before, payment of interest *may* afford an inference that the principal is still due. Interest, as separate from the principal, is not a cause of action. So it was held in *Hollis v. Palmer* (2 Bing. N. C. 713), where it was stated in the declaration, that the defendant, sixteen years before, delivered his promissory note, payable on demand, with interest, to the plaintiff, but neglected to pay except the interest, which he paid up to a day within six years. Plea, that the cause of action did not accrue within six years, held sufficient. *Tindal*, Ch. J.: "Perhaps in cases where there is an express contract to pay independently of the principal, there may be ground for contending that the party may sue for the amount of interest remaining unpaid; but in ordinary

this act, it had been decided in the case of *Bosworth and Parr v. Cotchett*, determined in the House of Lords,(1) that where the payee of a promissory note had written indorsements of the half-yearly payment of interest, from the time of making the note till his death (which happened within six years of the date of the note), like indorsements of his executor (who died before the commencement of the action), were admissible in evidence, in answer to a plea of the Statute of Limitations; though there was no extrinsic evidence offered of the time when the indorsements were made, and though more than six years had elapsed between the death of the maker of the note, and that of the executor.

Mutual account.

The plaintiff, in answer to a plea of the Statute of Limitations may show that there were mutual accounts existing between him and the defendant. The rule in respect of such accounts is now understood to be, that every new item or credit in an account (whether between merchants, or persons of other occupations), given by one party to the other, is an admission of there being an unsettled account between them, the amount of which is afterwards to be ascertained. And any account which the jury may consider as an acknowledgement of the account remaining open, is sufficient to take a case out of the Statute of Limitations.(2) But, where all the items are on one side, the last item, though it happen to be within six years, shall not exempt those of longer standing from the operation of the statute.(3) And if an account be *stated*, an action to recover the balance must be brought within six years after the adjustment of it;(4) unless a new account is subsequently entered upon, by which it becomes current again.(5)

Disability.

Lastly, the plaintiff may reply to a plea of the Statute of Limitations any

cases, interest has always been deemed a mere accessory to a loan, and when the demand for the principal is barred, the accessory falls along with it.

(1) Tried at Leicester Sum. Ass. 1819, before Richards, Ch. B., Judgment in the House of Lords, 6th May, 1824. And see *Searle v. Lord Barrington*, *infra*, "Debt."

(2) By Lord Kenyon, *Cutling v. Skoulding*, 6 T. R. 193; *Cranch v. Kirkman*, Peake's N. P. C. 164; *Webber v. Tivil*, 2 Will. Saund. 127, n. 6, 7; *Crawford v. Lydell*, cited 6 Ves. 382; *Jones v. Pengree*, 6 Ves. 580; *Duff v. East India Company*, 15 Ves. 190. Where the plaintiff keeps alive his side of the account by process, it will operate for the benefit of the defendant's cross demands. *Ord v. Ruspini*, 2 Esp. N. P. 568.

(Where the last item in a running account is within six years, the statute does not operate upon any part of the account. *Chambers v. Marks*, 25 Penn. State R. 296; 11 Texas, 522; *Judd v. Sampson*, 13 Id. 19; *Theobald v. Stinson*, 38 Maine, 149; 6 Rich. 117.)

(3) By Denison, J., *Cotes v. Harris* (Bull. N. P. 149), it seems that merchants' accounts are included in this rule. See *Barber v. Barber*, 18 Ves. jun. 286; *Cranch v. Kirkman*, Peake's C. 164; by Lord Kenyon, 6 T. R. 193.

(4) 2 Will. Saund. 127, n. 6, 7.

(5) *Farrington v. Lee*, 1 Mod. 270; 2 Mod. 311; *Scudamore v. White*, 1 Vern. 456.

of the disabilities which are an excuse for not commencing the action in time;(1) such as the absence of himself or of the defendant, and that the action was commenced within six years after their return to this country.(2) But if the time allowed by the statute has once begun to run, the plaintiff cannot avail himself of any disability subsequently occurring.(3) And the statute has been held to apply, where one of several plaintiffs was beyond seas when the cause of action commenced, it being proved that the others were living in England.(4)

CHAPTER XI.

OF THE EVIDENCE IN ACTIONS OF COVENANT.

THE facts to be proved by either party, in an action of covenant, will vary in every case with the nature and form of the issue. All covenants which are not put in issue are admitted to be true; but only such particulars in instruments as are exhibited on the record are admitted as not being traversed. If either party wishes to avail himself of any part of their contents besides those specified in the declaration, the execution of the instrument must be proved in the regular course.(5)

(1) NOTE 1059.—An action of assumpsit for unliquidated damages is within the saving clause (§ 7) of 21 Jac. I, c. 16. Therefore, such action, accruing while the plaintiff is in prison, may be brought at any time within six years from the first time of his being at large; or it may be commenced while he continues in prison, or before his enlargement, although more than six years after the cause accrued. 2 Saund. 120; 2 Mod. 71; Piggott v. Rush, 6 Nev. & Man. 376.

(2) 21 Jac. I, c. 16, § 7; 4 Anne, c. 16, § 19. It has been held, that Scotland is not a place beyond seas within the meaning of the statute. King v. Walker, Bl. R. 286. As to Ireland before the union, see by Holt, Ch. J., Shower, 91. As to what is a sufficient abiding in England, see Gregory v. Hurril, 1 Bing. 324; 5 Barn. & Cress. 341.

(3) Smith v. Hill, 1 Wils. 134; by Lord Kenyon, Doe v. Jones, 4 T. R. 311.

* * For a very masterly exposition of the Statute of Limitations, on the point stated in the text, see the learned opinion of Duer, J., in Ford v. Babcock (N. Y. Superior Court), in the New York Leg. Observer for Sept. 1849, pp. 276-286. The cases are there collected, and the law expounded with surpassing ability. * *

* * See 2 R. S. 406, § 77, cited *supra*, note 947; Case v. Boughton, 11 Wend. 106; Talmadge v. Wallis, 25 Wend. 107; as to certain defences under the plea of *non est factum*, accompanied with a notice. * *

(4) Perry v. Jackson, 4 T. R. 516. For other replications, see Chitty on Pleading, Vol. 2.

NOTE 1060.—The long continued absence of the *creditor* precludes the opportunity of making payment; no foundation exists on which an allegation to that effect can be reasonably supported. *Vide* 12 Ves. 266; 19 Id. 200; Boardman v. De Forest, 5 Conn. R. 1; Jackson v. Hotchkiss, 6 Cowen, 401; Rearden v. Searcy, 3 Marsh. 544; Palmer v. Dubois, 1 Conn. R. 178; Haskell v. Keen, 2 Nev. & Man. 160; Shields v. Pringle, 2 Bibb, 387.

(5) Williams v. Sills, 2 Campb. C. 519.

Non est factum.

The plea of *non est factum*, pleaded in an action of covenant puts in issue the execution of the deed on which the action is brought, and the plaintiff in support of the issue (the proof of which lies upon him) will have to produce the deed, unless an excuse for the profert of it is stated in the declaration.(1) The plaintiff will also, in general, have to prove that the deed in question was sealed and delivered by the defendant; and it will not be sufficient, to show that a person bearing defendant's name executed it.(2) It is a question for the jury, whether an instrument was intended to operate as an escrow, or was to take effect from the moment of its delivery; it is not necessary that the intention of the parties, as to the effect of the instrument, should be expressly declared at the time of the execution.(3) The circumstance of a party who has executed a deed retaining its own possession, does not invalidate the delivery.(4) Nor is it necessary, that the person, to whom the deed is delivered, should be the agent of the party who is to be benefited by it.(5)

The execution of a deed by an agent must be in the name of the principal, and the authority of the agent must be under seal.(6) An authority under seal is likewise necessary to be produced, where one party has executed a deed for himself and his copartners.(7) Payment of money into

(1) *Smith v. Woodward*, 4 East, 585. It is said, the record cannot be amended at *Nisi Prius*, by alleging an excuse for the profert; nor can the trial be put off on his ground. *Paine v. Bustin*, 1 Stark. C. 74. Though the deed be stated as lost, it may be given in evidence, if found before the trial. *Hawley v. Peacock*, 2 Campb. N. P. C. 557. The defendant cannot object to the reading of a copy, after withholding the original till the copy is proved. *Jackson v. Allen*, 3 Stark. C. 74.

(2) *Merriot v. Bates*, Bull N. P. 171; *Parkins v. Hawkshaw*, 2 Stark. C. 239; *Middleton v. Sandford*, 4 Campb. C. 34. See Vol. II. In some cases, a party to a deed, who takes advantage of its stipulations, may be bound, though he has not executed it. Co. Lit. 231 a.

(3) *Murray v. Earl of Stair*, 2 Barn. & Cress. 87. The delivery as an escrow is a special "*non est factum*." By Lord Ellenborough, *Stoytes v. Pearson*, 4 Esp. C. 255; *Whelpdale's Case*, 5 Rep. 119; *Esdale v. Oxenham*, 3 Barn. & Cress. 230. See *Hagood v. Harley*, 8 Rich. (S. C.) 325.

(4) *Doe v. Knight*, 5 Barn. & Cress. 671; *Mitchell v. Ryan*, 3 Ohio (N. S.) 377.

(The fact of delivery must be proved, and is to be determined like any other fact; and it is competent to show by parol that it has not been delivered. *Stephens v. Buffalo & N. Y. City R.* 20 Barb. 332; *Critchfield v. Critchfield*, 24 Penn. State R. 100. Possession of the deed by the grantee is *prima facie* evidence of delivery. *Dempsie v. Tylee*, 3 Duer R. 73. So is the act of the grantor in leaving it for record (*Willbam v. Weaver*, 17 Geo. 267); though this act may be explained. *Lessee of Breckley's Heirs v. Carlton*, 6 McLean, 125.)

(5) *Berkeley v. Hardy*, 8 D. & R. 102. See *Lloyd v. Freshfield*, 2 C. & P. 325.

(6) *Harrison v. Jackson*, 7 T. R. 207; *Steiglitz v. Egginton*, Holt's C. 141.

NOTE 1061.—*Partner cannot bind his copartner by deed, unless his authority is also by deed.* It is well settled, however, in this country, that if the execution of the deed is in the presence, and with the assent of the copartner, it is sufficient. *Hanford v. M'Nair*, 9 Wend. 54; *Hart v. Withers*, 1 Penns. R. 285; *Mackay v. Bloodgood*, 9 John. R. 285; *M'Bride v. Hogan*, 1 Wendell, 326; *Fichthorn v. Boyer*, 5 Watts, 159.

It was said by Chief Justice Gibbs, in *Streiglitz v. Egginton* (Holt's R. 141), that no subsequent acknowledgment will do. But in *Blood v. Goodrich* (9 Wend. 68), it was held, that a written recognition, accompanied by other acts *in pais* in confirmation, would have the effect to

court admits the due execution of the deed.(1) The mode of proving the execution of deeds has already been considered in the second volume.(2)

The plea of *non est factum*, also, puts in issue this point, whether the defendant has executed a deed, of which the legal effect and substance are correctly stated in the declaration.(3) The defendant, therefore, under this plea, may take advantage of any variance between the legal effect of the deed produced, and that specified on the record. Thus, under the plea of *non est factum*, the defendant may show, that a covenant, set out as general and absolute, is subject to a qualification or exception; but it will not be a variance, if a proviso, in defeasance of a covenant, but which is not incorporated with it in the deed, be omitted.(4) A variance in spelling will sometimes be aided; but not where the sense is altered, or where the mistake is not apparent to the court.(5) Where an alteration has been made in a deed, though not of a nature to avoid it, the defendant may take advantage of a variance between the contents of the deed set out on the record as so altered, and the deed in its original state.(6) If it is stated in the declaration, that "by a certain deed it is witnessed," there can be no variance, if the very words of the deed are set out.(7) By the payment of money into court, the contents of the deed are admitted as they are alleged.(8)

On issue joined upon the plea of "*non est factum*," the defendant, after oyer of the deed, may take advantage of variance, if its meaning is different from that attributed to it in the declaration, provided the defendant does not set out the deed. If the defendant sets out the deed on oyer, the only question raised upon the issue joined on the plea of "*non est factum*" is, whether the deed, as set out by the defendant, was, in fact, executed by him.(9)

render the contract valid. "The admission or acknowledgment, subsequently, is strong evidence." *Fichthorn v. Boyer*, *supra*.

(1) *Randal v. Lynch*, 2 Campb. C. 356.

(2) Vol. II, Chap. 7. As to the proof in the absence of an attesting witness, Vol. II; *Pytt v. Griffith*, 8 B. Mo. 538; *Talbot v. Hodgson*, 7 Taunt. 251.

(3) *Arnold v. Revoult*, 1 Bro. & Bing. 443; *Birch v. Gibbs*, 6 Maule & Selw. 115; *Swallow v. Beaumont*, 2 Barn. & Ald. 765.

(4) *Howell v. Richards*, 11 East, 633; *Tempany v. Burnand*, 4 Campb. N. P. C. 20; *Gordon v. Gordon*, 1 Stark. N. P. C. 294; *Brown v. Knill*, 3 Bro. & Bing. 395; *Saward v. Anstey*, 2 Bing. 519; *Brown v. Brown*, 1 Lev. 57; 1 Saund. 233 a, in *notis*.

(5) *Morgan v. Edwards*, 6 Taunt. 394; *Pitt v. Green*, 9 East, 188; *Hoar v. Mill*, 4 Maule & Selw. 470. Where a party is differently described in the same deed, the name by which he executes it, must be followed. *Mayelstone v. Lord Palmerstone*, 1 Mo. & M. 6.

(6) *Waugh v. Russell*, 1 Marsh. 215.

(7) *By Holroyd, J.*, 1 Barn. & Cress. 362. See Cro. Jac. 537; 1 Saund. 274, n. 1.

(8) *Randal v. Lynch*, 2 Campb. N. P. C. 356.

(9) *Snell v. Snell*, 4 B. & C. 750; *Ross v. Parker*, 1 B. & C. 363.

James v. Walruth, 8 John. R. 320; *Henry v. Clelland*, 14 Id. 401; *Door v. Fenno*, 12 Pick. 521.

Joint and several covenants.

Where the covenants in a deed are made with more than one person, it will be no variance, though the terms of a covenant are joint, and the action is several, if the interest be several; or if the terms are several, and the action is joint, provided the interest be joint; for the covenant, in law, follows the interest of the covenantees.(1) There is, however, an exception to this rule, where one or more joint covenantees take no beneficial interest by the deed; in that case it is necessary, that they should join in the action.(2)

Alteration or erasure.

The defendant may show, under the plea of "*non est factum*," that the deed has been altered by means of addition, rasure, or some interlineation.(3) It was the opinion of the court in *Pigot's Case*,(4) that an alteration of a deed by a party to it, avoided it as against himself, whether the alteration was in a material or immaterial part of the instrument. However, in a case where an alteration had been made in a lease by a party to it, after his own execution of it, but before the execution of the deed by the lessor or lessee, the lease was held valid.(5) And an alteration, though made by a party, which does not affect the provisions of a deed relating to the parties who have previously executed it, will not avoid the deed.(6) An immaterial alteration by a stranger is not to be regarded;(7) and it seems now to be settled, contrary to some earlier de-

(1) *James v. Emery*, 8 Taunt. 249. See *Eccleston v. Clipsham*, 1 Saund. 153.

(2) *Id.*; *Anderson v. Martindale*, 1 East, 497; *Southcote v. Hoare*, 3 Taunt. 87.

(3) NOTE 1062.—* * See *ante*, notes 695, 696, 697; also *Waring v. Smyth*, 2 Barb. Ch. R. 119; and the learned note of the reporter, *Id.* pp. 120–126. * *

(The party introducing or offering in evidence a deed that has been altered by erasure or interlineation, must show that the alteration was made before delivery. *Jordan v. Stewart*, 23 Penn. State, 244. But it has been held that the presumption, in the first instance, is, that the alteration apparent on its face was made before execution, so that it will be admitted in evidence without any proof on the subject. *Printrop v. Mitchell*, 17 Geo. 558; *Boothby v. Stanley*, 34 Maine, 115. The nature of the alteration should doubtless be considered in determining whether the party offering the instrument is bound to give evidence explaining the alteration; if the alteration make the deed more favorable to the party producing it, the alteration becomes suspicious and must be explained; while in other cases, no explanation need be given. *Huntington v. Finch*, 3 Ohio (N. S.) 445; *Wild v. Armsby*, 6 Cush. 314. If the alteration be merely verbal and immaterial, it will not affect the instrument, though made after delivery. *Arnold v. Jones*, 2 R. J. 345.

(4) 11 Co. 26 b. And see *Com. Dig. Fait. F.*, 1; *Shep. Touch.* 71; *Bull. N. P.* 281; *Master v. Miller*, 4 T. R. 325, on a bill of exchange. *French v. Patten*, 9 East, 335, on a policy. See *Doe v. Hirst*, 4 Stark. N. P. C. 60.

(5) *Hall v. Chandless*, 4 Bing. 129. It appears, in some cases, to have been considered that the alteration must have been made before plea pleaded. 1 Roll. Rep. 40; *Michael v. Scokwith*, Cro. Eliz. 120.

(6) *Doe v. Bingham*, 4 B. & Ald. 672. And see *Doe v. Hirst*, 3 Stark. N. P. C. 60; *Ventris*, 185.

(7) *Waugb v. Russel*, 5 Taunt.*707. And see *Lord Darcy's Case*, 1 Leon. 282, where the alteration was by the executor of the obligee.

cisions as to this point, that the validity of a deed will not be affected by an alteration, even in a material part, if made by a stranger.(1) Where the seals of a deed are torn off, it is for the jury to decide upon the intention with which it was done.(2)

Deed void *ab initio*.

The defendant may also show, under the plea of "*non est factum*," that the deed, when it was executed, was void *ab initio*; as that the defendant was a lunatic at the time of the delivery of it,(3) or that he was blind, or unlettered and unable to read, and that the deed was misread to him;(4) or that he was made to sign it when he was so drunk as not to know what he did;(5) or that the defendant was a married woman;(6) or that it was delivered to a stranger for the use of the plaintiff, who refused it; or to a married woman, and that her husband refused it.(7)

Deed only voidable.

But where the deed is only voidable (as by reason of infancy or duress of person) the defendant cannot give such matter in evidence under the plea of "*non est factum*,"(8) for, at the time of pleading, it had not been

(1) *Henfree v. Bromley*, 6 East, 309; *Irving v. Elnon*, 8 East, 54, cases on awards. And see by Lord Ellenborough, *French v. Patten*, 9 East, 355.

(2) *Palm*, 403; 1 *Ventr.* 297; *Bull. N. P.* 268.

(3) *Yates v. Bohen*, 2 Str. 1104; *Faulder v. Silk*, 3 *Campb. N. P. C.* 126.

(The deed of a lunatic is not void; it is like the contract of an infant voidable at his election, on condition that he returns the purchase money paid for the premises. If he receive a part of the price after coming to his right mind, this act is a ratification of the deed. *Arnold v. Richmond Iron Works*, 1 *Gray (Mass.)*, 434. So fraud vitiates a deed, but does not render it absolutely void; the defrauded party may avoid it, as he may where fraud is practiced in the sale of a chattel. *Gage v. Gage*, 9 *Foster (N. H.)* 533. A total want of consideration renders a deed of bargain and sale void, at common law. *Wood v. Chapin*, 3 *Kernan R.* 509.)

(4) *Thorogood's Case*, 2 *Rep.* 9; 11 *Rep.* 27 b, 28 a; 12 *Rep.* 90; *Gillb. Ev.* 145; *Nichols v. Holmes*, 1 *Jones' Law N. C.* 360.

(5) *Bull. N. P.* 172; *Pitt v. Smith*, 3 *Campb. N. P. C.* 34.

(6) *Lambert v. Atkins*, 2 *Campb. N. P. C.* 272; *Bull. N. P. C.* 172; *Davenport v. Nelson*, 4 *Campb. N. P. C.* 26.

(7) *Whelpdale's Case*, 5 *Co.* 1196.

(8) NOTE 1063.—*ESCROW*.—A plea of *non est factum* is a general issue plea, and the defendant may give in evidence anything which goes to show that the instrument was originally void at common law, as lunacy, fraud, coverture, &c., or that it had become void subsequent to its execution, as by erasure, alterations, &c.; for that plea puts in issue as well its continuance as a deed, as its execution. *The Union Bank of Maryland v. Ridgley*, 1 *Har. & John.* 324. As the defendant, under a plea of *non est factum*, may show that the instrument was delivered as an *escrow*; it is also settled, that he may plead it specially and conclude to the contrary; for the conclusion to the contrary raises the question, whether the proof is on the plaintiff or defendant. *Id.* The delivery of a deed as an *escrow* being pleaded, the issue is upon that special matter, the proof of that allegation rests on the defendant; without proof on the part of the defendant, the possession of the instrument by the plaintiff is *prima facie* sufficient evidence for him. *Id.* But if the defendant prove the delivery as an *escrow*, as alleged in the plea, the proof of the performance of the condition lies on the plaintiff, where the affirmative is with him. *Id.* See *Hare v. Horton*, 2 *Nev. & Man.* 428.

avoided, and was his deed.(1) And it is a general rule, where the consideration of the deed is illegal (whether by statute or at common law), that the defendant may take advantage of the illegality, by pleading the special matter, but cannot give it in evidence under the plea of "*non est factum*."(2)

The defendant, under this issue, may also show that the deed is void for want of a stamp.(3) But he will not be allowed to prove payment, or a release, or accord and satisfaction. And this issue is not of such a general nature as to entitle the defendant to prove a set-off, after notice.(4)

Condition precedent.

The plaintiff must prove the performance of such conditions precedent, as are put in issue by the defendant's pleas;(5) and an averment of per-

(1) 5 Rep. 119; Com. Dig. Pleader, 2 W. 18. Where infancy actually avoids the deed, it may be given in evidence under "*non est factum*." By Eyre, Ch. J., 2 H. Bl. 515.

NOTE 1064.—Union Bank of Maryland v. Ridgley, 1 Har. & Gill, 324.

In Oliver v. Houdlett (13 Mass. R. 240), it was held, that those acts alone are void, which necessarily operate to the infant's prejudice. And in Hartness v. Thompson et al. (5 John. R. 160), a joint promise made by an infant and an adult is valid as a joint contract, although the infant may avoid it in respect to himself. In Mason and Hale v. Dennison and Dennison (15 Wend. 64; 11 Id. 612); both the supreme and court of dernier resort concurred, that the infancy of one of the defendants as *joint debtors*, against whom judgment is rendered without assigning a guardian *ad litem* to the infant, cannot be assigned as error in fact, on a writ of error brought in the same court to revoke the judgment, where upon the *capias ad respondendum* the infant is returned not found, and the other defendants taken, and the judgment is entered against both defendants, pursuant to the statute authorizing proceedings against joint debtors. Cole v. Pennel et al. (2 Rand. 178), recognizes the principle of this decision. In the case in Wendell, the chancellor says, that the decision in Hartness v. Thompson (*supra*), is correct in principle, and that a joint contract made by an infant and an adult, constitutes a case of joint indebtedness, within the meaning of the statute authorizing the plaintiff to proceed to judgment against the party (1 R. L. 520, § 13; 2 R. S. 377, § 1); although such contract is not absolutely binding upon the infant. Id.

(2) 5 Rep. 119; Collins v. Blantern, 2 Wils. 347; Harmer v. Wright, 2 Stark. N. P. C. 35.

NOTE 1065.—An obligor sued on a bond, reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his *plea* that the real transaction was fraudulent and unlawful. Hill v. The Proprietors of the Manchester, &c., Water Works, 2 Barn. & Adol. 544.

In Virginia it has been held, that fraudulent misrepresentations in obtaining a deed is no ground for avoiding it in a court of law. Wyche v. Macklin, 2 Rand. R. 426.

(Where there is no fraud imputed, inadequacy of consideration is no ground for avoiding a deed (Harris v. Tyson, 24 Penn. State, 347); though it is a ground for refusing the aid of a court of equity to compel a specific performance. Robinson v. Robinson, 4 Md. Ch. Decis. 176. Only the party to the deed who is defrauded can take advantage of fraud or mistake in its execution. McCollough v. Wall, 4 Rich. 68. But this general rule does not apply, as against creditors. Belknap v. Wendell, 1 Foster (N. H.) 175. Deeds are frequently valid as between the parties, such as deeds to children, and void as against creditors. McLean v. Button, 19 Barb. 450; Sanders v. Waggoner, 19 Penn. (7 Harris) 248.)

(3) *Vide supra*, tit. "Stamps," in Index to Vols. I and II.

(4) Oldenshaw v. Thompson, 5 Maule & Selw. 164.

(5) NOTE 1066.—CONDITION PRECEDENT.—Where it was part of a condition precedent to the claim of

formance of a precedent condition at a particular time, will not be satisfied by showing, that the acts stated to be done, were postponed in consequence of a parol agreement between the parties, and were afterwards performed within the enlarged time.(1)

Proof of breach.

The proof of the breach will depend in every case upon the nature of the covenant. It is proposed to give a few examples of such covenants in charter parties and leases, as are of frequent occurrence. In an action of covenant upon a charter party, by the owner against the freighter of a chartered ship, the owner may give evidence of the actual burden of the vessel, to charge the defendant with not supplying a cargo, and is not restricted to the precise burden mentioned in the charter party, if there is no fraud in the case.(2) Where an action of covenant is brought for detaining a ship beyond her days of demurrage, the sum payable for these days is *prima facie* the measure of compensation for the extended time; but it is competent for the ship owner, to show that more damage has been sustained, and for the freighter to show, that there has been less than would thus be compensated.(3)

Common lease. Covenant not to assign.

There have been numerous decisions upon the subject of what shall be evidence of a breach of the covenant in leases, not to *assign, &c.*: which have proceeded, for the most part, on the language of the particular covenant, and the nature of the interest conveyed by the defendant to the person whose occupation is complained of.(4) It has been held that a com-

a sum of £80, in addition to the purchase money of a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April; it was held, that the delay of four days, though occasioned by *bad weather*, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. *Maryon v. Carter*, 4 Car. & Payne, 295.

Where the breach alleged was general, that the defendant did not perform his covenant or conditions, and the defendant pleaded that the conditions were performed, and that they were not broken; held, that the latter plea went to negative covenants, and as none such were in the condition, it was unnecessary to consider it. The other plea alleged a performance; plaintiff replied and set forth a special breach, in violating a decree of court in which he was interested; held, that this was no departure from the declaration, and was answer to the plea; but defendant's rejoinder, either upon record or in evidence, was a clear departure from his plea. *The Judges v. Deans*, 2 Hawks, 93.

An affirmative plea of performance of covenant waives a demand, and the defendant undertakes to prove whatever is necessary for his defence. *Id.* 12 Mod. 414.

(As to what are conditions precedent, see *Nicoll v. N. Y. & E. R. R. Co.*, 2 Kernan R. 121; *Underhill v. S. & W. R. R. Co.*, 20 Barb. 455, *Id.* 429; *Low v. Archer*, 2 Kern. 277.)

(1) *Little v. Holland*, 3 T. R. 590. As to what conditions precedent must be alleged and proved, *vide supra*, p. 354. As to proving the substance of the issue, see *Harris v. Mantle*, 3 T. R. 307; Vol. I, Chap. 12.

(2) *Thomas v. Clarke*, 2 Stark. N. P. C. 452.

(3) *Moorsom v. Bell*, 2 Campb. N. P. C. 616.

(4) *Crusoe v. Bugby*, 3 Wils. 234; *Holford v. Hatch*, Doug. 282; *Roe v. Harrison*, 2 T. R. 425 ;

pulsory assignment by act of law,(1) or the depositing of a lease as a security,(2) is not a breach of such a covenant. Where a stranger was in possession of premises apparently as tenant, and on inquiry, said that he rented the house, Lord Avonley held it sufficient *prima facie* evidence of an underletting.(3) In a later case, it was decided by Lord Ellenborough, that evidence of a stranger carrying on his business in the premises, and placing his name over the door, was no proof even of parting with the premises, for it may be, that the party in possession was a tortious intruder.(4)

For quiet enjoyment.

In support of a breach of covenant for quiet enjoyment, the plaintiff must show a lawful disturbance by a stranger; the covenant is only against persons having a lawful title.(5) And the plaintiff must adduce evidence of the claimant's title; as, by proving the judgment in ejectment.() The merely forbidding of the plaintiff's tenant to pay his rent, is not a sufficient proof of disturbance, to be deemed a breach of this covenant.(6)

Action by and against assignee.

Actions of covenant are often brought by or against the assignees of the reversion, or the assignees of a term. Where the plaintiff declares as assignee of the reversion, and his title is put in issue by the pleading of the defendant, he must prove his title as alleged.(7) If the action is against

Roe v. Sales, 1 Maule & Sel. 297; Doe v. Worsley, 1 Campb. N. P. C. 20; Doe v. Laming, 4 Campb. N. P. C. 77.

NOTE 1067.—COVENANT TO REPAIR.—Where the tenant covenants to keep the premises in repair during the term, and at the expiration thereof yield them up in like condition, and he permits them to go to decay, and omits to make necessary repairs, the landlord may bring his action forthwith. Schieffelin v. Carpenter, 15 Wend. 400.

* * And a covenant by a landlord to keep the premises in repair, requires him to rebuild in case of their destruction by fire. Allen v. Culver, 3 Denio, 284. * *

(1) Doe v. Carter, 8 T. R. 57; Doe v. Bevan, 3 Maule & Sel. 353; Doe v. Smith, 5 Taunt. 795. It seems that a devise by will is not a breach of the covenant not to assign (3 Maule & Sel. 361), nor the disposition of the term by executors. Steers v. Hurd, 1 Ves. jun. 295.

(2) Doe v. Hogg, 4 D. & R. 225; Doe v. Laming, 1 Ry. & Mo. 36. And see Gourlay v. Duke of Somerset, 1 Ves. & B. 68.

(3) Doe v. Rickerby, 5 Esp. N. P. C. 4.

(4) Doe v. Payne, 1 Stark. C. 86.

(5) Dudley v. Follet, 3 T. R. 587. And see Hodgkin v. Queenborough, Willes, 131.

(6) Witchcot v. Linesey, 1 Brownl. 81. See Hodgkin v. Queenborough, Willes, 129.

(7) Carvick v. Blagrave, 1 Bro. & Bing. 531. See Doe v. Parker, Peake's Ev. 283.

NOTE 1068.—When the covenant of seizin is broken, nothing passes by the deed, and the *sub-stratum*, having failed, the covenant of warranty cannot descend to the heir, or vest in the assignee. It cannot run with the land, for none having been conveyed there is none for it to run with. Per Parris, J., in Hacker v. Storer, 3 Fairf. R. 228.

A covenant for quiet enjoyment, runs with the land, and one who is evicted, may recover upon such covenant in the deed of any prior vendor, and this whether he purchased with or without warranty. Markland v. Crump, 1 Dev. & Batt. 94. See also Bickford v. Paige, 2 Mass. R. 460.

the defendant as assignee of the reversion, and the issue is, whether the reversion vested in the defendant by assignment, it will be sufficient to prove, that the estate came to him by descent, as heir at law to the lessor.⁽¹⁾

Where the action is brought against the defendant as assignee of the term, and the issue is on the assignment, it will be enough for the plaintiff to give general evidence, from which an assignment may be inferred; as, that the defendant is in possession of the demised premises, or has paid rent. Payment of rent by the defendant to the plaintiff, where the defendant has been let into possession by the original lessee, is *prima facie* evidence of the assignment of the whole term. If, however, the plaintiff

An intermediate vendor cannot, in respect to his liability upon his covenant for quiet enjoyment, recover of a prior vendor, but must first make good the damages of the person evicted. *Markland v. Crump*, 1 Dev. & Batt. 94. The principle is, that no man can maintain an action who has suffered no damages. Because the assignor can bring an action after suffering, it does not follow that he can bring his action upon the eviction of his assignee, and before satisfying the assignee himself. Per Parsons, C. J., in *Bickford v. Paige*, 2 Mass. R. 460; *Withy v. Mumford*, 5 Cowen, 137, overruling the dictum of Chief Justice Spencer, in *Kane v. Sanger*, 14 John. R. 89; per Ruffin, Ch. J., in *Markland v. Crump*, *supra*.

Privity of contract follows the estate.—Walker's Case (3 Rep. 22) held, "that if the lessor grants over his reversion, then the contract runs with the estate, and therefore the grantor shall not have an action of debt for rent due after his assignment, but the grantee shall have it. The cases also of *Kingdon v. Nottle* (1 Maule & Selw. 355, 4 Id. 53), and *Markland v. Crump* (*supra*), decide, that privity of contract will not alone suffice to sustain an action upon a covenant running with the land, but the plaintiff must show a damage to himself in particular from the breach alleged. However, it is to be observed, that upon the covenant of seisin, the assignee of the land cannot have an action, as was held in *Greenly v. Wilcox* (2 John. R. 4), and *Bickford v. Paige* (2 Mass. R. 460). But this does not affect the principle, that whenever a person is in the land in privity of estate with the covenantor, eviction or defect of title is not necessarily to the damage of one who has merely a privity of contract; but that latter person must particularly show *his* damage, before he can sue on the contract. *Kingdon v. Nottle*, and *Markland v. Crump*, *supra*. The above cases in respect to a covenant of *seisin*, proceed on the ground that the breach is necessarily before the assignment. The case of *Kingdon v. Nottle* (*supra*), further establishes that the action of the person who has only a privity of contract, will not lie, because a recovery in it would be a bar to the person who had the privity of estate, to whom the injury is immediate, and who, therefore, has the first right to satisfaction. In *Markland v. Crump* (*supra*), Ruffin, Ch. J., observes: "The court is of opinion, both upon authority and reason, that a purchaser with warranty from his vendor, may sue upon a covenant of warranty to his vendor; and as a consequence, that the latter cannot sue, until he shall have sustained damage by making satisfaction upon his own covenant."

In *Boyes v. Hewetson* (2 Bing. N. C. 575), in covenant by assignee of lessee, the plaintiff laid the venue in Middlesex, notwithstanding the lands to which the covenant applied laid in Surrey. The locality not appearing in the declaration, and no issue being raised on it, held, that the defendant was not entitled to a nonsuit.

(An action by the assignee of a lessor, for rent reserved in the lease, may be maintained on the covenant in the lease against the assignee of the lessee. *Main v. Feathers*, 21 Barb. 646, confirmed since at general term.)

(1) *Diersley v. Custance*, 4 T. R. 75.

states the particulars of the defendant's title, he must prove them as laid.(1)

Under tenant.

The defendant, who is charged as assignee of a term, is at liberty, in an issue upon the assignment, to show that he holds the premises as under tenant to the lessee, and not as assignee ;(2) or that part only of the premises have been assigned to him, and not the whole, as alleged in the plaintiff's declaration.(3) The defendant may plead, that he had made a second assignment of the term previous to the breach of covenant ; and, on issue joined on this replication, an assent by the second assignee, or that notice of the assignment was given to the plaintiff, need not be proved.(4) An assignee of the whole term, is liable on the covenants contained in the lease, though he has not entered upon the demised premises, and though he may be only a mortgagee ;(5) but an actual entry must be proved, where it is sought to make an executor liable as assignee.(6)

Assignee of bankrupt.

In order to charge the assignees of a bankrupt tenant as assignees of his term, some evidence must be given of an acceptance of the lease by them. And it has been held, that the mere circumstance of advertising the lease for sale, keeping the key of the premises, paying the rent to avoid a distress, are not such circumstances as will afford an inference that the lease has been accepted by the assignees.(7)

(1) By Lord Alvanley, Ch. J., *Turner v. Eyles*, 3 Bos. & Pull. 461.

(2) *Holford v. Hatch*, 1 Doug. 182 ; *Earl of Derby v. Taylor*, 1 East, 502.

(3) *Hare v. Cator*, Cowp. 766. An appointee of uses is not an assignee of the appointer. *Roach v. Wadham*, 6 East, 388. And see *Mayor of Carlisle v. Blamire*, 8 East, 487.

(4) *Pitcher v. Tovey*, 1 Salk. 81 ; *Taylor v. Shum*, 1 Bos. & Pull. 21.

NOTE 1069—ASSIGNMENT OVER.—The words "yielding and paying," constitute an express covenant ; and it is difficult to draw a distinction between yielding and paying, and holding subject to a rent to be paid. And though rent cannot be reserved to a stranger, a party may covenant to pay it to a stranger. *Deering v. Farrington*, 1 Mod. R. 113. And in *Steward v. Woolveridge* (9 Bing. 60), it was held, that an assignee who takes from a lessee leasehold premises by indenture, indorsed on the lease, "subject to the rent reserved in the lease, is liable in covenant to the lessee for rent which the lessee had been called on by the lessor to pay after the assignee has assigned over."

(5) *Williams v. Bosanquet*, 1 Bro. & Bing. 238.

(6) *Tilney v. Norris*, 1 Lord Raym. 553 ; *Carth.* 519 ; *Buckley v. Perk*, 1 Salk. 316 ; *Jevens v. Harridge*, 1 Will. Saund. 1. See *Remnant v. Bremridge*, 8 Taunt. 191.

(7) *Turner v. Richardson*, 7 East, 335 ; *Wheeler v. Braham*, 3 Campb. N. P. C. 340 ; *Copeland v. Stevens*, 1 Barn. & Ald. 593 ; *Welsh v. Meyers*, 4 Campb. N. P. C. 368 ; *Hanson v. Stevenson*, 1 Barn. & Ald. 303 ; *Clark v. Hume*, 1 Ry. & Mo. 207. And see stat. 6 G. IV, c. 16, § 75. With respect to the assignees of an insolvent termor, see *Crofts v. Perk*, 1 Bing. 354 ; *Stat. 7 G. IV, c. 57, § 23*.

NOTE 1070.—*Carter v. Warne* (4 Car. & Payne, 191) held, that trustees under an assignment for the benefit of creditors, are entitled (like assignees under the bankrupt and Insolvent Debtor's Act) to a reasonable time to ascertain whether the property held under a lease by the debtor, can be made available for the benefit of the creditors or not ; but if they act in such a way as to

In an action of covenant against a tenant, for the mismanagement of a farm, the defendant's under tenant, who is in possession of the farm, is competent, on the part of the defendant, to speak as to the proper management of the premises.(1) And where the point in issue is, whether the owner of the property, whose title is admitted by both parties, demised the premises to the plaintiff before he demised them to a third person, the owner himself is not an incompetent witness to prove that fact, however strong his bias may be to prefer one tenant to the other.(2) With respect to admissions, the recitals of a lease seem to be no more than *prima facie* evidence of the mode of cultivation of the demised premises at the commencement of the term.(3)

CHAPTER XII.

OF THE EVIDENCE IN ACTIONS OF DEBT.(4)

It is not proposed, in this chapter, to go minutely through all the various cases in which an action of debt may be brought. Our plan will be

render the premises of less value to the lessor, or deal with the property as if the lease were vested in them, they will, by that conduct, make themselves personally liable for the payment of rent, and the performance of covenants.

(1) *Wishaw v. Barnes*, 1 Campb. N. P. C. 341.

(2) *Bell v. Harwood*, 3 T. R. 309.

(3) *Skipwith v. Green*, 1 Str. 610; *Birch v. Stephenson*, 3 Taunt. 469.

(4) NOTE 1071.—DEBT ON JUDGMENTS.—And 1. On domestic judgments; 2. On judgments in sister states; lastly, On foreign judgments.

1. Debt on domestic judgments. Debt as well as *assumpsit* lies on a foreign judgment; but the judgment is no more than *prima facie* evidence; and the defendant has all the benefit he would be entitled to in an action upon the original cause. *Buttrick v. Allen*, 8 Mass. R. 573.

If an action of debt be sued on such judgment, *nil debet* is the general issue; or if it be made the consideration of a promise, the general issue is *non-assumpsit*. On these issues the defendant may impeach the justice of the judgment, by evidence relative to that point. He may also, by proper evidence, prove that the judgment was rendered by a foreign court, which had no jurisdiction; and if his evidence be sufficient for this purpose, he has no occasion to impeach the justice of the judgment. Per Parsons, Ch. J., in *Bissel v. Briggs*, 9 Mass. R. 462.

2. Debt on judgments and decrees of sister states. Debt lies on a judgment of another state; and the principle now settled is, that by virtue of the provision of the constitution of the United States, and the act of legislation under it, such a judgment is in all respects like domestic judgments, when the court where it was recovered had jurisdiction over the subject acted upon, and the person against whom it was rendered, leaving open for inquiry in the court where it was sought to be enforced, the question of jurisdiction, and taking the obvious distinction between the effect of the judgment upon *property* within the territory, and the *person* who was without it. If the property of a citizen of another state, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive. If the citizen himself is there and served with process, he is bound to appear and make his defence, or submit to the consequences; but if never there, there is no jurisdiction over his person, and a judgment cannot follow him beyond the territories of the state; if it does, he may treat it as a nullity, and the courts here will so treat it

to treat of the evidence in those actions of debt which are of principal importance; and afterwards to specify the necessary proofs in support of issues upon the more usual pleas.

I. As to the evidence in an action of debt on a bond of the ancestor against the heir, and against the heir and devisee.

Action on bond against heir.

An action of debt is very commonly brought, charging the defendant, as heir, upon the bond of his ancestor; for the heir, if expressly bound together with the obligor, is liable to be sued, as for his own debt, in respect of the assets which he has by descent.(1) If the defendant in such an action plead, that he has not, nor had at the time of the commencement of the suit, any lands or hereditaments by hereditary descent from the obligor in fee simple, sufficient to satisfy the debt claimed by the plaintiff, &c.—in the usual form, in which such a plea is expressed—and if the plaintiff, in his replication, deny generally the plea upon which issue is joined, the plaintiff in support of the issue will have to prove assets by descent;(2) that is, he must produce evidence to show, first, that the

when it is made to appear in a legal way that he was never a proper subject of the adjudication. These principles were settled by Ch. J. Parsons, in the leading case of *Bissel v. Briggs*, 9 Mass. R. 462, (in 1813) and recognized in *Hall v. Williams*, 6 Pick. 232, (1828,) *Borden v. Fitch*, 15 John. R. 121, and *Benton v. Burcott*, 10 Serg. & Rawle, 242.

* * And see 1 Kent Com. pp. 473, 474, and notes; and Story on Conf. of Laws, *passim*. * *

(The judgment of a court of general jurisdiction in a sister state, passing upon the merits of a cause, is conclusive in each of the other states on the issue before the court; jurisdiction in such cases is presumed. *Dobson v. Pearce*, 2 Kernan (N. Y.) 156. If the record shows that the parties appeared in the action, or were duly served with process, this will be *prima facie* sufficient evidence that the court had jurisdiction of the parties. *Moulin v. Trenton Ins. Co.*, 4 Zab. (N. Y.) 222; *Harbin v. Chiles*, 20 Mis. (5 Bennett) 314; *Houston v. Dunn*, 13 Texas, 476; *Topp v. Branch Bank*, 2 Swan (Tenn.) 184. See *Buchanan v. Port*, 5 Ind. 264, as to mode of pleading.

(1) See Co. Litt. 209 a; Vin. Abr. Heir; Com. Dig. Pleader, 2, E, 2.

(2) As to what constitutes assets, the reader is referred to a valuable note by Mr. Serjt. Williams, in his edition of Saunders, Vol. 2, p. 7, note 4;* and to Mr. Watkins' Treatise on De-

* The following passage, as to the nature of the judgment in this action, is part of a valuable note by Mr. Serjeant Williams, in his edition of Saunders, Vol. 2, p. 7, n. 4, in the case of *Jefferson v. Morton*. "The heir is not liable any further than to the value of the land, and therefore to an action against him on the bond of his ancestor, the heir may plead payment by him to other bond creditors before the commencement of the action, to the full value of the lands. *Buckley v. Nightingale*, 1 Strange, 665. He cannot, however, plead that he has laid out money beyond the amount of the rents in repairs. *Sketelworth v. Neville*, 1 T. R. 454. And in order that the heir should be no further liable, it is necessary for him to confess the action, and show the certainty of the assets. *Plowd.* 440; *Davy v. Pepys*, 2 Roll. Abr. 71; 1 Strange, 665. For if issue be taken on the quantity of assets, and it be found that the heir has other lands by descent; or if he plead a fact, which he knows to be false, and it be found against him; as where he says that he has *nothing* by descent, and the jury find that he has *something*, however small it may be, and insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages and costs, and to sue out the like execution against him as on a judgment for his own debt; and therefore the plaintiff may have a *capias ad satisfaciendum, fieri facias*, or an *elegit*, for a moiety of all the lands which the heir is seized of, whether by descent or otherwise. See *Smith v. Angel*, 7 Mod. 44; *Davy v. Pepys*, *Plowd.* 440; *Hinde and Lyon's Case*, 2 Leon. 11; 2 Roll. Abr. 70, C., pl. 2. Note—On a judgment upon a plea of *non est factum* by the ancestor, only the lands descended are liable. *Clotworthy v. Clotworthy*, Cro. Car. 487.

obligor died seized of lands or hereditaments in fee simple ; and, in case the obligor was entitled to a reversion merely, that he was the first taker of such reversion, or that he has exercised acts of ownership over his reversionary interest ; and, secondly, that the defendant is his heir at law. Proof of the value of the lands is unnecessary, since, in consequence of the defendant's false plea, the plaintiff will be entitled, if he recover, to a general judgment for the debt, damages and costs, and to sue out the like execution against the defendant, as on a judgment for his own debt.

The seizin of the obligor may be proved by showing his actual possession of the premises, or by proving his receipt of rent from the person in possession ; (1) this is presumptive evidence of a seizin in fee, and sufficient, until the contrary appear. On the other point, namely, the fact of the defendant being the obligor's heir, the plaintiff need only give very general evidence ; because it is a fact more peculiarly within the knowledge of the defendant himself. If the defendant can be proved to be in possession of the property of which the obligor was seized, or to have received rent from the tenant in possession, this circumstance alone would be sufficient to raise a strong presumption, that he claims as heir. (2)

Against the heir.

The declaration need not state the relationship between the defendant and the obligor, as, whether he is nephew or cousin, &c. : for the defendant's pedigree may be unknown to the plaintiff. (3) But if the defendant is described generally as heir of the obligor, or as son and heir, or nephew and heir, &c., which expresses an immediate descent to him from the obligor, but the proof is of a descent from the obligor to an intermediate heir, who died seized, and from that heir to the defendant, this would be

acent. A reversion after an estate tail is not assets. *Mildmay's Case*, 6 Rep. 42 a. A reversion after an estate for life ought to be specially pleaded by the heir. *Dyer*, 373 b ; *Carth.* 129. A reversion after an estate for years is assets in possession. *Bulkley v. Nightingale*, 1 Str. 665. A variance as to the county where the lands lie is immaterial. *Bull. N. P.* 175 ; 6 Co. 47.

In New York, "lineal and collateral warranties, with all their incidents, are abolished ; but the heirs and devisees of every person who shall have made any covenant or agreement shall be answerable, upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law." 2 R. S. 22 (3d ed.) At common law, an action might be maintained against the heir when he was named in and bound by the obligation of the ancestor ; and it was not necessary to allege in the declaration that the heir had lands by descent. If he had not, it lay on him to plead *riens per descent*. The statute extends the creditor's remedy to simple contract debts, and declares in what cases the heir or devisee shall be liable, and to what extent. The pleadings and proof must be such as to show his liability under the provisions of the statute. *Gere v. Clark*, 6 Hill R. 350. See 2 R. S. 547. to 551 (3d ed.) See *Sharpe v. Sharpe*, 3 Wond. 278.

(1) As to proof of seizin, see *infra*, "Action of ejectment by heir at law."

(2) See *Diersley v. Custance*, 4 T. R. 75.

(3) *Denham v. Stephenson*, 1 Salk. 355 ; S. C., 6 Mod. 241.

a fatal variance,(1) for the defendant is not heir to the obligor, but to the person who died last seized. The defendant, in such a case, should be charged as the heir of the person last seized, who was the heir of the obligor. But if the person through whom the defendant claims, had died in the life time of the obligor, the defendant would be properly charged as the heir of the obligor.(2)

Sale by the heir, before the action.

Upon the issue now under consideration (whether the defendant *had*, at the commencement of the action or afterwards, any land or hereditament by descent, &c.) the defendant might have shown, at common law, that he had sold and conveyed away the property, *bona fide*, before the commencement of the action; and in that case, the plaintiff would have been barred of his remedy at law;(3) but now, by the statute 3 W. & M., c. 14, § 6, it is provided, that where the defendant pleads *riens per descent at the time of the original writ brought, or the bill filed against him*, the plaintiff may reply, that he had lands, tenements, or hereditaments from his ancestors *before* the original writ brought, or bill filed; and the same section directs, that if the issue joined upon such replication be found for the plaintiff, the jury are to inquire of the value of the lands, &c., so descended; and judgment thereupon shall be given, and execution awarded as aforesaid;" that is (by reference to the preceding section of the act), according to the value of the land sold, aliened, or made over, as if the debt were the defendant's proper debt. The plaintiff, therefore, in this case, not being entitled to a general judgment, as in the case of a judgment at common law, must give some evidence of the gross value of the land sold.(4)

Although the above provision is directed more particularly to the case of a sale by the heir before the commencement of the action, yet, it seems, the plaintiff may reply according to the statute in cases where the heir has not sold; or he may, at his option, take issue on the plea of *riens per descent*. In the latter case, he will be entitled to his general judgment, without reference to the value of the lands, in case the heir shall have transferred the property by a fraudulent conveyance within the meaning of the statute of Elizabeth.(5)

Lord Holt is reported to have held at Nisi Prius, that the defendant, under the plea of *riens per descent*, may be allowed to prove an extent against him, for a debt due from his ancestor on a bond given to the

(1) Jenk's Case, Cro. Carr. 151; Case of Duke and Spring, 2 Roll. Abr. 709, pl. 62; 2 Saund. 7, note 4; Vin. Abr. title Heir, K, 2.

(2) See Co. Litt. 11 b, 15 n; Kellow v. Roden, 3 Mod. 253; 2 Will. Saund. 7, n. 4. As to the mode of tracing descents of reversions, see Watkins' Treatise on Descents. *Vide supra*, p. 469.

(3) Roll. Abr. 269; Dyer, 149 a, margin; 2 Will. Saund. 7, note 4.

(4) The jury must find the gross, and not the annual value. Redshaw v. Herther, Carth. 354.

(5) 13 Eliz. ch. 5. See 2 Will. Saund. p. 7, note 4. If the heir's estate has been defeated by act of the law, this is a good defence. Covell v. Weston, 20 John. R. 414.

crown.(1) But there is probably a mistake, in the short note of this case, as to the form of the plea. The defendant might have pleaded that he had not any lands or hereditaments by descent, &c., excepting certain lands, &c., of certain value, then stating the bond given to the crown, and the extent, and that the debt due to the king exceeds that value of the lands, &c.; and such a plea appears to be the only one that could properly be pleaded. For if the defendant should plead simply *riens per descent*, it would be inconsistent with that plea to prove an extent for a debt due to the king; which, by insisting only that the lands are already bound beyond the amount of the bond, admits the fact of their descent. It seems that the defendant would be no more allowed to give such evidence under the issue on the plea of *riens per descent*, than he would be allowed to prove payment to other bond creditors before the commencement of the action, to the full value of the lands, which, it has been observed, is the subject matter of a plea in bar.

Taking by descent or devise.

A defendant, who is charged only as heir, may prove, on the issue joined upon the plea of *riens per descent*, that he takes the lands by devise, under the will of his ancestor, and not by descent. And if it appear from the original will, that he takes by devise, he will not be chargeable, as heir, in respect of lands descending to him. To make him chargeable, the action should have been brought against him as heir and devisee. The general rule on this subject (whether the heir takes by devise or by descent) is that although the ancestor *devise* the estate to his heir, yet if the heir take the same estate in quantity and quality that the law would have given him, the devise is a nullity, and the heir is seized by descent, and the estate will be assets in his hands.(2)

Action against the heir and devisee.

Before the statute 3 W. & M., passed, it was in the power of specialty debtors, though they had bound their heirs, to defeat their creditors, of their remedy against the real assets, by disposing or charging their lands by will. Where the land was devised, the bond creditor had no remedy against the devisee; but, by that statute, the devisee is, for the

(1) *Sherwood v. Adderley*, 1 Ld. Raym. 734.

(2) The cases in illustration of this general principle are collected in the note before referred to, in 2 Saund. p. 7; and 1 Selw. N. P. 584; *Watkins' Treatise on Descents*. The charging the estate with debts makes no difference as to the descent. *Allan v. Heber*, Str. 1270; *Bull. N. P.* 175.

(The personal estate of the testator is liable, in the first instance, for the payment of his debts; and hence the creditor must exhaust his remedy against the personal estate before he can proceed against the heir or devisees. *Schermerhorn v. Barhydt*, 9 Paige, 28; *Wambaugh v. Gates*, 11 Id. 505. After the personal estate has been exhausted, the heirs are liable, and after them the devisees, to the extent of the estate inherited or received by devise. 2 R. S. of N. Y. 550 (3d ed.) The manner of proceeding for the recovery of such debts is particularly prescribed by statute. See *Mersereau v. Ryerp*, 3 Comst. N. Y. 261.)

first time, made chargeable, jointly with the heir, for the debt of his testator in respect of the lands devised to him.(1) By the second section of the statute,(2) "all wills, limitations, dispositions, or appointments, of or concerning any manors, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person, at the time of his decease, shall be seized in fee simple, in possession, reversion, or remainder, to have power to dispose of the same by his last will, shall be deemed, only as against such creditor" (that is, creditors by bond or specialty binding the heir),(3) "to be fraudulent and utterly void." Then, by the third section, "every such creditor may have his action of debt, upon his bond or specialty, against the heir at law of the obligor and such devisee jointly; and such devisee shall be chargeable, for a false plea pleaded by him, in the same manner as any heir would have been, for any false plea, or for not confessing the tenements descended to him."(4) And the seventh section provides, that in case such devisee shall alien the lands, &c., before the action brought, he shall be chargeable in the same manner as the heir at law. It has been held, that this act does not extend to any settlement made by deed of the obligor in his lifetime.(5)

The seizin of the obligor must be proved against the heir, who is charged jointly with the devisee; and the fact of the defendant being devisee must also be regularly proved. As the devisee is liable only to the extent of the value of the lands devised, some proof of the gross value will be requisite.

II. Of evidence in an action of debt for the treble value of tithes.

In an action of debt, under the statute 2 and 3 Ed. VI, for not setting out predial tithes, and for the forfeiture of the treble value, the plaintiff will have to prove his title, and the defendant's liability as an occupier of lands within the parish; together with the value of the tithe.

The direct evidence of a rector's title will be afterwards treated of, in considering the action of ejectment. In this action of debt, it is seldom necessary to give more than presumptive evidence of title, such as the possession of the rectory or vicarage, and perception of the tithes without disturbance.(6) And evidence of this nature is sufficient, where tithes are

(1) 7 East, 133.

(2) Stat. 3 W. & M. ch. 14, § 2.

(3) 2 Atk. 291, Plunket v. Penson.

(4) The fourth section contains a provision in favor of any limitation, appointment or disposition, for the raising or payment of just debts, or any portion or sum of money for any child (other than the heir at law) in pursuance of any marriage contract bona fide made before the marriage. This clause does not give any new force to the law in these particular cases, but leaves them just as they stood before the making of the act. Plunket v. Penson, 2 Atk. 292.

(5) Pardoe v. Weedon, 1 Eg. Abr. 149. Nor to actions of covenant. Wilson v. Kimbley, 7 East, 128.

(6) By *Ld. Kenyon*, Ch. J., 3 T. R. 635; by *Buller, J.*, 4 T. R. 367; *Chapman v. Beard*, 3 Anstr. 942. As to the point, whether the plaintiff shall recover, where he traces his possession back to

claimed by a rector arising upon lands which are situate without his own parish.(1) But where the evidence was, that parishioners had treated with a rector for a composition, which was not followed by any agreement, it was held that further proof of title was necessary.(2) A bad modus is evidence of a title to tithes in kind.(3)

A vicar may establish his right to a particular species of tithes by proof of constant perception, although the endowment expressly states that the tithe in question belongs to the rector; for, in this case, a subsequent endowment will be presumed.(4) A lay impropriator must claim under a patentee of the crown by virtue of the stat. 31 H. VIII, c. 13;(5) but length of possession and perception of tithes will be sufficient evidence of his title; though a possession of twenty or thirty years, unaccompanied by proof of deeds, has been considered weak evidence of an impropriator's title.(6) Receipt of tithes is sufficient evidence of title in the farmer of them, without producing his lease.(7) And it seems, that if he declare as solely entitled to the tithes, and prove himself entitled to a moiety only, he may recover for that moiety.(8) If instead of stating himself, in his declaration, to be farmer of the tithes, he alleges that he is owner and proprietor of them, it seems it will be a fatal variance.(9)

It is not necessary to give any direct proof in support of the averment in the declaration, that the tithes were payable within forty years of the passing of the statute; and the presumption in favor of the tithe owner will not be rebutted by evidence, that as far as living memory extends, the tithe has never been paid, though the lands have always been cultivated in a manner to produce it.(10) If it is objected that the articles, of

a bad title, see *Wheeler v. Haydon*, Cro. Jac. 328; by *Eyre, Ch. J.*, *Wyburn v. Tuck*, 1 Bos. & Pull. 458; *Bull, N. P.* 188 a.

(1) *Barnes v. Messinger*, 13 East, 251.

(2) *Wyburn v. Tuck*, 1 Bos. & Pull. 458.

(3) *Travis v. Oxtou*, 3 E. & Y. 1248. Payment of a composition for turnips, whether pulled, or eaten off the ground, is no evidence of perception of egistment tithe. *Gwill.* 1462.

(4) *Parsons v. Bellamy*, 4 Price, 190. With respect to the proof of an endowment, see *Titles "Presumptions,"* and *"Proof of Deeds,"* &c., Index to Vols. I and II. And see *Goole v. Jordan*, *Gwill.* 648; *Manby v. Curtis*, 2 Price, 284; *Williams v. Price*, 4 Price, 156; *Cunliffe v. Taylor*, 2 Price, 329; *Manby v. Lodge*, 9 Price, 244; *Scott v. Lawson*, 7 Price, 267; *Kennicot v. Watson*, 4 Price, 250, note; *Travis v. Oxtou*, *Gwill.* 1066. A decree between a former vicar and the impropriator, is not conclusive for the parishioners. *Carr v. Heaton*, *Gwill.* 1258. See *Illingworth v. Leigh*, *Gwill.* 1615; *Scott v. Allgood*, *Gwill.* 1369, as to former depositions.

(5) *Comyn*, 651.

(6) *Kinaston v. Clarke*, 5 T. R. 265, in notes; 2 E. & Y. 234.

(7) *Bull. N. P.* 188 b; *Ganson v. Wells*, 8 Taunt. 542, where the tithes were let in separate lots every year.

(8) By *Buller, J.*, *Wyburd v. Tuck*, 1 Bos. & Pull. 458; *Nalthorpe v. Dorrington*, 2 Lev. 113.

(9) See *Stevens v. Attridge*, 5 Price, 334; *Bull. N. P.* 187.

(10) *Mitchel v. Walker*, 5 T. R. 260. See *Lord Mansfield v. Clarke*, 5 T. R. 264, n. That the allegation is essential, see *Butt v. Howard*, 4 B. & Ald. 658.

which the tithe is demanded, were not cultivated in England previous to the statute, the burden of proof will be on the defendant.(1)

Defence. Receipts.

The defendant, under an issue, on a plea of *nil debet* in an action for the treble value of tithes not set out, may prove a *modus*.(2) The evidence which is admissible in support of a *modus*, has been much considered in the first volume.(3) It may be further observed, that the receipts of the present and former incumbents are evidence to prove the existence of a *modus*, but not conclusive, even against the party who has signed them; and the weight, to be attached to them, will be much diminished by the circumstance of the persons, who gave the receipts, not being residents.(4) If, in fact, a payment has been ancient, it may be regarded as a *modus*, although it be mentioned in old receipts as a rent, or be spoken of by the witnesses as a composition.(5) It seems that a *modus* cannot be established by evidence of terriers alone, without some evidence of payments; unless, perhaps, when the terriers have been made in the time of the existing rector.(6) The ancient public documents, which are usually produced on the trial of questions relating to tithes, are not in any case conclusive.(7) The rankness of a *modus* for tithes, is a question of fact, and not of law.(8)

Composition real.

There appears to be as much reason for allowing the defendant under

(1) *Hallewell v. Trapps*, 2 N. R. 173. As to the point where it is necessary, in an action on this statute, to prove perception of tithes in kind within forty years before action brought, see *Kinaston v. Clarke*, 5 T. R. 265, n.

(2) *Chany v. Garland*, 3 Gwill. 951.

(3) Vol. I, Chap. 5, Sects. 4, 5, 6; admissibility of witness. For presumption of *modus*, farm *modus* and for *Hearsay*, see those titles in index to Vols. I and II. Ecclesiastical and parliamentary surveys, Vol. II; Tyrriers, Id. 120; Entries in Public Book, Vol. I; Vol. II; Rector's and Vicar's Books, Id.; Decree, Vol. I; Secondary evidence of ancient writing, Vol. II; Custody of old documents, Vol. I; Vol. II; Proof of ancient handwriting, Vol. I; Customs in other parishes, Id.

(4) *Weston v. Vaughton*, Atk. Ex. E. T. 1828. See *Perigal v. Nicholson*, Wightw. 63, entry of a sum total of *moduses* admissible; *Jones v. Carrington*, 1 C. & P. 32, receipts of a vicar's lessee; *Yate v. Leigh*, Gwill. 861, receipt signed by deputy of receiver inadmissible; *Bertie v. Beaumont*, 2 Price, 303, receipt in hands of defendant, of the same name as a former occupier, admissible; *Manby v. Curtis*, 1 Price, 225, the situations of the parties to a receipt, given in the time of a former rector, must be proved, and the death of the person signing it; *De Whelpdale v. Milbourn*, 5 Price, 485, answer by rector to a bill for establishing a farm *modus*, in evidence on a question of parochial *modus*; *Bertie v. Beaumont*, 2 Price, 303, valuation not evidence against rector, to prove money payments, unless the surveyor was directed to value with reference to them. And as to the effect of receipts, see *Robinson v. Williamson*, 8 Price, 139.

(5) *Manby v. Lodge*, 3 Price, 231; *Driffeld v. Orrel*, 6 Price, 324.

(6) *Lake v. Skinner*, 1 Jac. & Walk. 9. As to the effect of terriers, see *Stuart v. Greenhall*, 8 Price, 113.

(7) *Jee v. Hockley*, 4 Price, 87. And see by Richards, Ch. B., *Driffeld v. Orrel*, 6 Price, 325; 5 Price, 577; *Robinson v. Williamson*, 8 Price, 139.

(8) *Pye v. Dowling*, 2 W. Bl. 1257.

the general issue to prove his lands discharged by a composition real, as to prove them exempted by a prescription;(1) it is, however, unusual to plead it specially. It has been seen, that the evidence adduced in support of a composition real, must refer to the deed of composition, where it is not produced; and that mere evidence of usage is not sufficient.(2) Where the occupier has long retained that which by law he ought not to retain, and yields to the person that which by law he is not bound to yield; this mutuality of loss and gain, acquiesced in for a great length of time, is, it has been said, strong corroborative evidence of such an agreement having been executed by the necessary parties.(3) In the case of *Sawbridge v. Benton*(4) instruments were produced, from which it was presumed that a composition real had taken place, and that the consent of the necessary parties had been obtained.

The defendant may give evidence of a composition, that is, an agreement with the plaintiff for the retaining of the tithes. The same notice for determining such an agreement is required as in the case of a tenancy of lands.(5) This notice ought to be unequivocal; a mere refusal to take the sum previously paid, and a demand of the tithes, is not sufficient.(6) No notice is required, from a bargainee of tithes, to determine compositions entered into by a preceding bargainee.(7) And compositions determine with the death of the incumbent, unless they are ratified by his successor.(8) A disclaimer of the rector's title, as by claiming a *modus*, makes it unnecessary for him to give notice to determine a composition.(9)

An occupier of land cannot avail himself of a composition made with a preceding occupier, as compositions for tithes are merely personal.(10) But, as the composition of the former tenant does not determine with his ten-

(1) See 2 and 3 E. VI, c. 13, § 4.

(2) Vol. I. It seems that an actual *permancy* of the tithes is evidence to show a severance of them from the rectory. *Countess of Dartmouth v. Roberts*, 16 East, 334; by Lord Eldon, *Berney v. Harvey*, 12 Ves. 119.

(3) *Knight v. Halsey*, 2 Bos. & Pull. 207.

(4) *Anstr.* 375.

(5) *Hewit v. Adams*, 7 Bro. Ch. C. 68, cited 12 East, 84, n.; *Wyburd v. Tack*, 1 Bos. & Pull. 460; *Bishop v. Chichester*, 2 Bro. Ch. C. 161; *Hulme v. Pardoe*, 1 M'Cleland, 393; *Doe v. Church*, 3 Campb. N. P. C. 71.

(6) *Fell v. Wilson*, 12 East, 82. A parol notice is sufficient. *Leach v. Bailey*, 6 Price, 504. See *Price v. Elvy*, E. & Y. 201. A composition cannot be determined in part. *Reynal v. Rogers*, Bunb. 15.

(7) *Cox v. Brain*, 3 Taunt. 95. See *Wyburd v. Tuck*, 1 Bos. & Pull. 460, where notice was held necessary, because the composition was made with the plaintiff before a bargainee, whose interest had expired, became entitled.

(8) *Williams v. Powell*, 10 East, 269.

(9) *Bower v. Major*, 1 Bro. & B. 4; *Leach v. Bailey*, 6 Price, 504. See *Fell v. Wilson*, 12 East, 82; *Hewit v. Adams*, 7 Bro. Ch. C. 68; *Bishop v. Chichester*, 2 Bro. C. C. 161.

(10) *Paynton v. Kirby*, 2 Chitty, 405. The payment by the preceding occupier is *prima facie* evidence of value. *Id.*

ancy, unless notice has been given, it seems that the incoming tenant may give in evidence, under the plea of *nil debet* to an action upon the statute, the receipts for the payment of the composition.(1)

The defendant may also prove, under the plea of *nil debet*, that the lands are not chargeable with the payment of tithes, on account of having been held discharged of tithes by one of the greater monasteries dissolved by 31 H. VIII, c. 13, and 32 H. VIII, c. 23.(2) The fact of the lands having belonged to one of the dissolved monasteries is generally proved by the survey of their lands made about the time of their dissolution, or other public documents, most of which are deposited in the augmentation office, or chapter-house. Where lands appear to have been part of the possession of a greater monastery, and there is no evidence of any payment of tithes, it will be considered that they have been legally discharged from tithes before the dissolution.(3) Domesday Book is evidence to show that particular lands have belonged to a monastery time out of mind.(4) The pope's bull is evidence to show that the lands were discharged in the hands of the abbot.(5) The pope's bull must be proved by the production of the bull itself, or by an exemplification of it, under the bishop's seal.(6)

The lands will be exempt from tithes, if they belong to one of the privileged orders, before the council of Lateran in the year 1215, provided they are in the hands of a tenant in fee or in tail, or a lessee of the crown.(7) If tithes have been paid for the lands, it induces a presumption that they were purchased before the council of Lateran.(8) If no tithe has been paid for lands in the hands of lessees, it shows that the discharge is not grounded on the privilege of the order only, but on some more extensive foundation.(9) The identity of the lands may be proved by the minister's accounts, maps, ancient grants, and the like evidence.(10)

Where the action is for not setting out the title of corn, the defendant may prove, under the plea of *nil debet*, that, by the custom of the parish, the *eleventh* mow only ought to be set out, and that the eleventh was accordingly set out,(11) provided the labor of the farmer, added to the quan-

(1) See *Hulme v. Pardoe*, 1 M'Clelland, 393.

(2) *Bolls v. Atkinson*, 1 Lev. 185; *Wildman v. Oades*, Pollex. 1; *Compost v. —*, Hardr. 315. The exemption does not extend to lands which come to the crown by 27 H. VIII, c. 28; 1 Ed. VI, c. 14, 2 Co. 47; *Fosset v. Franklin*, Ray. 225.

(3) *Lamprey v. Rooke*, Amb. 291. See *Hanking v. Gay*, Bunb. 37. Where lands appear to have been in lay hands shortly before the dissolution, the exemption cannot be supported. Page v. Wilson, 2 T. & W. 524.

(4) *Clavill v. Oram*, 3 E. & Y. 1369.

(5) *Palm*, 38.

(6) *Sir T. Reade's Case*, cited Hardr. 118. See *Britton v. Ward*, 1 E. & Y. 298.

(7) 2 H. IV, c. 4; *Wilson v. Redman*, Hard. 174; *Owen*, 46.

(8) *Lord v. Tuck*, Bunb. 122.

(9) *Dennison v. Elsley*, 1 M'Clel. & Y. 1.

(10) *Id.*

(11) *Phillipps v. Davies*, 8 East, 178. See by Lord Kenyon, *Knight v. Halsey*, 7 T. R. 93;

tity of the tithe, may be considered an equivalent for the full tithe. But a custom to take less than the tenth will not avail the defendant, if it be bad in law; as, if the parson is not compensated by the farmer doing something for his benefit. And the farmer cannot bring in aid any occasional ulterior labor, which he would do for his own benefit, in order to found a consideration for the custor.(1) With respect to the proof of a custom, it has been seen, that persons, who are interested in establishing or defeating any customary right, are not competent witnesses, and that evidence of customs prevailing in other districts is, in general, not admissible.(2) Where a custom of tithing was laid to exist "within the parish and tithable places thereof," it was held sufficient to prove that the custom existed in all parts of the parish, where tithe in kind was payable.(3)

The defendant may also show, that the land for which the tithe is claimed, is, in its own nature and quality, barren, or, in the language of the law, "*suapte natura sterilis*," in which case it is exempted from the payment of tithe for seven years.(4) It will be incumbent on the defendant to prove that the land is barren; and the question to be determined, with respect to this point, seems to be, whether it requires an extraordinary expenditure either of manure or labor, to bring it into a proper state of cultivation.(5)

The defendant may also avail himself of the provision in 53 G. III, c. 127, § 5, which enacts, that no action shall be brought for the recovery of tithes, unless within six years from the time when the tithes were due; or he may show, that the incumbent was simonically presented.(6) After payment of money into court, in an action upon the statute of Edw. VI, the defendant cannot object to the plaintiff's title.(7)

III. Of the evidence in an action of debt for penalties.

In this action, the plaintiff, besides proving the act imputed to the defendant, and all the affirmative averments in the declaration, must show also that the action has been regularly commenced within the limited

Wood v. Harrison, Ambl. 563; Collier v. Jacob, 3 Bing 106; Walker v. Ridgway, 3 Bing. 317; Blundell v. Maudesley, 15 East, 641. The custom must be found by the jury. Id.

(1) Smyth v. Sambrook, 1 Maule & Selw. 66. As to the proper mode of setting out grass, see Newman v. Morgan, 10 East, 5; Halliwell v. Trapps, 2 Taunt. 55; wheat, Halliwell v. Trapps, 2 Taunt. 55; Shallcross v. Towle, 13 East, 261; Smyth v. Sambrook, 1 Maule & Selw. 73; Erskine v. Ruffel, 2 E. & Y. 235; barley, oats, vetches, peas, Smyth v. Sambrook, 1 Maule & Selw. 73; Erskine v. Ruffel, 2 E. & Y. 235; hops, Knight v. Halsey, 7 T. R. 86; 2 Bos. & Pull. 172; turnips, Blaney v. Whitaker, cited 10 East, 12.

(2) On these points, see Vol. I, Chap. 5, Sects. 4, 5 and 6.

(3) Pigott v. Bayley, 6 Barn. & Cress. 16.

(4) 2 & 3 Edw. VI, 13, § 5, 2 Inst. 656; by Lord Ellenborough, Warwick v. Collins, 5 Maule & Selw. 216; Com. Dig. Dismes, H 15.

(5) Warwick v. Collins, 2 Maule & Selw. 349; 5 Maule & Selw. 216; Lord Selsea v. Powell, 6 Taunt. 297.

(6) Hob. 163. See Brooksby v. Watts, 6 Taunt. 333.

(7) Broadhurst v. Baldwin, 4 Price, 58.

time;(1) and, where the venue is local, that the action has been brought within the right country.

If the commencement of the action does not appear from the *Nisi Prius* record, it must be shown by proof of suing out the writ, or by other legitimate evidence;(2) and this it has been held, the plaintiff may show in any stage of the cause.(3) The suing out of a *latitat* is a sufficient commencement of the action to save the limitation of time.(4) It has before been noticed, in what cases it is necessary to connect the plaintiff's writ with his declaration by extrinsic evidence, and where the return of the writ must be proved.(5)

An offence against a penal statute must, in general, be alleged and proved to have been committed within the county where the venue is laid.(6) And although the venue be changed into another county for the purpose of trial, the cause of action must, nevertheless, be proved to have arisen in the county where it was originally laid.(7) Where part of the penalty is given to the poor of a parish, evidence is necessary to prove

(1) As to the time of limitation, see statute 31 Eliz. c. 5, § 5; Bull. N. P. 195. A common informer must bring the action within a year after the offence; an informer *q. t. pro rege* within two years. *Id.* (The Statute of Limitations must be interposed. *Fowler v. Tuttle*, 4 Foster (N. H.), 9.

(2) *Vide supra*, pp. 306, 451.

(3) *Maughan v. Walker*, Peake's N. P. C. 163. In *Tovey v. Palmer* (Esp. on penal stat. 142), Lord Ellenborough would not permit counsel to supply an omission in a penal action as to the proof of the proper county.

(4) *Culliford v. Blandford*, Carth. 232; *Hardiman v. Whitaker*, 2 East, 573, n. *Vide supra*, p. 450, n. 3.

(5) *Vide supra*, p. 450, n. 6.

(Penal actions are given by statute, and the declaration or complaint must set forth the particular acts or omissions which constitute the cause of action and by which the alleged penalty was incurred. *The People v. Brooks*, 4 Denio R. 469. If the statute prescribes a particular form of declaring, it will be sufficient to follow the form prescribed. *Id.* In the absence of any prescribed form, the plaintiff must state the facts constituting the cause of action. *Moorhouse v. Crelley*, 8 How. Pr. 431. Whether the Code has abolished the mode of declaring in penal actions prescribed by the Revised Statutes does not seem to be clearly settled. *Id.* And see *Bank of Genesee v. Patchin Bank*, 3 Kernan (N. Y.), 314. The better opinion seems to be that it has not.

The action for a penalty or forfeiture, given in whole or in part to any person who will prosecute, must commence in this state within one year by such person, and within two years thereafter in behalf of the people. Code of N. Y. § 96.)

(6) Stat. 31 Eliz. c. 5, § 2; 21 Jac. I, c. 4; Bull. N. P. 194. The statute of Elizabeth is not confined to antecedent penal statutes. *Barber v. Tilson*, 3 Maule & Selw. 429. And it extends as well to offences of omission as of commission. *Whitehead v. Wyner*, 5 Maule & Selw. 427. As to what is considered the place where the offence is complete, see *Scurvey v. Freeman*, 2 Bos. & Pull. 381; *Wade v. Wilson*, 1 East, 195; *Scot v. Brent*, 2 T. R. 238; *Butterfield v. Windle*, 4 East, 335; *Pope v. Davies*, 2 Campb. C. 266; *Pearson v. McGowram*, 3 Barn. & Cress. 700.

(7) *Robinson v. Garthwaite*, 9 East 296. See 38 G. c. 52 § 1.

In an action by overseers of the poor for a penalty for selling liquor, if no objection be taken on the trial, the appellate court will assume that the place of selling was properly shown. *Andrews v. Harrington*, 19 Barb. 343.

that the offence was committed in the parish alleged in the declaration.(1) It is sufficient, however, if the parish is described in the record by its popular name, provided no uncertainty is thereby occasioned.(2)

The defendant in this action may give in evidence, under the general issue, any proviso in the penal statute, excepting him from the penalty; and it should seem also, that he may avail himself of such proviso contained in any other public act.(3) He cannot prove, under this plea, that penalties have been already recovered in a former action for the same offence; such a defence ought to be pleaded specially, that the plaintiff may have an opportunity of replying *nul tiel record*, or that the recovery was fraudulent, and contrived to defeat a real prosecution.(4)

The defendant may also, under the general issue, avail himself of a material variance between the evidence and the allegations in the plaintiff's declaration; and where proof of a contract is essential in a penal action, the same proof of it is required as in an action on the contract;(5) but the plaintiff will not be nonsuited on account of not proving the want of a legal qualification, the existence of which is peculiarly within the knowledge of the defendant.(6)

The competency of witnesses living in the place, for the benefit of which a pecuniary penalty is to be applied, has been before mentioned.(7) They are rendered competent by the provisions of a particular act of Parliament; and their competency is confined to those cases only where the penalty does not exceed twenty pounds. Before the passing of this act, they would have been incompetent.(8)

An informer, who is entitled to any part of the penalty, is, in general, incompetent to give evidence; but, in some instances, the testimony of informers has been received, where a statute could receive no execution unless the party seeking to recover the penalty were admitted as a witness;(9) and the evidence of informers is made admissible by the express provisions of various statutes.

IV. Of the pleas in an action of debt.

1. Nil debet.

The plea of *nil debet*, by which the defendant denies his owing any part

(1) *Evans v. Stevens*, 4 T. R. 226; *Wilson v. Gilbert*, 2 Bos. & Pull. 281.

(2) *Williams v. Burgess*, 3 Taunt. 127. *Vide supra*, p. 286. United parishes may be described as one rectory. *Wilson q. t. v. Van Mildert*, 2 Bos. & Pull. 394.

(3) *Rex v. Inhabitants of St. George*, 3 Campb. C. 222.

(4) *Bredon v. Harman*, 1 Str. 701.

(5) *Parish v. Burwood*, 5 Esp. C. 33; *Everett v. Tindall*, 5 Esp. C. 169; *Phillips v. Da Costa*, 1 Esp. C. 59; *Partridge v. Coates*, 1 Ry. & Mo. 113.

(6) *Apothecaries' Company v. Bently*, 1 Ry. & Mo. 159.

(7) See Vol. I.

(8) *R. v. Seymour*, Bull. N. P. 195.

(9) *Bush v. Rattery*, Say. 289; *Howard v. Shipley*, 4 East, 180; *Mead v. Robinson*, Willes, 425. Case of bribery at election. See Vol. I.

of the sum demanded, and traverses the whole of the declaration, makes it necessary for the plaintiff to prove his demand as stated, and allows the defendant to prove, on his part, anything which shows that there is no such debt as the plaintiff alleges. The nature of the evidence which is admissible on an issue joined upon this plea has been already, in some measure, considered in treating of particular actions of debt.

Payment.

The defendant, on this issue, may prove payment to the plaintiff, or to another by his appointment; (1) or he may show a release, or a levy by distress. (2) Lord Holt appears to have held, in two cases of *Nisi Prius*, (3) that the defendant may prove under the plea of *nil debet*, that the cause of action arose more than six years before the commencement of the action. But as the Statute of Limitations only affects the remedy, and does not extinguish the debt, it seems more consistent with principle to plead the statute. (4)

Disbursements.

In an action of debt upon a lease, for arrears of rent, the defendant cannot, under the plea of *nil debet*, give evidence of disbursements for necessary repairs, not even where they ought to have been made by the plaintiff; (5) unless, perhaps, in the case of a lease where it is part of the covenant that the tenant should deduct from the rent for such repairs. (6) The defendant may, on this issue, prove an expulsion by the plaintiff from the demised premises; (7) but it has been held that he will not be allowed to give evidence of an eviction by a third person claiming under an elder title; for he ought to plead such matter specially. (8) He may take ad-

(1) *Taylor v. Beal*, Cro. Eliz. 222.

(2) *Anon.*, 5 Mod. 18; *Galaway v. Susach*, 1 Salk. 384; *Cecil v. Harris*, Cro. Eliz. 140. Chief Baron Gilbert thought this inadmissible. And see Co. Litt. 182 b.

(3) *Anon.*, 1 Salk. 278; *Draper v. Glossop*, 1 Ld. Ray. 153; *Gilbert Ev.* 242; *Com. Dig. Pleader*, 2 W, 17.

(4) See 1 Saund. Rep. 284, note, and 2 Saund. 63 c, note.

(Under the new practice the defence consisting of new matter must be pleaded; for the court will not assume in favor of the defendant anything which he has not averred. *Cruger v. Hudson River R. R. Co.*, 2 Kernan N. Y. Rep. 201; Code, § 149. And the code expressly requires that the defence of the Statute of Limitations be interposed by answer. § 74. See *Dennison v. Plumb*, 18 Barb. N. Y. 89, as to the defence of the Statute of Limitations interposed by a sheriff, and the authorities there cited by Marvin, P. J. See also *Chemung Canal Bank v. Judson*, 4 Selden N. Y. Rep. 254.)

(5) *Taylor v. Beal*, Cro. Eliz. 222; *Gaudy J.*, *contra*, Bull. N. P. 177; by Holt Ch. J., 1 Ld. Raym. 420. Ch. B. Gilbert seems to have thought the evidence admissible.

(6) See *Gilb. Ev.* 249; *Clayton v. Kinaston*, 1 Ld. Ray. 420. An apportionment of rent may be given in evidence under *nil debet*. *Hodgkins v. Robson*, 1 Vent. 276; *Clayton v. Kinaston*, 1 Ld. Ray. 420; *Baylye v. Offord*, Cro. Car. 137.

(7) *Anon.*, 1 Mod. 85, 118; *Anon.*, 1 Vent. 258, n.; *Drake v. Beere*, 1 Sid. 151; Bull. N. P. 177; *Gilb. Ev.* 283.

(8) See *Winfield & Seckford's Case*, 2 Leon. 10; *Gilbert on Debt*, 429, *contra*.

vantage of a variance between the actual rent reserved, and that stated in the declaration. (1)

Stipulated damages.

It seems, as far at least as respects contracts not under seal, that whether the term *penalty* or stipulated *damages* be used in an agreement in referring to the compensation payable on the breach of it, the question for the jury to determine, will be the actual damage sustained. (2) It has been held, however, that where an increased rent was reserved, by an instrument under seal, for every acre of land converted into tillage, the jury were not at liberty to give damages for the actual injury sustained, instead of the increased rent. (3) Where articles contain covenants for the performance of several things, and then a large sum is stated, at the end, to be paid upon breach of performance, the sum stated is to be treated as a penalty, and not as liquidated damages; especially, if the performance of the covenants is secured by smaller penalties. (4)

Nil debet to action on specialty.

Whenever the statement of a specialty or record is but inducement to the action, *nil debet* is a good plea, as in debt for rent by indenture, or for an escape, or on a devastavit; but where an action is grounded upon a record or specialty, as in an action by the assignee of the sheriff upon a bail bond, the plaintiff may demur to the plea. (5) If, however, the plaintiff do not demur to the plea, it will oblige him to prove the whole of his case, and admit the opposite party into a general defence. (6)

2. Non est factum.

The evidence which is admissible on an issue joined upon the plea of *non est factum*, has been before particularly considered in treating of the action of covenant. If an action is brought upon a bond against one

(1) *Sands v. Ledger*, 2 *Ld. Ray.* 793.

(2) *Randal v. Everest*, 1 *Mo. & M.* 42; *Pinkerton v. Caslon*, 2 *Barn. & Ald.* 704. See *Reilly v. Jones*, 1 *Bing.* 302; *Barton v. Glover*, 1 *Holt's C.* 43; *Davies v. Penton*, 6 *Barn. & Cress.* 222, in which case both the terms "penalty" and "liquidated damages," occurred. Where the word penalty is used, it is clear that the jury may determine the question of damages. *Smith v. Dickenson*, 3 *Bos. & Pull.* 630.

(3) *Farrant v. Olmius*, 3 *Barn. & Ald.* 692. And see *Ponsonby v. Adams*, 6 *Bro. P. C.* 418; *Rolfe v. Paterson*, 5 *Id.* 470; *Fletcher v. Dyke*, 2 *T. R.* 32.

(4) *Astley v. Weldon*, 2 *Bos. & Pull.* 353.

The cases on the subject of *penalties* and *liquidated damages*, are well stated in *Sedgwick on Damages*, pp. 425-455; and *Chitty on Contr.* (7th ed.) pp. 98, 863-869.

(The form of the agreement does not determine the question whether the damages stipulated for in the contract, are to be treated as agreed damages or as a penalty; the nature of the agreement is to be considered as well as the intention of the parties; *Thoroughgood v. Walker*, 2 *Jones Law (N. C.)* 15; *Low v. Nolte*, 16 *Ill.* 475; *Hosmer v. True*, 19 *Barb.* 106; *Lampman v. Cochran*, *Id.* 388; *Mundy v. Culver*, 18 *Id.* 336.)

(5) 1 *Saund.* 39, n.; *Hart v. Wilson*, 5 *Burr.* 2586.

(6) *Rawlins v. Danvers*, 5 *Esp. N. P. C.* 39.

obligor alone, who pleads *non est factum*, the plaintiff may maintain his action, notwithstanding that there appears, on the production of the bond, to be a joint obligor.(1) And though the bond is declared on as the joint bond of the defendant and of other persons, it will be sufficient to prove the execution by the defendant alone.(2) An obligor is a competent witness to prove the execution of the bond by his co-obligors.(3) The answer of an obligor in chancery, admitting the execution of a bond to which there is a subscribing witness, is only secondary evidence.(4) In an action by the assignee of a bail bond, the defendant may prove, under this general plea, that the bail bond was dated and executed after the return of the writ.(5) If a person enters into a bond by a wrong Christian name, the name which he assumes in the bond is the proper name by which he ought to be sued.(6)

The defendant may prove, under the plea of *non est factum*, that the instrument declared on is void for want of the proper stamp, or that it has been altered, after execution, without any new stamp.(7) It has been held, that a bond conditioned for the discharge of quarterly payments of rent for a definite period, should be stamped according to the aggregate amount of the whole rent received.(8) And although a certain sum be specified as the penalty in a bond, yet if it be conditional for the payment of all sums to be advanced, it ought to be stamped as for an unlimited sum.(9) A deed indorsed on a former deed, as a further security for advances made and to be made under the first deed, is exempted from an *ad valorem* stamp, if the duty has been paid on the first deed.(10) A conveyance by debtors to trustees, for the payment of the debts due to the

(1) Whelpdale's Case, 5 Rep. 119; Cabell v. Vaughan, 1 Saund. 291; Gaulton v. Chalmer, 1 Saund. 291 f, note; South v. Tanner, 2 Taunt. 254. As to when the obligees should join or sever, *vide supra*, p. 462.

(2) Middleton v. Sandford, 4 Campb. N. P. C. 34. The bond in this case was the joint and several bond of the obligors.

(3) Lockhart v. Graham, 1 Str. 53.

(4) Call v. Dunning, 4 East, 53.

(5) Thompson v. Rock, 4 Maule & Selw. 339. See Shaw v. Lee, 3 Stark. C. 76. If a party executes a bail bond before the condition is filled up, it is void. Powell v. Duff, 3 Campb. N. P. C. 181. A bound bailiff may prove the execution, where he is requested to be attesting witness. Honeywood v. Peacock, 3 Campb. N. P. C. 196.

(6) Gould v. Barnes, 3 Taunt. 504.

(7) The alteration of instrument properly stamped by an unstamped writing avoids it entirely. Keed v. Deere, 7 Barn. & Cress. 261.

(8) See 48 G. III, c. 149, Sch. (similar provision, 55 G. III, c. 184); Attree v. Anscamb, 2 Maule & Selw. 88. And see Collins v. Collins, 2 Burr. 820; Walcot v. Goulding, 8 T. R. 126; Willoughby v. Swinton, 6 East, 550. See Mounsey v. Stephenson, 7 B. & C. 403.

(9) Scott v. Alsop, 2 Price, 20; 48 G. III, c. 149, (similar provision, 55 G. III, 184). See Williams v. Rawlinson, 3 Bing 71. As to a bond to secure damages and costs, see Lopez v. De Tastet, 8 Taunt. 712.

(10) 48 G. III, c. 149; Robinson v. Macdonnell, 5 Maule & Sel. 228. Clauses referred to in an agreement, are not to be considered part of it, unless they are actually annexed. Attwood v. Small, 7 B. & C. 390; Lake v. Ashwell, 3 East, 326.

trustees, with a further trust in favor of creditors generally, does not require an *ad valorem* stamp, as upon a sale or mortgage.(1)

Breaches assigned.

Where breaches of covenants are assigned on the record (as in certain cases they must be, under the statute 8 and 9 W. III, § 8),(2) the plaintiff should be prepared, on the trial of the issues, to prove the breaches as suggested,(3) and to give evidence of the amount of his damages.(4) And where the condition of a bond is for the performance of covenants in some other deed; proof must be given of the execution of the deed referred to, as well as of the breaches assigned.(5) If the condition of a bond is not set out in the pleadings, but suggested only on the roll after judgment on demurrer, the plaintiff ought also to prove, on the execution of a writ of inquiry to assess damages, that the bond produced, containing the condition in question, is that on which the action was brought, and on which the judgment was obtained; the mere production of such a bond without some proof of the identity, is insufficient.(6)

3. Solvit ad diem.

The defendant, in an action on a bond, containing a condition to pay on a certain day, may plead payment on the day; for this is in effect a plea of performance of the condition, and payment before a breach of the condition is a good discharge, without an acquittance. And now, by the statute 4 Anne, c. 16, § 12, where the action is brought on a single bill, or bond without a condition, the defendant may plead the same plea. The proof of this issue lies on the defendant; for he maintains an affirmative, which, if proved, will be a complete discharge.

The plea of *solvit ad diem* will be supported by proof of payment *before* the day appointed, as well as on the day;(7) the defendant could not in this case plead payment *before* the day, as he might, if the condition were to pay *on or before* a particular day. Payment before the day (as Lord Hardwicke said in the case of Tryon v. Carter),(8) where the condition is

(1) 55 G. III, c. 184; Coates v. Perry, 3 Bro. & B. 48. And see further as to stamps on bonds, &c., Vol. II; 1 Stark. N. P. C. 119, 162; 4 Esp. 253.

(2) All bonds are within the statute except bail bonds, replevin bonds, petitioning creditors' bonds, common money bonds, and *post obit* bonds. 1 Saund. 58, n. a; 11 Saund. 187.

(3) The jury who try the issue may assess the damages under the common venire. Perkins v. Hawkshaw, 2 Stark. N. P. C. 380, n.

(4) 2 Saund. 187 a; 2 N. R. 362.

(5) Edwards v. Stone, *coram* Lawrence, J., 1 Saund. 580, n.

(6) Hudgkinson v. Marsden, 2 Campb. N. P. C. 121. In this case the attesting witness was not called, but the plaintiff's attorney proved that the bond produced was the bond delivered to him, for the purpose of bringing the action, and on which the action was afterwards brought, and the plaintiff recovered on this evidence.

(7) Bull. N. P. 174, citing Winch v. Pardon; Sturdy v. Arnaud, 3 T. R. 601. See Anon., 2 Wils. 175.

(8) 7 Mod. 231; 3 T. R. 601; Willes, 575.

for payment on a certain day, is strictly not a legal performance of the condition; but it may be given in evidence under the plea of *solvit ad diem*, for this reason, because the money is looked upon as a deposit in the hands of the obligee until the day comes, and then it is actual payment. A payment of the debt to a third person by the plaintiff's appointment is payment to the plaintiff himself.(1)

4. *Solvit post diem*.

Proof of the defendant having paid interest after the day of payment will falsify the plea of *solvit ad diem*, such subsequent payment raising the strongest presumption, that the debt was not paid on the day appointed. And though the bond is old, and the payment of interest was made at such a remote period, that the whole debt may be presumed to have been discharged since that time, still the plea will be falsified, by proving interest paid after the appointed day.(2) The defendant, in such a case, in order to take advantage of the legal presumption of payment after the lapse of twenty years, ought to plead the plea of *solvit post diem*;(3) and then, if nothing is proved but the payment of interest above twenty years ago, the issue ought to be found for the defendant.

Payment presumed after twenty years.

If a bond has been suffered to lie dormant for twenty years, this of itself raises a presumption of payment. Forbearance for so long a time, unexplained, is a circumstance from which the jury may and ought to infer that the bond has been satisfied.(4) It has been sometimes said, that payment may be presumed even within that time;(5) but this is to be understood with reference only to those cases where there has been some other evidence to raise such a presumption, as the settling of an account in the intermediate time, without noticing any demand upon the bond.(6) However, the presumption arising after such a lapse of time may be repelled by proof of the defendant's recent admission of the debt; or by proof of the payment of interest within twenty years, which is an acknowledgment that the principal sum was not then discharged;(7) or the presumption may be answered by proof of other circumstances explaining, satisfactorily, why an earlier demand has not been made.(8)

(1) *Taylor v. Beal*, Cro. El. 222.

(2) *Moreland v. Bennet*, 1 Str. 652; Bull. N. P. 174.

(3) This plea is given by stat. 4 Anne, c. 16, § 12. As to the point, whether proof of payment of the principal only will support this plea, see *Dixon v. Parks*, 1 Esp. C. 110; *Hellicr v. Franklin*, 1 Stark. N. P. C. 291.

(4) 6 Mod. 22; 4 Burr. 1963; *Oswald v. Leigh*, 1 T. R. 270.

(5) 1 Burr. 434; Cowp. 109.

(6) 1 T. R. 271, 272; 4 Burr. 1963; *Colsel v. Budd*, 1 Campb. 27.

(7) 1 T. R. 270.

(8) As in *Newman v. Newman*, 1 Stark. N. P. C. 101, where the obligee had resided abroad

Indorsement by obligor.

Indorsements on a bond, purporting that interest has been paid on the principal sum, have been admitted in evidence, under certain circumstances, as proof of the facts there stated, to repel the presumption of payment of the principal, and to raise a contrary presumption, namely, that the principal sum has not been discharged. An indorsement to this effect in the handwriting of the obligor, or made by his direction, or with his privity, is clearly admissible in evidence against him, or against his personal representative, as an admission.

Whether indorsements by the *obligee* can be admitted in favor of his personal representative, in an action against the obligor, is a very different question, and requires consideration. The general principle certainly is, that a person cannot make evidence for himself: what he says or writes for himself cannot be evidence for his representative claiming in his right or place; what a party has said or done, may be evidence against himself, but it can only be admitted to restrain, not to advance his interest.(1) And although there are a variety of cases, in which written entries by persons against their interest have been admitted after their decease as evidence of the fact there stated, it is to be observed that, in those cases, the entries have been received in evidence, not in favor of the persons who made them, nor for their representatives, but on the part of third persons, who had no concern whatever in making them. There must, therefore, be some special circumstances, to form an exception to the general rule, and to render such indorsements admissible.

The case of *Searle v. Lord Barrington*,(2) is the earliest reported case

for the last twenty years. But proof of the defendant's poverty is not sufficient to rebut the presumption. *Willaume v. Georges*, 1 Campb. N. P. C. 217.

(1) 2 Ves. 42, 43; 5 T. R. 123.

(2) 2 Str. 826; S. C., 8 Mod. 279; S. C., 2 Lord. Raym. 1370; S. C., 3 Brown P. C. 593. The dates will be found to be as follows: The bond was dated in June, 1697; the obligor died in 1710; the plaintiff's letters of administration were obtained in July, 1723; the first action was tried before Pratt, C. J., in 1724; the second action, before Raymond, C. J., in 1726. The writ of error in the Exchequer Chamber was in 1729; and the judgment of the Exchequer Chamber was affirmed on appeal to the House of Lords in 1730. See the reports in *Strange and Brown*. The time of the *obligee's* death is not stated in any of the reports; but it appears that administration of his effects was sued out in 1723, which was about twenty-six years after the date of the bond.

With reference to this case, the reader is referred to *Glyn v. Bank of England*, 3 Ves. 42; *Turner v. Crisp*, 2 Str. 827; *Rose v. Bryant*, 2 Campb. 323; and the case of *Bosworth v. Cotchett*, *supra*, p. 457.

(In the *Executors of Clark v. Hopkins* (7 John. R. 556), the court refused to allow judgment to be entered on a bond and warrant of attorney, after a lapse of eighteen years, holding that the presumption in such a case is that the bond has been paid. And in *Bander v. Snyder* (5 Barb. 63), the lapse of fourteen years was considered a strong circumstance tending to prove that a bond and mortgage has been paid. As a matter of law, no lapse of time, short of that prescribed by the Statute of Limitations, will raise a presumption of payment (*Thayer v. Mowry*, 36 Maine, 287); but in connection with other evidence, it is often a very strong circumstance to

that can be found after a careful search, in which the effect of indorsements in the handwriting of the *obligee* appears to have been considered. This was an action on a bond, brought by the plaintiff, as administratrix of her deceased husband (the *obligee*), against the defendant as administrator of the obligor. The defendant insisted on the length of time that had elapsed between the date of the bond and the commencement of the action, which was about twenty seven years, as raising a presumption that the money had been paid: in answer to this, the plaintiff offered in evidence two indorsements on the bond,(1) in the handwriting of the obligee, one dated in December, 1699, the other in March, 1707, purporting that the whole of the interest had been paid up to the time of these dates. The Chief Justice Pratt, before whom the action was first tried, rejected the evidence,(2) on account of the inconvenience which would arise from allowing the obligee, in whose custody the bond always remains, to make such indorsements, whenever he might think proper. The plaintiff was accordingly nonsuited. But, after an argument in the Court of King's Bench on a case stated for the opinion of that court, the other three judges held,(3) that the indorsements in question ought to have been left to the consideration of the jury; "for the jury (as the report in *Strange* states) might have reason to believe that it was done with the privity of the obligor; and the constant practice is for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement than by taking a loose receipt." And the report in the 8th Mod. is full and strong to the same effect. "It is the daily practice (says that report) to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond, into whose hands soever it falls, as long as the original, which creates the charge, shall continue." The nonsuit was not set aside, because at the time there was a prevailing notion that, as the plaintiff had been put out of court by the nonsuit, the court could not order a new trial.

prove payment. *Gould v. White*, 6 Foster (N. H.) 178; 18 Barb. 401; *McKeethan v. Atkinson*, 1 Jones' Law (N. C.), 421. The lapse of twenty years, in a court of equity, raises a presumption of fact that the debt has been paid (*McQueen v. Fletcher*, 4 Rich. Eq. 152); and this has been held to be the presumption at common law. *Smith v. Benton*, 15 Mis. 371. See *Perkins v. Hawkins*, 9 Gratt. 649; and *Walker v. Wright*, 2 Jones' Law (N. C.), 155.

An indorsement of a payment on a promissory note, in the handwriting of the payee, without any other evidence of the fact of payment, cannot be submitted to a jury as proof of payment, to take the case out of the Statute of Limitations. *Roseboom v. Billington*, 17 John. R. 182. Evidence that the indorsement was made at or about the time of its date, when it was against the interest of the party making it, will authorize its submission to the jury.)

(1) See 3 Brown P. C. 593, and 2 Lord Raym. 1370.

(2) See the Reports in *Strange*, and 8 Mod.

(3) See Rep. in *Strange*.

The plaintiff afterwards brought a new action, which was tried before Lord Raymond; and the same indorsements were again offered in evidence, to repel the presumption of payment of the principal. The counsel for the defendant objected to the evidence,(1) on the ground that it did not appear when the indorsements were made, otherwise than by the indorsements themselves. But Lord Raymond was of opinion that the indorsements were evidence to be left to the consideration of the jury, and therefore allowed them to be read; and other circumstantial evidence being given to induce the jury to believe that the bond had not been satisfied,(2) the plaintiff had a verdict. The defendant's counsel tendered a bill of exceptions, which was sealed by the chief justice; and a writ of error was brought in the Exchequer Chamber. The errors were twice argued in Exchequer Chamber, and the judgment of the Court of the King's Bench was affirmed.(3) A writ of error was then brought in the House of Lords; and after counsel had been heard on this writ of error, and the judges had delivered their opinions *seriatim*, the House of Lords affirmed the judgment of the Exchequer Chamber.

The grounds of the decision in the Exchequer Chamber and in the House of Lords do not appear in any of the reports. The reason given by the Court of King's Bench, on the argument after the first trial, has been before mentioned; the three judges on that occasion, who were against the rejection of the evidence, adverted to the common practice of indorsements being made by the obligee, and were of opinion that the indorsements ought to have been left to the jury, who were to consider whether the indorsements were made with the privity of the obligor. There appears to have been no direct proof of the indorsements having been made at the time when they bore date, and this is mentioned as the ground of the objection.(4) If the obligee, by whom the indorsements were made, had died within twenty years after the date of the bond, this would have supplied direct evidence, at least, that the indorsements were made before the presumption of the payment of the principal could have arisen, and when it was against the interest of the obligee to make such indorsements, if the fact of the receipt of interest was untrue; and then, it might have been said, the jury would be warranted in concluding that such indorsements, so made against the interest of the party, had been made with the privity of the obligor. But the death of the obligee is not stated in the reports; and, to judge from the course of the arguments in the Court of King's Bench, as well as in the House of Lords, it seems not

(1) See Report in Brown.

(2) See Brown's Report.

(3) According to the report in Strange, five judges thought the evidence admissible; two were of the contrary opinion. The report in Brown states, that the judgment was affirmed by the opinion of all the judges.

(4) See the Report in Brown.

to have been proved. Nor is there any other direct proof, stated in the reports of the indorsements having been made within twenty years.

Upon the whole, the case of *Searle v. Lord Barrington* seems, at least, to have established this principle, that indorsements by the obligee, purporting to be made within twenty years after the date of the bond, though not proved by direct evidence to have been made within that time, are yet admissible, to repel the presumption of payment, after the lapse of twenty years, and are proper to be left to the consideration of the jury, provided there are any circumstances in the case to show that the indorsements have been made before the presumption could arise.

An indorsement by the obligee, purporting that part of the principal sum has been received, if made after the presumption of payment has arisen, is clearly inadmissible.(1) And further, if the defendant produces direct evidence of the payment of the principal sum and interest at a certain time within twenty years, the plaintiff cannot be allowed to encounter that evidence by an indorsement in the handwriting of the obligee, purporting that interest and part of the principal sum were paid at a subsequent time;(2) for, supposing the fact to be true that the bond had been satisfied by payment, it would obviously be to his advantage to make such an indorsement which might afterwards be used as evidence in an action upon the bond.

CHAPTER XIII.

OF THE EVIDENCE IN AN ACTION OF REPLEVIN.

THE next action to be treated of, is the action of replevin, in which the plaintiff complains of an unjust taking and detention(3) of his goods and

(1) *Turner v. Crisp*, 2 Str. 827, by Lee, C. J.

NOTE 1072.—INDORSEMENT BEFORE PRESUMPTION OF PAYMENT.—In *Rosebroom v. Billington* (17 John R. 182), Chief Justice Spencer declared, that to admit evidence of a party's own creating was repugnant to every sound principle of law. However, he seems to arrive at the same conclusion of our author in the text, namely, that such evidence is admissible, where it appears that the indorsement was made at a time when its operations would be against the interest of the party making it.

(2) *Rose v. Bryant*, 2 Campb. 323.

(3) NOTE 1073.—UNJUST TAKING AND DETENTION.—In Massachusetts and Maine, it is settled, that whatever might be the strict principles of the common law, yet under their statutes an action of replevin may be maintained in case of an unlawful detention, though the taking was not tortious and unlawful. *Badger v. Phinney*, 15 Mass. R. 459; *Baker v. Fales*, 16 Id. 147; *Seaver v. Dingley*, 4 Greenl. 306.

(The code of New York has a chapter on the "claim and delivery of personal property," which is a substitute for the former action of replevin. §§ 206–217. See *Brockway v. Burnap*, 16 Barb. 309; 3 Sand. 707.)

chattels. The principal subject of controversy in this action is generally, whether the taking can be justified; for, with respect to the mere detention, that can scarce ever be a ground of complaint, excepting where the arrears of rent or amends for the damage have been tendered to the distrainer.

Right of property.

If issue be joined on the right of property,(1) it is necessary for the plaintiff to prove either a general or special property in the goods, at the time when he alleges they were taken; it has been said, that it is not sufficient for him merely to show that the goods were in his possession.(2)

(1) Clift's Ent. 954; Cro. Eliz. 475; Com. Dig. Pleader, 3 K, 11.

NOTE 1074.—A taking under a fraudulent purchase may well be considered as tortious; such a sale changes no property, if the vendor, on discovery of the fraud, rescinds the contract, or treat it as a nullity; and in replevin, if issue be joined on the right of property, no previous demand need be proved, though the original taking was lawful. *Seaver v. Dingley*, 4 Greenl. 306.

In New York (2 R. S. 366, § 17), "the title of any purchaser in good faith of any goods or chattels acquired prior to the actual levy of any execution, *without notice* of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer, to be executed before such purchase was made." Held, that a levy on property which in law is valid as against the defendant in the execution, and will justify a sale under it, will operate to defeat a subsequent purchase, though *bona fide* and for valuable consideration. *Butler v. Maynard*, 11 Wend. 548.

* * And as to the right of a vendor, defrauded on the sale of goods, to maintain replevin in the *cepit* against the vendee and his execution creditor, see *McKnight v. Morgan*, 2 Barb. S. C. R. 171; *Acker v. Campbell*, 23 Wend. 372; *Ash v. Putnam*, 1 Hill, 302; *Cary v. Hotailing*, Id. 311. And see *Stillman v. Squire*, 1 Denio, 327; *Anonymous*, 4 Hill, 603; *Morris v. Danielson*, 3 Hill, 168; *Cummings v. Vorce*, Id. 282; *Barrett v. Warren*, Id. 348; *Mount v. Derick*, 5 Id. 455; *Pattison v. Adams*, 7 Hill, 126; *Pierce v. Van Dyck*, Id. 613, as to circumstances under which replevin lies, and the distinction between replevin in the *cepit* and in the *detinet*. And see 1 Sm. L. Cases, 151 *et seq.*, in the notes to *Armory v. Delamirie*. * * (See under the New York Code, *Brockway v. Burnap*, 16 Barb. 309, and cases cited there.)

(2) 10 Mod. 25.

NOTE 1075.—POSSESSION.—To maintain replevin, it is one of the indispensable requisites, that the plaintiff should have a right to the possession of the goods. *Wheeler v. Train*, 3 Pick. 255; 4 Id. 168. Though the plaintiff was the general owner, yet having leased the goods, which were in the possession of the lessee when the action was brought, he could not maintain his action. Id. But the lease having expired before judgment, defendant was content to have judgment for costs only, and not for a return. Id. The principle of that case has been recognized in *Collins v. Evans*, 15 Pick. 63. (See *Russell v. Allen*, 3 Kernan R. 173.)

Where a party is rightfully in possession of property belonging to another, he does not unlawfully detain it, until after a demand by the true owner and a refusal. *Seaver v. Dingley*, 4 Greenl. 306; *Galvin v. Bacon*, 2 Fairf. R. 28. In *Hussey v. Thornton* (4 Mass. R. 405), and *Marston v. Baldwin* (17 Mass. R. 606), that point was not taken.

If the property has been taken tortiously, or without the assent of the owner, no previous demand is necessary. *Galvin v. Bacon*, 2 Fairf. R. 28.

* * The text is well illustrated in the following cases: *Pringle v. Philips*, 1 Sandf. S. C. R. 292; *Redman v. Hendricks*, Id. 32; *Sharp v. Wittenhall*, 3 Hill, 576; *Pattison v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barb. S. C. R. 304. And see 1 Sm. L. Cas. 151, *et seq.*, in the notes to *Armory v. Delamirie*; and *Stephens' N. P.* 2485. * *

(Forwarding merchants who have advanced on goods that have been consigned to them, have

The plaintiff's interest in the property must be proved agreeably to the statement in the declaration. Where the interest is several, there should be several replevins.(1) Where the property of a *feme covert* is taken after marriage, the husband should sue alone, but the wife may be joined if they were taken before the marriage.(2) Executors may maintain replevin for goods of their testator taken in his lifetime.(3)

Non cepit.

The general issue in replevin is *non cepit*—that is, whether the defendant took the cattle or goods, or any part of them, in the manner in which the plaintiff complains. This issue admits the property to be in the plaintiff, and disputes only the caption. If the defendant means to dispute the point of property, he ought to plead it; for he will not be allowed to disprove the ownership under an issue which only denies the taking.(4)

The declaration names a particular place, in which the goods were taken; if, therefore, at the trial, it should appear that the goods were not originally taken in that place, nor afterwards carried thither by the defendant, the plaintiff has failed in proving a part of his charge, and will be nonsuited.(5) But if the plaintiff prove that the goods were in the defendant's possession at the place described in the declaration, he has proved as much as is necessary upon this issue: for, though the defendant originally took them at another place, yet if he took them wrongfully at first, the wrong is continued in every place where he afterwards detains them.(6) The same remark applies to the case where the defendant pleads that he took the goods in another place, traversing the place named in the declaration upon which traverse the plaintiff takes issue; proof of the goods having been in the defendant's possession at the place named in the declaration, will maintain the issue wherever they may have been originally taken.

such a property in the goods as will enable them to maintain an action under the code to recover the possession of them against a stranger to whom the carrier has wrongfully delivered them. *Fitzhugh v. Wiman*, 5 Seld. N. Y. R. 559. The form of entering the judgment is prescribed by the Code, § 277; *Dwight v. Enos*, 5 Seld. 470.)

(1) 1 Inst. 145 b; Bro. Abr. Repl. pl. 12; Com. Dig. 3 K, 10.

(2) *Bern et ux. v. Mattaire*, Cas. temp. Hard. 119, F. N. B. 69 K.

(3) *Arundell v. Trevil*, 1 Sid. 81.

(4) NOTE 1076.—Where, besides the plea of *non cepit*, defendant pleads *property* in a third person, the jury *must* pass upon both issues; otherwise judgment will be reversed. *Boynton v. Page*, 13 Wend. 425; *Bemus v. Beekman*, 3 Id. 667; *Law v. Merrills*, 6 Id. 272.

* * And see *Ingraham v. Hammond*, 1 Hill, 353; *Anstice v. Holmes*, 3 Denio, 244; 6 Ireland, 38; *Prosser v. Woodward*, 21 Wend. 205; *Sawyer v. Huff*, 25 Maine, 464. * *

(5) *Johnson v. Woolyer*, 1 Str. 507; *Weston v. Carter*, 1 Sid. 10; Bull. N. P. 54. Here there was no taking whatever in the place named in the declaration. See *Abercrombie v. Parkhurst*, 2 Bos. & Pull. 481. The defendant may plead *cepit in alio loco*, and may entitle himself to a return by an avowry, which, in that case, is not traversable. 1 Ventr. 127. Bull. N. P. 54.

* * See the cases cited *ante*, in notes 1074, 1075, 1076. * *

(6) *Walton v. Kersop*, 2 Wils. 354.

Avowry.

An avowry or cognizance admits the plaintiff's property and the taking of the distress, but justifies the taking, and sets forth the cause of the distress in order to have a return.(1) So that, in effect, both parties are actors; the plaintiff to have damages for the taking and detaining of his goods; the defendant, the avowant, to have a return of the goods and damages. Avowries are for rent, services, heriots, &c., or for taking cattle damage feasant. The issues joined upon pleas to those avowries will now be separately considered.

1. Pleas to avowries for rent.

The most usual pleas in bar to an avowry for *arrears of rent*, are, that the avowment did not demise, or that the plaintiff did not hold, in manner and form as the avowry alleges. These pleas require the defendant to prove the demise on which the rent accrues, as stated in the avowry. If the defendant avow for rent under a demise to the plaintiff, but it appears that there was only an agreement for a future lease, the avowry is not proved.(2) A tenancy, sufficient to authorize a distress, may, however, be created by other means besides a formal lease; and it seems, that where a person has been in possession for more than a year under an agreement for a lease,(3) or where he has paid rent, a valid distress may be made on the premises.(4) Where, indeed, the rent is not fixed, and there has been no payment of rent, the occupier of the premises will not be liable to a distress.(5) Unstamped receipts, tending to show that the plaintiff had previously paid the rent specified in the avowry, for the same premises, are inadmissible to support this issue.(6)

In support of an issue upon the plea of "*non tenuit modo et forma*," the tenancy must be proved as alleged. An averment of a joint demise by a husband and his wife, was held to be disproved, where the only evidence of the demise was the receipt of rent by the husband, and where the authority to distrain was given by him, though the premises were the wife's inheritance.(7) If the avowry state that the plaintiff held as tenant at a

(1) See the case of *Jack v. Martin*, 14 Wend. 507; 6 Hill R. 613.

(2) *Hegan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 Barn. & Ald. 322. Many cases have been decided on the distinction between agreements for leases and actual demises. *Vide supra*, p. 286.

(3) *Agreement for lease*.—See *Schieffelin v. Carpenter*, 15 Wend. 400, 409. (*Hill v. Stocking*, 6 Hill R. 277; *Nichols v. Dusenbury*, 2 Comst. 283.)

(4) *Knight v. Bennett*, 3 Bing. 361; *Hamerton v. Stead*, 3 Barn. & Cress. 478; *Mann v. Lovejoy*, 1 Ry. & Mo. 355.

(5) *Vide supra*, n. 2; by *Ld. Tenterden*, Ch. J., 1 Ry. & Mo. 356. As to the nature of the tenancy of a mortgagor, and his lessee, see 5 Barn. & Ald. 605, n. As to the circumstances which render assignees of bankrupts liable as tenants, *vide supra*, p. 467; *Hancock v. Welsh*, 1 Stark. N. P. C. 347.

(6) *Hawkins v. Warre*, 5 D. & R. 512.

(7) *Parry v. Hindle*, 2 Taunt. 180. (The subject of variance is not now so important, since

certain rent payable half-yearly, and it appears that the premises were let at a higher rent, or that the times for the payment of rent are incorrectly set forth, it will be a fatal variance.(1) It is not a material variance, if it is alleged in the avowry, that the premises are held of the defendant at a certain rent, and it is proved that the plaintiff held other premises together with those mentioned, at a specified rent; for each part of the land is liable to the whole rent.(2) It is not necessary to prove the plaintiff's holding for the precise time mentioned in the avowry.(3)

The plaintiff, upon the trial of this issue, will not be allowed to prove that the landlord, under whom he gained possession, had no right or title to demise the premises;(4) for he could not plead it in bar to the avowry, the plea of *nil habuit in tenementis* having been taken away by the stat. 11 G. II, c. 19, § 22, which permits the landlord to avow generally, without setting forth his title; and as he cannot plead such matter, so he cannot give it in evidence under the plea of *non demisit* or *non tenuit*.(5) And although, as will be presently noticed, the plaintiff may avail himself of payments made in order to avoid a distress for enforcing a charge created before the lessor's title commenced, yet the plaintiff will not be admitted to show, that the premises held by him had been mortgaged by the defendant before the commencement of the lease, and that he had attorned to the mortgagee; for this, in effect, disputes the right of the defendant to demise.(6) It has been before considered, in what cases a tenant will be permitted to show that his landlord's title has expired; and where he will be allowed to explain the circumstances under which he may have made an attornment, so as not to be concluded by it.(7)

No rent in arrear.

The plea of *riens in arrear* admits the demise in the manner stated in the avowry.(8) And the issue will be maintained, by proving that rent to any amount is in arrear; and this, notwithstanding the issue is not in the general form, but is merely as to a specific sum being in arrear.(9) The

the court has power to amend in all cases where the opposite party has not been misled. Code of New York, § 169; *Corning v. Corning*, 2 Seld. 97.)

(1) *Brown v. Sayce*, 4 Taunt. 320, where the amount of rent was laid under a *videlicet*; *Bristow v. Wright*, Doug. 665.

(2) *Hargrave v. Shewin*, 6 Barn. & Cressw. 34.

(3) *Forty v. Imber*, 6 East, 434.

(4) *Non habuit*.—Held, that *nil habuit in tenementis* is no plea in an action of debt for use and occupation. *Curtis v. Spetty*, 1 Bing. N. C. 15.

(5) *Syllivan v. Strading*, 2 Wils. 208.

(6) *Alchorne v. Gomme*, 2 Bing. 54. The tenant will not be allowed to show that his landlord was only a receiver. *Dancer v. Hastings*, 4 Bing. 2.

(7) *Vide supra*, p. 293.

(8) *Hill v. Wright*, 2 Esp. C. 669. If the issue upon the plea of *non-tenuit* is found for the plaintiff, the issue on this plea becomes immaterial. *Cossy v. Diggons*, 2 Barn. & Ald. 546.

(9) *Cobb v. Bryan*, 3 Bos. & Pull. 348.

plaintiff, under this issue, may prove that he has satisfied the demands of a mortgagee of the premises, in respect of the interest of his mortgage, with the defendant's consent, which will be equivalent to the payment of so much rent.(1) The defendant may, it seems, upon this issue, avail himself of a payment made by him of ground rent to the original landlord, or of the payment of a rent charge created before the lessor's title commenced, though it is more usual and safer to plead these matters specially.(2) The defendant cannot, under an avowry for double rent, pursuant to the statute 11 G. II, c. 19, recover any single rent which may be due to him, because it is not parcel of the rent for which he avows.(3)

If the plaintiff traverse the averment in the cognizance, of the defendant being the bailiff of J. S., the authority must be shown; and for this purpose, it will not be indispensably necessary to prove an appointment previous to the distress; but proof that J. S. assented to the distress, which had been taken for him, though it was taken without his knowledge, will be sufficient; for the subsequent agreement by J. S. to the distress amounts to an authority, as much as if he had previously directed the defendant to distrain.(4) One joint tenant or co-parcener has an authority in law, without any express command, to distrain as bailiff of his co-tenant.(5)

In the case of an avowry or a cognizance for rent in arrear, the defendant ought to be furnished with evidence not only of the amount of arrears, but also of the value of the goods or cattle distrained, in order to guide the judgment of the jury; the statute of 17 G. II, c. 7, having enacted that if the plaintiff shall be nonsuit, after cognizance or avowry and issue joined, or if the verdict shall be given against the plaintiff, then the jurors impaneled to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrears, or so much as the goods or cattle distrained amount to. If the jurors give a defective judgment, as if they find the value of the distress, but omit to find the sum of the arrears, the omission cannot be supplied by writ of inquiry.(6)

2. Pleas to avowries for cattle damage feasant. Right of common.

If the plaintiff, in bar to an avowry, for taking his cattle *damage feasant*, plead a right of common over the place, the right of common must be proved substantially as averred.(7) A plea claiming a prescriptive right

(1) *Dyer v. Bowley*, 2 Bing. 294. See *Alchorne v. Gomme*, 2 Bing. 64.

(2) *Sapsford v. Fletcher*, 4 T. R. 513; *Taylor v. Zamira*, 6 Taunt. 524.

(3) *Johnstone v. Huddleston*, 4 Barn. & Cress. 938.

(4) *Trevillian v. Pine*, 11 Mod. 112; *Godb.* 109; *Vin. Ab. Tit. Bailiff D*, pl. 7.

(5) See *Leigh v. Shepherd*, 2 Bro. & Bing. 466.

(6) *Sheape v. Culpepper*, 1 Lev. 255; 1 Saund. 195 b. But the avowant may take his judgment as at common law. *Rees v. Morgan*, 3 T. R. 349. See 1 Taunt. 218.

(7) See Vol. I.

of common for a certain number of beasts, is not supported by evidence of a right of common of vicinage.(1) And the proof must, at least, be commensurate with the claim. If the plaintiff prescribe generally for common for all commonable cattle at all times of the year, evidence of a right of common for some particular species of commonable cattle only, or with the exception of some particular period of the year, will not maintain the issue.(2) But where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but that he had never kept any sheep, it was held that this was evidence of a right for all his commonable cattle proper to be left to the consideration of the jury.(3) So an allegation of a right for all commonable cattle *levant and couchant*, is supported by a grant of "reasonable common and pasture."(4) And where the right claimed is for common for all the plaintiff's cattle, it will be no variance, although the common is not sufficient to feed all the cattle any length of time.(5)

And although the plaintiff will be obliged to prove as much as he claims, he will not be precluded from recovering by proving a more ample right. Thus, evidence of a right of common for cows, as well as for sheep, will support a plea prescribing for common only for sheep.(6) When a party prescribes absolutely, and proves a prescriptive right subject to a condition or limitation, the sufficiency of the proof, to maintain the issue, seems to depend upon this, whether the condition or limitation is part of the entire prescription, or whether it is not another distinct prescriptive right, and a consideration subsequent rather than a part of the prescription alleged.(7) In the case of *Brook v. Willet*,(8) where a prescriptive right of common appurtenant was claimed for a certain number of sheep every year, and *at all times of the year*, and this general right was proved, but it also appeared that the tenant of an adjoining farm was entitled to have the sheep folded on his land, whenever they were fed on the common, an objection was taken on the ground of a variance between the plea and the proof; but the Court of Common Pleas, on consideration,

(1) 12 Vin. Ab. Common, T, 6, 18.

(2) *Pring v. Henley*, Bull. N. P. 59. And see *Rotheram v. Green*, Cro. Eliz. 593; *Palmer*, 269; *Freeman*, 211; *Carth.* 241; Bull. N. P. 60; *Sir M. Corbet's Case*, 7 Co. 5; *Kingsmill v. Bull*, 9 East, 185. Partial proof of what is claimed is sufficient, though the proof fail as to part which is not material on the trial; because the verdict would be evidence on another occasion of the prescription to the extent alleged in the record. *Rogers v. Allen*, 1 Campb. C. 309. See Vol. I.

(3) *Manifold v. Pennington*, 4 Barn. & Cress. 161.

(4) *Doidge v. Carpenter*, 6 Maule & Selw. 47.

(5) *Willis v. Ward*, 2 Chitty, 297; and see *Cheesman v. Hardham*, 1 Barn. & Ald. 706.

(6) *Bushwood v. Pond*, Cro. El. 722; *Johnson v. Thoroughgood*, Hob. 64; Bull. N. P. 29; *Bailiffs of Tewkesbury v. Bricknell*, 1 Taunt. 142. And see *Ricketts v. Salwey*, 2 Barn. & Ald. 360.

(7) See *Gray's Case*, 5 Rep. 78; *Lovelace v. Reynolds*, Cro. El. 546, 563; *Gray v. Fletcher*, Bull. N. P. 59; *Laughton v. Ward*, 1 Lutw. 111; *Ballard v. Dyson*, 1 Taunt. 279.

(8) 2 H. Bl. 224.

held, that the words "*at all times*" must be understood according to the subject matter and the general course of feeding sheep, which seldom, if ever, remained during the night on the common, but were folded; these words must, therefore, be understood as meaning at all usual times; and the folding of the sheep at night was not part of one entire prescription for common of pasture, but rather a consideration subsequent to the enjoyment of the right, and not necessary to be stated.

Where a plea in bar, claiming a right of common for the defendant's commonable cattle levant and couchant, is put in issue, the plaintiff must prove that the cattle were his own, or that he had a special property in them.(1) If the cattle have been distrained by a commoner, the plaintiff will fail, unless he prove some of the cattle to be levant and couchant; but he will be entitled to a verdict, if any of the cattle are levant and couchant, because a commoner cannot distrain for a surcharge.(2) If the lord of the manor had distrained, and on the trial of the issue joined on the plea in bar, it appears that some of the cattle were levant and couchant, and others were not, the issue will be found for the lord.(3)

If a tender of amends is pleaded, it must be pleaded as having been made to the person for whose benefit the distress was taken, and not the bailiff, and the proof must agree with that averment. A tender to the bailiff, when the principal is present, will not maintain the plea, the derivative power of the bailiff being then determined; and the tender should in general be made to that person to whom the amends belong, and who was ready to receive them.(4) Yet if the distress was taken by the bailiff in the absence of the lord, and if the bailiff is proved to be his usual receiver, in this case a tender of amends to the bailiff seems to be equivalent to a tender to the lord himself.(5)

A surety in the replevin bond is not a competent witness, on the part of the plaintiff, in an action of replevin for taking cattle damage feasant.(6) A commoner, who claims a right of common under the same *custom* as the plaintiff, is not a competent witness in support of the claim, as he might afterwards use the record in his own cause, to establish a similar

(1) Br. Common, 47; 2 Shower, 328; Melliton v. Trevivan, Skinn. 137.

(2) 1 Wms. Saund. 346 *d*; 1 Roll. Ab. 320, 405, pl. 5; Yelv. 104; Bulst. 117.

(3) 1 Wms. Saund. 346 *d*; 2 Roll. Ab. 706, p. 41; Sloper v. Allen, 1 Brownl. 171.

(4) Pilkington's Case, 5 Rep. 76 *a*; Cro. Eliz. 813; Brown v. Powell, 4 Bing. 232. A tender to an agent of the bailiff, or a subsequent demand by him, is insufficient. Pimm v. Grovill, Esp. N. P. C. 95.

(5) Gilbert on Replevin, 89; Brown v. Powell, 4 Bing. 230. The tender of amends before the distress makes the distress unlawful; and after distress, but before impounding, the detainer unlawful. 2 Inst. 107; Anscombe v. Shore, 1 Campb. C. 285, *infra*. A tender of amends, whilst the cattle are in a private pound, is not too late, especially where there is evidence of an intention to remove them to a public pound. 4 Bing. 230.

(6) Bailey v. Bailey, 1 Bing. 92, where the court granted a rule for substituting another surety.

customary right for himself.(1) But when the issue does not affect any customary right, and is merely on a right of common claimed by *prescription*, as belonging to the estate of A., one who claims a prescriptive right of common, as appurtenant to his own estate, may be a witness; for though A. may have such a right of common, it does not follow that B. has, nor would the verdict in the action of A. be evidence in B.'s action.(2)

In replevin by an under tenant against the superior landlord, who made cognizance as bailiff of his own tenant, the tenant is not an admissible witness to prove the amount of rent due.(3) And, indeed, it has been held that in no case is a party, under whom a defendant makes cognizance, a competent witness for the defendant;(4) nor are his declarations admissible in evidence for the plaintiff.(5) A person jointly responsible for the rent avowed for, is not a competent witness for the plaintiff; but the circumstance of a lease having been made to the plaintiff together with the witness, which they had paid for, but had refused to execute, is not conclusive evidence of the witness's interest.(6)

CHAPTER XIV.

OF EVIDENCE IN AN ACTION OF TRESPASS.

THE action of trespass is brought to recover damages for an injury done either to the property, or to the person of an individual. In treating of this subject, it is proposed to consider, first, the action for a trespass to real or personal property; secondly, that for a trespass to person; and, thirdly, the actions for a criminal conversation with the plaintiff's wife, and for debauching the plaintiff's daughter.

SECTION I.

Of Evidence in an Action for a Trespass to Real or Personal Property.

The action for breaking and entering the plaintiff's close is founded upon possession; and though title may, and often does, come into question, yet

(1) By Buller, J., 1 T. R. 302; Bull. N. P. 283; 1 Str. 658; *Anscombe v. Shore*, 1 Taunt. 261.

(2) 1 T. R. 302; 3 T. R. 32; by Holt, Ch. J., *Hockley v. Lamb*, 1 Lord Ray. 731.

(3) *Upton v. Curtis*, 1 Bing. 211.

(4) *Golding v. Nias*, 5 Esp. N. P. C. 272. It is reported to have been held, that the wife of such party may be examined. *Johnson v. Mason*, 1 Id. 89.

(5) *Hart v. Horn*, 2 Campb. N. P. C. 92.

(6) *Bunter v. Warre*, 1 B. & C. 689.

there is nothing in the form of the action to make it necessary; the plaintiff, therefore, will have, in the first instance, to prove himself in the possession of the premises at the time when the injury was committed.

Proof of actual possession.

The action cannot be maintained, unless the plaintiff have actual possession,(1) although he may have the freehold in law. An heir at law cannot, before entry, bring trespass against an abater;(2) neither can a bargainee bring trespass before entry, though the possession is transferred to him by the statute of uses,(3) Upon the same principle, a lessee,(4) or an assignee of a lessee,(5) cannot maintain this action before making an entry upon the demised premises; though, for other purposes, such as assigning or underletting, &c., they may be considered as being in possession. A parson after induction may maintain this action for an injury to the glebe land, though he has not actually entered upon the part trespassed on: the act of induction putting him into possession of a part for the whole.(6)

(1) NOTE 1077.—PROOF OF ACTUAL POSSESSION.—In *Walton v. File* (1 Dev. & Batt. 567), held, that if one enters into land under a treaty of purchase with the owner, he can maintain no action of trespass against the owner for entering upon the premises without his consent. In *Smith v. Wilson* (Id. 40), held, that if the plaintiff fails to prove title to the *locus in quo*, he must, to entitle him to recover, prove that the trespass was committed on land of his, either inclosed or improved by cultivation. But every unauthorized intrusion into the land of another, is a sufficient trespass to support an action for *breaking the close*, whether the land be actually inclosed or not. And from every such entry, the law infers some damage; if nothing more, the treading the grass or shrubbery. *Dougherty v. Stepp*, Id. 371. See *Math*, 198, n. 1; *ante*, Vol. I, n.; 7 Taunt. 41, u.

* * See *The Seneca Road Company v. The Auburn and Rochester R. R. Co.*, 5 Hill, 170; *Stephens' N. P.* 2629, 2639. * *

(As against a stranger, possession is sufficient to sustain the action (*Blaisdell v. Roberts*, 37 Maine, 239); but is not sufficient to maintain the action against the party having the title and immediate right of possession. *Everett v. Smith*, *Busbee Law N. C.* 303. Title, without a right of immediate possession, is not enough. *Brown v. Thomas*, 26 Miss. (4 Cush.) 335; *Halligan v. Chicago and R. I. R. R. Co.*, 15 Ill. 553.)

(2) 2 Roll. Ab. 553, l. 45; Com. Dig. tit. Trespass, B, 3. The same law of a conusee, devisee, surrenderee, reversioner after estate for life or years determined.

(3) Vent. 361; Com. Dig. tit. Trespass, B, 3.

(4) Perkins, 603, p. 261; Bac. Ab. tit. Lease, M.

(5) By Holt, Ch. J., *Cook v. Harris*, 1 Lord Raym. 367. It is otherwise of a lessor, in the case of a lease at will, by Holroyd, J. (4 B. & C. 583; Co. Litt. 62; 5 Rep. 13); or where trees are excepted (1 Lord Ray. 552), or where a lessor enters upon his lessee holding over. *Butcher v. Butcher*, 6 B. & C. 399. Plowing the land by the plaintiff's servants was, in that case, held a sufficient taking possession by him, without an express declaration of his intention.

(6) *Bulwer v. Bulwer*, 2 B. & Ald. 470. By st. 6 Anne, c. 18, persons continuing in possession of their estates after the determination of their interest, are, in certain cases, declared to be trespassers.

(See *Barnett v. Guildford*, 32 Eng. Law & Eq. 518. Title, in many cases, implies possession. *Warren v. Cochran*, 10 Foster (N. H.) 379; *Coon v. Osgood*, 15 Barb. 583; *Vance v. Beatty*, 4 Rich. 104.)

What title sufficient.

It is not sufficient for maintaining this action, to prove that the plaintiff has a right of entry on the land for a trespass to which the action is brought.(1) And, on the other hand, where possession can be shown, the person in possession, whether rightfully or wrongfully, may maintain trespass against a mere wrongdoer.(2) An exclusive possession, though for a limited purpose, as under a contract for the purchase of the herbage or underwood growing on the land, will entitle a person to bring this action.(3) And it is not necessary to prove an exclusive possession in all cases, as is plain from the instance of the owner of the soil of a highway or of a market.(4)

Presumptive ownership.

The ownership of lands, in the absence of express proof of title, and of actual occupation, is sometimes to be presumed from the situation of the property, or other circumstances. Thus, where strips of land lie between the highway and the adjoining land, they are *prima facie* the property of the owner of such adjoining land, as is the soil of the highway *usque ad filum vice*; but this presumption may be rebutted by the circumstance of the strips communicating with open commons, or larger portions of land, or by the exercise of acts of ownership by the lord of the manor.(5) And the cutting down of trees by the side of a way, or clearing it, is evidence to prove the right of soil in the way.(6) It has been considered in a former part of this work, how far acts of ownership in one portion of land can be considered as evidence that the person exercising them has any right to the adjoining land.(7)

(1) Duke of Newcastle, v. Clark, 8 Taunt. 602, case of Commissioners of Sewers; Hollis v. Goldfinch, 1 Barn. & Cress. 205.

(2) Dyson v. Collick, 5 Barn. & Ald. 603; Catteris v. Cowper, 4 Taunt. 547; Graham v. Peat, 1 East, 244; Harper v. Charlesworth, 4 Barn. & Cress. 574.

(3) Co. Litt. 46; Hoe v. Taylor, Cro. Eliz. 413; Wilson v. Mackreth, 3 Burr. 1827; Crosby v. Wadsworth, 6 East, 609; Tompkinson v. Russell, 9 Price, 287. It is doubtful if the owner of a free warren can bring trespass. Trespass may be brought by persons to whom land is divided annually by lot, after the portions are allotted. 5 East, 481; 13 East, 159; 1. Barn. & Cress. 389.

(4) Lade v. Shepherd, 2 Str. 1004; Mayor of Northampton v. Ward, 1 Wils. 107. Trespass may be brought, after re-entry on a disseizin, for the whole time of the disturbance, but not after re-entry on a fine levied. Co. Litt. 257 a; Compere v. Hicks, 7 T. R. 727; Hughes v. Thomas, 13 East, 486.

(5) Doe v. Pearsay, 7 Barn. & Cress. 304; Grose v. West, 7 Taunt. 39; Stevens v. Whistler, 11 East. 51; Steel v. Prickett, 2 Stark. N. P. C. 463; Headlam v. Hedley, Holt, 463.

(6) See Berry v. Goodman, 2 Leo. 148; Vin. Ab. Ev. T. b. 102. As to the evidence of ownership in rivers, Hargr. Tracts, 5. In walls, Callis on Sewers, 74; 8 Taunt. 602; 5 Taunt. 20. In bridges, 6 East, 154. In monuments, 3 Bing. 136. Hedges and ditches, 2 Selwyn N. P. 1218; 3 Taunt. 138. Trees, 1 Lord Raym. 737; 2 Rol. Rep. 141, 255; Holder v. Coates; 1 Mo. & M. 112.

(7) Vol. I.

Possession of goods.

There is a distinction, with respect to the necessity of actual possession, between the action of trespass for breaking and entering upon lands and tenements, and the action for taking and carrying away goods. In the latter case, proof of actual possession will not be absolutely necessary, if the plaintiff has the exclusive right of possession. Many instances of this latter kind might be cited; as where an estray or wreck has been taken by a stranger before seizure by the lord of the manor;(1) or where goods have been taken after the owner's death, and before they came into the hands of the executor.(2) But the plaintiff must have either the one or the other, either the actual possession at the time when the act was done, or the constructive possession in respect of the right actually vested in him.(3) And, accordingly, it has been held, that a landlord could not maintain trespass for the wrongful seizure of personal chattels, which he had demised together with certain premises, during the continuance of the demise.(4)

Evidence of trespass.

It is necessary, for the purpose of proving a trespass committed, to show that the injury, sustained by the plaintiff, resulted immediately from the act of the defendant, and was not merely consequential to it.(5) A principal is not liable in trespass, but in an action on the case for the negligent conduct of his agent; and for a willful unauthorized trespass, committed by an agent or servant, the principal is not at all responsible.(6) The defendant is answerable, in this species of action, for the conduct of a person whom he has expressly commanded or procured to commit the injury, though he was not present at the time of the trespass;(7) or if he

(1) Fitz. N. B. 91; *Smith v. Miller*, 1 T. R. 480. And see *Bro. Ab. Trespass*, 303.

(2) 2 Bulst. 268; *Com. Dig. tit. Trespass*, B, 4. A landlord may bring trespass for trees carried away during a lease for years. *Ward v. Andrews*, 2 Chitty, 636. And see *Farrant v. Thomson*, 5 Barn. & Ald. 826.

(3) *Smith v. Miller*, 1 T. R. 480.

(4) *Ward v. Macauley*, 4 T. R. 489. And see *Lotan v. Crosse*, 2 Campb. N. P. C. 464; *Croft v. Allison*, 4 Barn. & Ald. 590. Cases on trespass to hired carriages.

(5) The right of immediate possession gives the party a right to take the chattels. *Fuller v. Rounceville*, 9 Foster, 554. Where a chattel is hired for a specified time, so that the owner has no right of immediate possession, he cannot maintain trespass for an injury to it. *Heath v. West*, 8 Id. 101. The bailee may maintain the action (*Bass v. Pierce*, 16 Barb. 595); and so may the absolute owner, having a present right of possession. *Grenshaw v. Moore*, 10 Geo. 384; *Davis v. Young*, 20 Ala. 151; *Leaïrd v. Davis*, 17 Id. 448.)

(6) See *Moreton v. Hardern*, 4 Barn. & Cress. 226; *Branscomb v. Bridges*, 1 Barn. & Cress. 145; *Hopper v. Reeve*, 1 B. Moore, 107; *Leame v. Bray*, 3 East, 593; *Huggett v. Montgomery*, 2 N. R. 446; *Ogle v. Barnes*, 8 T. R. 188; *Scott v. Shepherd*, 5 Wils. 403; 2 N. R. 117; 5 Taunt. 534; *Str. 634*.

(7) *Morley v. Gainsford*, 2 H. Bl. 441; *Macmanus v. Crickett*, 1 East, 106; *Savignac v. Roome*, 6 T. R. 125.

(7) 2 Roll. Ab. 555, 1; 10 *Com. Dig. Trespass*, C, 1. And see *Wilks v. Lorck*, 2 Taunt. 400;

has assented to a trespass committed for his use and benefit, though not privy at the time the act was done.(1) The defendant will be made liable for a trespass, if it is proved that he came in aid of the person who committed it, though he took no further part in it.(2)

Trespasses are usually laid, in the declaration, to have been committed on a particular day, and on divers days and times between that day and the commencement of the suit.(3) Different opinions have been entertained respecting the effect of this mode of stating the complaint; but the practice appears to be at present settled, that the plaintiff, under such an allegation, may give in evidence any number of trespasses within the space of time specified or a single act of trespass anterior to the first day mentioned.(4)

In an action of trespass against several defendants, the plaintiff may elect to proceed for a trespass committed by some of the defendants, or by one of them alone. Where the plaintiff elects to proceed for a trespass committed at any particular time, he must confine himself to that period; and if all the defendants were not concerned in the trespass committed at the time, the plaintiff cannot have recourse to a trespass committed at another time, when some of the defendants were concerned, who were not implicated in the other transaction; for some of the defendants might thereby be subjected to damages for a trespass wherein they had taken no part.(5) Where a joint trespass is proved, the jury are to estimate the damages against all the defendants, according to the amount which they think the most culpable of the defendants ought to pay.(6)

Special damages.

Many things, says Mr. Justice Buller, may be laid in aggravation of damages, for which alone trespass would not lie;(7) and, in considering what may be specially laid and proved in aggravation, he makes a dis-

Sedley v. Sutherland, 3 Esp. C. 202; Barker v. Braham, 3 Wils. 377; Crook v. Wright, 1 Ry. & Mo. N. P. C. 278. Cases on the liability of attorney, and party in a cause. See Bard v. Yohn, 26 Penn. Stat. R. 482.

(1) 4 Inst. 317; Com. Dig. Trespass, C, 1; by De Gray, Ch. J., 3 Wils. 377; Lane, 90.

(An attorney giving a bond of indemnity to the sheriff is not a trespasser, though his authority be disproved. Ford v. Williams, 3 Kernan (N. Y.) 577. See Edmonds v. Buel, 23 Conn. 242; 20 Barb. 350.)

(2) Com. Dig. Trespass, C, 1; 2 Roll. Ab. 555, 1, 17. A *feme covert* or infant cannot make themselves trespassers, by subsequent assent, or prior command. Co. Litt. 180 b, n. 357 b, F. N. B. 179.

(3) Trespass on different days, Bishop v. Lyman, 6 N. H. R. 268.

(4) Hume v. Oldacre, 1 Stark. N. P. C. 351; Wilson v. Powell, Skinn. 641; Bull. N. P. 86; Co. Litt. 283; 1 Salk. 639.

(5) Sedley v. Sutherland, 3 Esp. N. P. C. 202; Page v. Freeman, 19 Mis. 421. See Knott v. Cunningham, 2 Sneed (Tenn.) 204.

(6) Brown v. Allen, 4 Esp. N. P. C. 158.

(7) Bull. N. P. 89; Russell v. Corb, Rep. temp. Holt, 699; S. C., 6 Mod. 127; Newman v. Smith, Rep. temp. Holt, 699; S. C., 2 Salk. 642; 1 Sid. 225.

inction between cases where the special damage may be made the subject of a distinct action, and where it cannot.(1) However, this distinction is not supported by the modern practice. The rule now generally adopted seems to be, that the plaintiff will be allowed to prove the special damages, if they are strictly the consequence of the trespass committed; or if the act done by the defendant, causing such special damages, constitutes a part of one entire transaction, of which the principal trespass was the commencement. It will not, in the latter case, be considered whether there may have been a sufficient ground for a separate action, provided only that the parties to such action would not be different persons.(2)

In an action of trespass for breaking and entering the plaintiff's house, and there beating the plaintiff's servant or debauching his daughter, the loss of service, or the seduction, may be proved in aggravation of damages; for the assault upon the servant, and the seduction, are part of the same illegal transaction, and completed during the continuance of the original trespass.(2) In the late case of *Bracegirdle v. Orford*,(3) (where the declaration was for breaking and entering the plaintiff's house, and without any probable cause, and under a false charge and assertion that the plaintiff had stolen property of the defendant, searching and ransacking, &c., by reason of which the plaintiff was not only interrupted in the quiet enjoyment of his house, but his credit and character injured, &c.), the court held, that the trespass was the substantive allegation, and that the rest was laid as matter of aggravation only; and though the false charge is not to be left to the jury as a distinct and substantial ground of damages, yet all the circumstances attending the trespass may be properly proved, and the jury will take the whole together into their consideration in estimating damages. "It is always the practice," said Mr. Justice Le Blanc, "to give in evidence the circumstances which accompany and give a character to the trespass."(3)

(1) Bull. N. P. 89. And see *Osborne's Case*, 10 Rep. 130 b.

(In trespass for cutting down a tree upon the highway, it may be shown to have been done maliciously. *Winter v. Peterson*, 4 Zab. (N. J.) 524. So it may be shown that the officer executing a distress warrant improperly levied upon books and papers of little or no market value, but of great use to the owner, as a means of estimating damages. *Sherman v. Dutch*, 16 Ill. 283.)

(2) *Bennett v. Alcott*, 2 T. R. 166. As to the point whether the plaintiff can recover special damages for which an action lies by another, or by himself and another jointly, see *Dix v. Brookes*, Str. 61; by *Eyre*, Ch. J., Str. 1094; *Todd v. Redford*, 11 Mod. 264.

(3) 2 Maule & Selw. 77.

(4) The jury may consider the intention with which the fact has been done, whether for insult or injury. By Lord Tenterden, Ch. J., *Sears v. Lyons*, 2 Stark. N. P. C. 318. See *Huxley v. Berg*, 1 Stark. N. P. C. 98; *Merest v. Harvey*, 1 Marsh. 139; S. C., 5 Taunt. 442. See *Brown v. Gordon*, 1 Gray, 182.

Statement of damage.

The special damages for which the plaintiff seeks a compensation must, in general, be alleged with certainty in the declaration. Thus, where the plaintiff seeks to recover for a consequential injury arising from the loss of lodgers, he ought not to be allowed to do so, unless he has stated their names.(1) It has, indeed, been held, that under the general averment, contained in the common form of declaration, which charges that the defendant did "other wrongs" to the plaintiff, the beating or debauching of a servant might be given in evidence, though not specially laid in the declaration.(2) However, it seems to be the most convenient and safest rule, not to admit, under this general averment, proofs of facts which are entirely unconnected in their nature, and distinct from the substantive ground of the action, though, in point of time, the one may have immediately followed the other. This form of averment seems more particularly adapted for introducing the proof of circumstances which could not be conveniently put upon the record, as of the particular behavior or malicious motives of the defendant, or the use of indecent or intemperate language, and for avoiding of the prolixity which would be occasioned by the statement of the necessary consequences of the injury received.(3)

The action of trespass for breaking and entering a close or house is a local action; and, therefore, the locality of the premises ought to be proved, as described in the declaration.(4) In trespass for breaking and entering a dwelling-house in the parish of A., if it appear that the house is in the parish of B., the plaintiff cannot recover.(5) And in an action of trespass, where the declaration consists of a single count, for entering a house in the parish of A., and taking the plaintiff's goods there, this is, in its nature, local, and must be proved as laid; the taking of the goods cannot be proved in another parish, as it might if there were a second general count for such a taking.(6) But the court will not try a question of parochiality in an action of this description, and, therefore, it is sufficient to prove that the place alleged to be a parish has a church and its own overseers.(7)

If the plaintiff, either in the declaration or in a new assignment, describe the close, in which the trespass is supposed to have been com-

(1) *Westwood v. Cowne*, 1 Stark. N. P. C. 172.

(2) By Holt, Ch. J., Rep. temp. Holt, 669; 2 Salk. 642; 6 Mod. 127; Bull. N. P. 89, cited the case of *Sippora v. Bassett*, 1 Sid. 225.

(3) See *Merest v. Harvey*, 5 Taunt. 442; *Lowden v. Goodrick*, Peake's N. P. C. 64; *Sears v. Lyons*, 2 Stark. N. P. C. 318; *Huxley v. Berg*, 1 Stark. N. P. C. 98.

(4) As to cases of variances, see Vol. I.

(5) See *Taylor v. Hooman*, 1 B. Moore, 161, where the premises were laid in the parish of Clerkenwell generally, and it was proved that there were two parishes in Clerkenwell. Holt's N. P. C. 525, n. And *vide supra*, p. 286.

(6) *Smith v. Miller*, 1 T. R. 479.

(7) *Anon.*, 2 Campb. C. 4.

mitted, by its name or by its abutments, the proof ought to agree with the description, and a material variance will be fatal; for instance, if the description, be thus: "On the south abutting on the mill of A.," the plaintiff will have to prove a mill there, and that it was in the tenure of A., (1) this being a material part of the description. But if it should appear that a highway passes between the close and the mill, that would not be material; (2) or if the close is described as abutting towards the east, but it proves to be north inclining to the east, it will be sufficient. (3) Extreme particularity and strictness, therefore, are not requisite in the proof of abutments. If the plaintiff declare upon a trespass in one acre, setting forth its abuttal, and he proves a trespass in any part of that acre so abutted, the jury may find the defendant guilty as to that part. (4)

Defence. 1. General issue in trespass *qu. cl. fregit*.

In an action of trespass *quare clausum fregit*, evidence of title and of right of possession is admissible, under the general issue; as a demise from the owner of the land. (5) Or the defendant may show that the plaintiff's interest in the premises, which he had occupied under the defendant, had expired at the time of the supposed trespass; for, in that case, the party wrongfully holding possession of the land cannot treat the rightful owner who enters upon the land as a trespasser. (6) Or he may show that the freehold and right of possession were in a third person, by whose command he entered. (7) Or the defendant may prove that he was tenant in common with the plaintiff; (8) or that a third person by whose command he entered, was tenant in common with the plaintiff. (9) Such

(1) *Nowell v. Sands*, 2 Roll. Ab. 678; Bull. N. P. 89.

(2) *Id. ibid.*

(3) *Roberts v. Carr*, 1 Taunt. 501. And see *Lethbridge v. Winter*, 2 Bing. 53.

(4) Bull. N. P. 89.

(5) *Argent v. Durrant*, 8 T. R. 403; *Taunton v. Costar*, 7 T. R. 431; *Dodd v. Kyffin*, 7 T. R. 354; *Turner v. Meymott*, 1 Bing. 158; *Butcher v. Butcher*, 7 Barn. & Cress. 402.

(6) NOTE 1078.—A purchaser of land under execution may enter peaceably and retain possession, although some of the last tenant's goods remain on the premises. *State v. Johnson*, 1 Dev. & Bat. 324; *McDougall v. Sitcher*, 1 John. R. 43; *The People v. Nelson*, 13 Id. 430. An action for the mere injury to the house or land, cannot be maintained against one who has a right of entry, for entering by force. *State v. Johnson, supra*. *Wildbor v. Rainsforth*, 8 Barn. & Cress. 4. Under not guilty, in trespass *quare clausum fregit*, the defendant may entitle himself to the possession as plaintiff's mortgagee for years, or as the lessee of such mortgagee. *Johnson v. Howson*, 2 Man. & Ryl. 226.

(7) *Diersley's Case*, 1 Leon. 301; 8 T. R. 403; *Garrd v. Fletcher*, 2 Stark. N. P. C. 67. The declarations of the owner, made after the trespass, are clearly not admissible, to show authority given to the defendant. *Id.*

NOTE 1079.—A party obtains a warrant, under the statute authorizing summary proceedings in the removal of tenants, &c., and sends his agent with the same to a deputy, with orders to turn the party out of possession; held, that trespass does not lie against such agents acting by the direction of the owner, although the warrant is void. *Gault v. Tuttle*, 12 Wend. 488.

(8) *Gilb. Ev.* 204; *Russell v. Allen*, 3 Kernan R. 173. See *Halford v. Tetheron*, 2 Jones' Law (N. C.) 393; *Blaton v. Vanzant*, 2 Swan (Tenn.) 276; *Hall v. Fisher*, 20 Barb. 441.

(9) *Rosse's Case*, 3 Leon. 83; *Gilb. Ev.* 204.

evidence falsifies the declaration, by showing that the defendant did not break the close of the plaintiff, as is stated in the declaration.(1)

Justification.

But the defendant under this plea, cannot prove a license from the plaintiff,(2) or defect of the plaintiff's fences,(3) or right of common,(4) or right of way,(5) or other easement;(6) or that he entered to take his emblements or his cattle, or in aid of an officer in the execution of process, or in fresh pursuit of a felon, or to remove a nuisance; for all these are matters only of justification. Neither can matters in discharge of the action be given in evidence, under the general issue, as accord and satisfaction.(7) Nor can the defendant show, under the general issue, that the plaintiff was joint tenant of the premises, or tenant in common with a third person; for this goes only to the quantum of damages, and the objection must be taken in a plea of abatement, or by way of apportionment of damages at the trial.(8)

By particular statutes, the defendant is, in certain cases, enabled to prove matter of justification under the general issue. As, for instance, persons distraining for rent in arrear, by 11 G. II, c. 19.(9) And although the defendant cannot give in evidence, under the general issue, any matter in bar of the action, which does not expressly contradict the plaintiff's case, yet he will be allowed to prove circumstances in mitigation, which tend to reduce the damages; thus, in action of trespass for cutting down trees, the defendant was permitted to show, that the plaintiff had covenanted to furnish timber.(10)

(1) Gilb. Ev. 221.

Declarations of the plaintiff that the defendant was in possession are good evidence for the defendant, in an action of trespass *quare clausum fregit*. *Parlaman v. Parlaman*, 1 Penn. 269.

(2) Gilb. Ev. 216; 2 T. R. 166, 168.

(3) Co. Lit. 283 a; Gilb. Ev. 216.

(4) Id. *ibid*.

(5) Gilb. Ev. 217, 220.

(6) *Hawkins v. Wallis*, 2 Wilson, 173.

NOTE 1080.—In an action of trespass for removing boards, on a plea of justification, that they obstructed an ancient window, through which the light ought to pass, it is sufficient to show that the window was one through which the light ought to be permitted to pass, though the window is proved to have been erected within living memory. *Penwarden v. Ching*, 1 Mood. & Malk. 400.

Evidence that the *locus in quo* is a private road, in which the defendant has a right to travel, is not admissible under the general issue. *Saunders v. Wilson*, 12 Wend. 338. So, in respect to a public road. *Babcock v. Lamb*, 1 Cowen, 238. See also *Spear v. Bicknell*, 5 Mass. R. 125; *Strout v. Berry*, 7 Id. 385.

(7) *Bird v. Randall*, 3 Burr. 1353.

(8) See *Stowell's Case*, Moore's Rep. 466, and *infra*, tit. "Trover."

(9) Section 21, where the distress is taken off the premises after a clandestine removal, the defence must be pleaded. *Vaughan v. Davis*, 1 Esp. N. P. C. 256; *Furneux v. Fotherby*, 4 Campb. N. P. C. 136.

(10) *Rennel v. Wither*, Mann. Ind. Tresp. 36.

In an action of trespass for taking goods, the defendant, under the general issue, may prove that he is entitled to the property; as that the goods were sold to him under an execution upon a judgment obtained by him, and that the plaintiff derives title under a bill of sale fraudulent against an execution creditor.(1) Or he may prove, that an action on the case and not of trespass, is the proper form of action for the redress of the injury complained of.(2) A pound-keeper, to whose custody property distrained has been delivered, may give the circumstances in evidence under the general issue.(3) And it has been held, in one case, that the defendant might show, under this issue, that the property, which he was charged with removing from the plaintiff's land, was a fixture which he was entitled to take away.(4)

But, where the defendant has removed the plaintiff's property because it was incumbering his own land, he must justify the removal by a plea, stating that it was damage feasant.(5) So the seizure of goods as a deodand or customary heriot must be specially pleaded;(6) and, in general, matters of justification or excuse, or which are done under a warrant, or other authority, whether express or implied, must be pleaded.(7) Though matters in mitigation, which tend to reduce the value of the property injured, may be proved under the general issue.(8)

2. *Liberum tenementum.*

If the plaintiff declare for a trespass in his close generally (not naming the close), and the defendant plead his soil and freehold, and the plaintiff in his replication does not new assign, but traverses the plea, and at the trial, it appears that the defendant has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there.(9) But if the action were for a trespass in a certain close particularly named, and the defendant plead his soil and freehold, the plaintiff need not make a

(1) *Martin v. Podger*, 2 W. Bl. 701. It seems that trespass cannot be brought against the vendee of a sheriff, even where the goods have been unlawfully taken. 2 Roll. Abr. 556, pl. 50; Cro. Eliz. 374.

In *Clay v. Caperton* (1 Mon. R. 10), held that the plaintiff in the suit is bound to show a judgment, but the officer need only show the execution.

(2) *Vide supra*, p. 500.

(3) *Badkin v. Powell*, Cowp. 476.

(4) *Penton v. Robart*, 2 East, 88. In this case, the defendant suffered judgment by default, as to the injury of the land.

(5) *Welsh v. Nash*, 8 East, 394. See 5 B. & Ald. 603.

(6) *Dyer v. Mills*, Str. 61; 2 Saund. 1686.

(7) Com. Dig. Pleader, E 15, 16, 17. And see Bull N. P. 90 a; *Milman v. Dolwell*, 2 Camp. N. P. C. 378, that an implied authority from the plaintiff must be pleaded; *Knapp v. Salisbury*, 2 Camp. N. P. C. 500, the plaintiff's negligence must be pleaded.

(8) *Du Bost v. Beresford*, 2 Camp. 511, case of a libelous picture.

(9) *Helvis v. Lamb*, 2 Salk. 453; *Goodright v. Rich*, 7 T. R. 355; *Hawke v. Bacon*, 2 Taunt. 156. See *Richards v. Peake*, 2 Barn. & Cress. 918; 1 Saund. 299 b, n.

new assignment, but will be entitled to recover, on proof of a trespass in his close of that name, although it turn out that the defendant has another close of the same name.(1) If the defendant justify under the grant of a close (which term imports in the abstract, the interest in the soil), and it appear in evidence that he has only a partial interest in the land, as the first crop of the produce, the issue on this plea must be found against him.(2)

3. License.

Where the declaration is for several trespasses on the plaintiff's land on divers days, &c., to which the defendant pleads, that at the said several days he committed the trespasses by the leave and license of the plaintiff, and the plaintiff replies, that the defendant of his own wrong and without the cause by him alleged, &c., it will be necessary for the defendant to prove a license co-extensive with the trespasses proved against him; and if the license were given after one of the trespasses, the plaintiff must recover.(3) In this case, where the defendant says, in effect, that he had a license for all the trespasses, the plaintiff could not reply in any other form; a new assignment would have been double.

A license virtually implies an authority to do everything which is necessary for making use of the license.(4) And although a license for pleasure is personal and confined to the individual licensed, yet, in the case of a license for profit, the persons licensed may take others with him to exercise the right.(5) It has been held, that the keeping open the doors of a house in which there is a public billiard table, is evidence of a license for all persons to enter, for the purpose of using the table.(6) It is not, in general, sufficient to show, upon an issue joined on this plea, a license from the wife, daughter, or servant of the plaintiff.(7) The plaintiff cannot give in evidence upon this issue, the abuse of a license, whether it be a license in fact, or in law.(8) And, on the other hand, if the plaintiff merely new assigns the excess or abuse of the license, he will not be allowed to give evidence to negative it.(9) It seems that where the de-

(1) *Cocker v. Crompton*, 1 Barn. & Cress. 489. Where part of the close in the declaration is the plaintiff's, he may recover for an injury to his part of it. *Stevens v. Whistler*, 11 East, 51.

(2) By Lord Ellenborough, *Stammers v. Dixon*, 7 East, 207. (Where the defendant pleads *liberum tenementum*, the jury should pass directly on that issue. *Turner v. Beatty*, 4 Zab. 644. Proof of right of possession establishes the plea. 1 Carter, 45.)

(3) *Barnes v. Hunt*, 11 East, 451.

(4) *Dennett v. Grover*, Willes, 197. See *Ancaster v. Mulling*, 2 D. & R. 714.

(5) Willes, 197; 13 H. VII, 10, 13.

(6) *Ditcham v. Bond*, 3 Camp. N. P. C. 525.

(7) *Holdingshaw v. Rag*, Cro. Eliz. 876; *Taylor v. Fisher*, Cro. Eliz. 245; *Cock v. Wortham* Selw. N. P. 1040.

(8) *Ditcham v. Bond*, 3 Camp. N. P. C. 525; *Aikenhead v. Blade*, 5 Taunt. 198; 1 Saund. 300 d. n.

(9) *Pickering v. Rudd*, 1 Stark N. P. C. 56.

fendant pleads that he committed the trespass complained of with the license of the plaintiff, a revocation of the license may be proved upon an issue joined on this plea, for it shows that there was no license at the time of the trespass.(1)

4. Right of common.

The principal questions which usually occur upon the traverse of a plea of right of common have been considered in another place.(2) Where the action of trespass is brought by the lord of a manor, who traverses that the cattle mentioned in the plea were *levant* and *couchant*, it will be sufficient for the defendant to prove that some of the cattle were *levant* and *couchant*; and if they were not *levant* and *couchant*, it is the subject of a new assignment.(3) The plea of a right of common will be disproved, by showing that the place upon which the trespass was committed has been inclosed for twenty years;(4) or that the messuage, to which an immemorial right of common is stated to belong, was modern, and not built on the site of an ancient house.(5) And the plaintiff, on an issue joined upon the right of common, may prove a custom to inclose, and a grant to him of the land inclosed, and that sufficient common was left for the commoner; without its being necessary for him to set out a custom to inclose, leaving a sufficiency of common.(6) He may also prove a release of the right of common.(7) But where the lord of a manor brought an action of trespass for taking peat, and the defendant pleaded that he removed the peat, because it interfered with his right of common, it was held that the plaintiff could not, under the general replication, *de injuria*, give evidence that a sufficiency of common was left to the defendant.(8)

(1) Best, Ch. J., and Holroyd, J., *Bridge v. Siddal*, Derby Sp. Ass. 1827. A waiver of a forfeiture must be replied. *Warral v. Clare*, 3 Camp. C. 629. It seems that a conditional license, like a conditional agreement, should be stated according to the fact. See 5 Barn. & Ald. 42.

NOTE 1081.—See *Mumford v. Whitney*, 15 Wend. 380, where it was held, that a right to enter upon land and to erect and maintain a dam as long as there should be employment for the water power thus created, is more than a license; it is the transfer of an interest in lands and must be in writing.

* * On the subject of *license*, see 2 American Law Cases, pp. 506–538, and the cases there cited. * * (See also *Lonk v. Woods*, 15 Ill. 256; *Floyd v. Ricks*, 14 Ark. 286. A license may be shown from one having title and right of immediate possession. *Everett v. Smith*, Busbee Law. N. C. 303.)

(2) *Vide supra*, p. 495. The general replication *de injuria* is improper in the case of a plea of right of common. Willes, 101. See *Maxwell v. Martin*, 6 Bing. 522.

(3) 2 Will. Saund. 346 e, n.; *Ellis v. Bowles*, Willis, 368.

(4) *Greach v. Wilmot*, cited by Lawrence, J., 2 Taunt. 160. See *Hawke v. Bacon*, 2 Taunt. 159; *Richards v. Peake*, 2 B. & C. 918.

(5) *Dunston v. Tresider*, 5 T. R. 2. See *Wilson v. Page*, 4 Esp. C. 71.

(6) *Arlett v. Ellis*, 7 B. & C. 346. And see *Spoonor v. Day*, Cro. Car. 432. The right of inclosure, and that sufficient common was left, has usually been pleaded. 2 T. R. 391; 5 T. R. 412, n.; 6 T. R. 742; 1 Taunt. 435.

(7) *Clayton*, 9; *Rotheram v. Green*, Cro. Eliz. 593.

(8) *D'Ayrollas v. Howard*, 3 Burr. 1385; Bull. N. P. 93 b. And see *Anon.*, cited 16 East, 86.

5. Right of way.

Upon an issue joined on a right of way, the right may be proved by reputation; or by the production of an award of commissioners of inclosure; or by direct evidence of a grant of the way.(1) A grant of a right

NOTE 1082.—Where the owner of two adjoining closes (A. and B.), separated by a fence and gate, which had always been repaired by the occupier of B., sold A. to the plaintiff, and two years afterwards sold B. to the defendant; held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain. *Boyle v. Tomlyn*, 6 Barn. & Cress. 329. A man is only bound to take care that his cattle do not wander from his own land upon the lands of other; being under no obligation to keep up fences between adjoining closes of which he is owner; and even where adjoining lands which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards became the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. Per Bayley, J., in *Id.* (The owner is bound to take care of cattle and see that they do not trespass upon another's land. *Noyes v. Colby*, 10 Foster, 143.)

And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose. *Id.* The allegation in the declaration, that the defendant, by reason of his possession, was bound to repair, will be supported by proof in the deed of conveyance to that effect, if produced at the trial. *Id.* If such deed is not produced, nor any evidence given of its loss or destruction, the inference is that no such deed in fact ever existed. *Id.*

(1) See Vol. II, on the proof of an award of commissioners of inclosure. A private inclosure act, which contains clauses respecting a public highway, is to be considered, as far as respects those particular clauses, a public act. *Rex v. Utterby*, by Holroyd, J., Lincoln Sp. Ass. 1828. And on the construction of grants of way, see *Kooystra v. Lucas*, 5 B. & Ald. 830; *Morris v. Egginton*, 3 Taunt. 24; *Whalley v. Thompson*, 3 Bos. & Pull. 371; *Senhouse v. Christian*, 1 T. R. 560.

NOTE 1083.—In trespass, sued by the owner of the land against the surveyor who made the road, held, that objections could not be taken to the doings of the court; for the court of sessions, or county commissioners who laid out the road, had a general jurisdiction in respect to roads; and until annulled upon certiorari, are valid. *Baker v. Runnels*, 3 Fairf. 236. It is different in the case of towns, who have only a special and limited power in respect to roads. *Id.*

Roads, &c., being established by matter of record, matter of record only could be admitted to prove whether the bridge was a public or private bridge. *Brander v. Chesterfield Justices*, 5 Call, 548. But long use of way is evidence that it was duly laid out. *Pritchard v. Atkinson*, 3 N. H. Rep. 335. *Colden v. Thurber*, 2 John. R. 424; *Gallatin v. Gardner*, 7 Id. 106; *Sage v. Barnes*, 9 Id. 365; *The State v. Champion*, 2 N. H. R. 513; *Yelv.* 142, note.

Right of way, how proved, see 1 Bayl. 56, 341; 2 Watts, 23.

Non-existing grant, see 3 Kent's Com. 450.

Dedication, see Math. 333 to 344; 3 Pick. 413; 6 Wend. 651; 2 Hayw. 301, 302; 6 Pet. 431; 16 Serg. & Rawle, 390, 400; 8 Pick. 504; 5 Greenl. 368; 3 N. H. Rep. 335; 2 Virg. Cas. 135; 4 Greenl. 270.

Way of necessity, see Math. 325, 326; 3 M'Cord, 131; 2 Id. 445; 24 Com. L. R. 406; 6 Greenl. 118; 12 Wend. 172, 371; 5 Mill, 132; 12 Pick. 184.

Description of way, see 5 Call, 548; 4 Paige, 510; 6 Pet. 514, 515.

* * The learning on the subject of *dedications*, may be found very fully stated, in *Stephens' N. P. tit. Common, Fishery, Way, Watercourses*; *Hilliard's Am. L. Real Property*, same titles; 2 Smith's L. Cas. p. 90, *et seq.*, in the notes to *Dovaston v. Payne*. And see the great cases of *Post v. Pearsall*, 20 Wend. 111; *S. C.*, in error, 22 Id. 425; *Rowan's Ex'rs v. Town of Portland*, 8 B. Monr. 232. * *

of way may be presumed from an enjoyment of the right unexplained for twenty years;(1) though proof of uninterrupted possession is insufficient, where there are circumstances which are inconsistent with the existence of a deed.(2) And an acquiescence must be shown on the part of the owner of the inheritance.(3) A dedication of a right of way to the public is presumed, where the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing along it by positive prohibition.(4) In this case also, the owner of the property will not be bound by a dedication made by his lessee, unless there has been a succession of tenants, and a long time has elapsed.(5) The grant of a way of

(1) *Campbell v. Wilson*, 3 East, 294, where all ways have been extinguished by an inclosure act twenty-six years before; *Keymer v. Summers*, cited 3 T. R. 157, where there had been an unity of possession.

NOTE 1084.—*Estes v. The Inhab. of Troy*, 5 Greenl. 368.

Use for twenty years not conclusive. *Holleman v. The Commonwealth*, 2 Virg. Cas. 135. See *Barclay v. Howell's Lessee*, 6 Pet. 498, and also *City of Cincinnati v. The Lessee of White*, 14 Id. 431. The doctrine of a limitation of twenty years is not applicable to public highways, and cities and streets in villages. Per *Thompson, J.*, Id., and *Jarvis v. Dean*, 3 Bing. 447.

* * See the last note. * *

(2) *Levett v. Wilson*, 3 Bing. 118.

(3) *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 B. & Ald. 539. And see *Cross v. Lewis*, 2 B. & C. 636.

Lands adjoining a public highway, remaining uninclosed, are considered as dedicated to the public use, and no action will lie by the owner against any person traveling over them. *Cleveland v. Cleaveland*, 12 Wend. 172.

* * See *ante*, note 1083. * *

(4) By *Lord Ellenborough*, *Rex v. Lloyd*, 1 Campb. N. P. C. 262. A bar placed across the way, though removed, will rebut the presumption of a dedication. *Roberts v. Carr*, 1 Campb. C. 262, note. As to the time within which a dedication may be presumed, see 11 East, 376, n. *Jarvis v. Dean*, 3 Bing. 447. It seems there may be a limited dedication to the public. *M. of Stafford v. Coyney*, 7 B. & C. 257.

NOTE 1085.—* * See *ante*, note 1083. As to the right of grantees bounded on unopened streets laid out on public maps, but not opened, see *Matter of Mercer Street*, 4 Cowen, 542; *Matter of Seventeenth Street*, 1 Wend. 262; *Matter of Lewis Street*, 2 Id. 472; *Livingston v. The Mayor of New York*, 8 Id. 85; *Wyman v. The Mayor of New York*, 11 Id. 486; *Matter of Furman Street*, 17 Wend. 649; *Matter of Thirty-second Street*, 19 Wend. 128; *Matter of Twentieth Street*, 1 Hill, 189; *Matter of Thirty-ninth Street*, Id. 191. The cases cited show, that no grantee is necessary to take, to give effect to the public right; that the right does not depend upon privity with the grantor; that the grant is irrevocable. * *

(5) *Wood v. Veal*, 5 B. & Ald. 454; *Harper v. Charlesworth*, 4 B. & C. 574; *Rex v. Barr*, 4 Campb. N. P. C. 16.

NOTE 1086.—Whether a public highway can be acquired by *dedication* or not, in Massachusetts, is doubtful. *Commonwealth v. Low*, 3 Pick. 408; *Same v. Newbury*, 2 Id. 57.

What length of time will create a presumption of the dedication of private property to the public as a street or highway, is not a settled point. *Denning v. Roome*, 6 Wend. 651. See *Sevey's Case*, 6 Greenl. 118. If a person opens his land, so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it and use it as a way; and if the person does not mean to dedicate it as a way, but only to give a license, he should do some act to show that he gives a license only. The Trustees, &c., of the B. Museum

necessity may be presumed from the circumstances of the property to which it leads; as when a close is purchased, to which there is no access, except through the land of the vendor.(1) And it seems that a way may be pleaded as a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had.(2)

Description of way.

The proof of user of a right of way only establishes a right commensurate with the usage. Thus a right of way for carriages does not necessarily include a right for all manner of cattle, but is evidence for the consideration of the jury.(3) And the right of way to a particular close of the defendant will not support a plea, by which he justifies using it for the occupation of another close which he has purchased.(4) A variance in the proof of the *termini* of the way, as set out in the plea, will be fatal;(5) it will be a misdescription, if part of the way, as set forth in the plea, is over the defendant's own land.(6) A plea that the defendant is entitled to a right of way as occupier of certain premises, is not disproved by showing that the premises are, in fact, occupied by the defendant's servant, who receives less wages on that account.(7) And, although the land be in lease, an allegation of user of a way by the defendant being

v. Finnis, 5 Car. & Payne, 160, and note *a*. The doctrine of prescription has not been adopted in New Jersey. *Ackerman v. Shelp*, 3 Hals. 125. It has, however, in Massachusetts; but the time of legal memory is confined to sixty years. *Coolidge v. Learned*, 8 Pick. 504. All dedications must be considered with reference to the use for which they are made. Per Thompson, J., in 6 Pet. R. 431, 438.

(In Pennsylvania twenty-one years' user by the public establishes a highway. *Commonwealth v. Cole*, 26 Penn. State R. 187. Informal proceedings to open a road, ripen by public use into a right of way, after a long and uninterrupted use. *Gibbs v. Larrabee*, 37 Maine, 506; *Brock v. Chase*, 39 Id. 300; *Regina v. Petrie*, 30 Eng. L. & E. 207. As to the effect of user of water lots, see *Boston v. Lecraw*, 17 How. U. S. 426. Laying out of a public street does not make it a public highway till it is accepted as such. *Oswego v. Oswego Canal Co.*, 2 Seld. 257; 14 Barb. 328; 16 Id. 251.)

(1) *Horston v. Frearson*, 8 T. R. 50, where the vendor was a trustee. *Roberts v. Karr*, 1 Taunt. 495; *Rouse v. Bardin*, 1 H. Bl. 351; *Bullard v. Harrison*, 4 Maule & Sel. 387; *Allen v. Brownsall*, Yelv. 163; *Clarke v. Cogge*, Cro. Jac. 220; 2 Roll. Ab. pl. 60, pl. 17. A way of necessity exists after unity of possession. *Buckley v. Coles*, 5 Taunt. 311.

(2) *Morris v. Egginton*, 3 Taunt. 24. And see Sir D. Evan's remarks on the late cases respecting ways of necessity. *Chambers on Leases*, 238; 1 Will. Saund. 322, n. 6.

(3) *Ballard v. Dyson*, 1 Taunt. 279. And see *Rex v. Lyon*, 1 Ry. & Mo. 151.

(4) *Laughton v. Wards*, Lutw. 111; 1 Roll. 391; 1 Mod. 190; *Jackson v. Stacey*, Holt's. C. 455. Grantee of a way cannot make a road across it. *Senhouse v. Christian*, 1 T. R. 560. Nor, if the way be private, can he go on the adjoining land, because it is out of repair. *Bullard v. Harrison*, 4 Maule & Sel. 387. The defendant may rest on his title to a private right of way, though a general right exist. *Allen v. Ormond*, 8 East, 3.

(5) *Wright v. Ratray*, 1 East, 377; *Rex v. Great Caufield*, 6 Esp. N. P. C. 136; 4 Burr. 2090. Where one of the *termini* was laid as a highway, and it was proved to be a foot-way, it was held sufficient. *Allen v. Ormond*, 8 East, 3; *Rouse v. Bardin*, 1 H. Bl. 351.

(6) *Jackson v. Shillito*, cited 1 East, 381.

(7) *Bertie v. Beaumont*, 16 East, 33; *Rex v. Stock*, 2 Taunt. 339.

seized in fee, includes an user for all purposes for which the defendant, as landlord, might have occasion for the way, as to view waste, or to demand rent.(1)

The plaintiff, upon the traverse of a prescriptive right of way, may show that the way has been extinguished by unity of possession of the land to which the way is appurtenant, and that over which it lies.(2) Or he may give in evidence that the way has been stopped by order of two justices; but the order must pursue the form prescribed in the act of Parliament, and a material variance will render it invalid.(3) By traversing a prescriptive right of way, the seizin and occupation are admitted.(4)

Replication de injuria.

The general replication *de injuria* is a traverse of the whole of the defendant's plea, and the plaintiff will succeed in an issue joined upon this replication, if he is able to disprove any of the material facts stated in the plea.(5) Where a party abuses a license which the law gives him, as that of entering a common inn, or of going upon premises in the occupation of a tenant to view waste; the plaintiff, instead of making general replication *de injuria*, will reply the abuse, and proof of the circumstances will render the plaintiff in law a trespasser *ab initio*.(6) This cannot be done where the defendant has merely been guilty of a non-feasance;(7) or where the license, which has been abused, was not given by the law, but by the act of a private individual.(8)

New assignment.

Where the defendant, by taking advantage of the general terms used in a declaration of trespass, apparently answers the whole matter of com-

(1) Proud v. Hollis, 1 B. & C. 8.

(2) Walley v. Thompson, 1 Bos. & Pull. 371; Buckley v. Coles, 5 Taunt. 311; 1 Roll. Ab. 935; 3 T. R. 157; 5 East, 295.

(3) Davison v. Gill, 1 East, 64; De Ponthieu v. Pennyfeather, 5 Taunt. 634.

(4) Stott v. Stott, 16 East, 343.

(5) By De Grey, Ch. J., Sayer v. Earl Rochford, 2 W. Black. 1169. As to the cases in which *de injuria* is a proper replication, see 1 Saund. 299 b; 6 Co. 67 a; Langford v. Waghorn, 7 Price, 670; Com. Dig. Pleader, F, 19, 20. If the plea consists of two facts, either of which, if separately pleaded, would be a defence to the action, the defendant may prove either of those facts. Spilsbury v. Micklethwaite, 1 Taunt. 146.

(6) Six Carpenter's Case, 8 Co. 290; 1 Saund. 300 d; Cro. Car. 196; Yelv. 96; 9 Co. 11 a; 1 And. 65, that such matter must be specially replied; by Buller, J., Taylor v. Cole, 3 T. R. 297; Bovy's Case, 1 Vent. 211; Fisherwood v. Annon, cited 3 T. R. 297; Lambert v. Hodgson, 1 Bing. 317; Crowther v. Ramsbottom, 7 T. R. 654; Aitkenhead v. Blades, 5 Taunt. 198. In which case a new assignment was held insufficient, because an unlawful continuance in possession, after a lawful entry, is not a new or different trespass. See Lambert v. Hodgson, 1 Bing. 317.

(7) 8 Co. 290.

(8) 8 Co. 290. A party guilty of an irregularity, after a lawful distress for rent, is not a trespasser *ab initio* by stat. 11 Geo. II, c. 19; 1 H. Bl. 13; 1 Esp. N. P. C. 382. See Pitt v. Shew, 4 Barn. & Ald. 208.

plaint in the declaration, but, in fact, only answers part of it; or where the plea contains a justification of the original and principal trespass in the declaration, but takes no notice of those matters of aggravation which the plaintiff has a right to connect with it, in his demand for damages,(1) a new assignment is made necessary. Thus, if a right of way is pleaded, and other trespasses have been committed without the limits of the supposed way, but which are not distinguishable, on the face of the declaration, from those which have happened within those limits;(2)—if the trespasses in the declaration are apparently excused by a license granted by the plaintiff, which is stated in the plea, but the license has been abused or exceeded;(3) if the defendant justifies an entry into the plaintiff's house, but omits to account for his continuance there during the whole of the time alleged, or says nothing of any right to expel the plaintiff(4) (which is a circumstance introduced by way of aggravation merely); in all these cases the plaintiff must have recourse to a new assignment; for the defendant, being considered to have answered the apparent subject of complaint, will succeed upon an issue joined on a replication which only denies the truth of his plea.

If the plaintiff, in making a new assignment, does not intend to admit that the trespass in the declaration is answered to the extent of the justification pleaded, he must, besides new assigning, traverse the matter of justification.(5) Where the plea, in fact, covers the whole of the trespasses complained of, the plaintiff cannot amplify the charges in the declaration by means of a new assignment; as, if there be a count containing a single trespass, which is justified, and the plaintiff new assigns, the defendant, on pleading not guilty to the assignment, will be entitled to a verdict.(6) Where there is a new assignment of excess committed in performing a lawful act, some little excess will not be closely scanned, but clear excess and unnecessary injury must be proved.(7)

A person concerned in committing a trespass together with the defendant, but who is not a party to the record, is a competent witness for the

(1) *Vide supra*, p. 501. On the different rules respecting new assignments, see 1 Will. Saund. 300 a.; 2 Saund. 6; 1 Saund. 330, n. 6.

(2) 1 Saund. 300 a. As to the necessity of a new assignment in the case of a plea of *lib. tenementum*, *vide supra*, p. 506.

(3) *Ditcham v. Bond*, 3 Campb. N. P. C. 524; 1 Saund. 300 d, n.

(4) *Montprivatt v. Smith*, 2 Campb. N. P. C. 176; *Warral v. Clare*, 2 Campb. N. P. C. 629; *Crowther v. Ramsbottom*, 7 T. R. 654; *Taylor v. Cole*, 3 T. R. 292; *Phillips v. Howgate*, 5 Barn. & Ald. 220.

(5) *Pickering v. Rudd*, 1 Stark. N. P. C. 56; *Prettyman v. Lawrence*, Cro. Eliz. 812; *Odeham v. Smith*, Cro. Eliz. 589; *Oakley v. Davis*, 16 East, 82; *Atkinson v. Metteson*, 2 T. R. 176.

(6) *Cheasley v. Barnes*, 10 East, 73; *Taylor v. Smith*, 7 Taunt. 156; *Pratt v. Greene*, 15 East, 235; *Anon.*, cited 16 East, 86.

(7) *Hockless v. Mitchell*, 4 Esp. N. P. C. 86. And see *Houghton v. Butler*, 4 T. R. 365; *Pickering v. Rudd*, 1 Stark. N. P. C. 56; *Arlett v. Ellis*, 7 Barn. & Cress. 375.

plaintiff, although a recovery against one of the several co trespassers is a bar to an action against the others, and if the plaintiff succeeds, the witness will not be liable to the defendant, as there is no contribution in actions of tort.(1) But the evidence of a joint trespasser, who has suffered judgment to go by default, is inadmissible for the plaintiff,(2) though it may be received in favor of the defendant.(3) A joint trespasser, not a party to the record, is a competent witness for the defendant.(4) Where a witness is made a co-defendant by mistake, the court will, on motion, give leave to strike his name out of the record, even after the issue joined.(5) When no evidence is offered against a particular defendant, he will not be entitled to an acquittal, in order to be made a witness, until the whole case of the other defendants is finished.(6)

In an action of trespass, with the general issue, and pleas of justification, the plaintiff is at liberty, if he thinks fit, to reserve his evidence in answer to the defendant's case, until the defendant's case is closed; or he may, in the first instance, call any evidence to repel the defendant's justification. If he adopts the latter course, he must go through all the evidence he proposes to give, and he will not be permitted to give further evidence in reply.(7) Where the general issue is not pleaded to an action of trespass, and issue is taken upon the defendant's plea of justification, the defendant's counsel has a right to begin, as he will have to maintain the affirmative of the issue; and this, notwithstanding the onus of proving damages, is on the plaintiff.(8)

(1) By Lord Tenterden, Ch. J., 3 Barn & Cress. 387; Bull. N. P. 286; *Chapman v. Graves*, 2 Camp. N. P. C. 333; *Morris v. Daubenny*, 5 B. Moore, 319; Vol. I.
(2) *Chapman v. Graves*, 2 Camp. N. P. C. 333, n. And see *Brown v. Brown*, 4 Taunt. 752; Vol. I.

(3) 2 Campb. N. P. C. 333, note; *Ward v. Haydon*, 2 Esp. N. P. C. 552; Vol. I.

(4) *Poplet v. James*, Bull. N. P. 286. See *Reason v. Ewbank*, Bull. N. P. 286; *Hill v. Fleming*, Id. 264; Vol. I.

(5) Bull. N. P. 286; 1 Sid. 441.

(6) *Wright v. Paulin*, 1 Ry. & Mo. 128; *Holt's N. P. C.* 275; *Huxley v. Berg*, 1 Stark, N. P. C. 98. The plaintiff cannot, in adducing evidence in reply, implicate the plaintiff for the first time. Id. See Vol. I.

(7) *Sylvester v. Hall*, 1 Ry. & Mo. 255, n.

(8) *Bedell v. Russell*, 1 Ry. & Mo. 292; *Hodges v. Holder*, 3 Campb. 366; *Jackson v. Hesketh*, 2 Stark, N. P. C. 518.

NOTE 1087.—In trespass for entering plaintiff's dwelling-house and taking his goods on a plea justifying the trespass by proceeding under a commission of bankruptcy, the defendant is entitled to begin. *Cotton v. James*, 1 Moore & Malk. 273. This case seems to complete the series of those by which the doctrine that the plaintiff is entitled to begin, where he has sustained damage, has been for the present overruled. Id. note a. It is observed, however, that "it is impossible not to entertain some doubt whether the rule now existing will long be recognized." Id.

SECTION II.

Of the Evidence in an Action for Trespass to the Person.

Many of the rules, which have been mentioned with reference to the action of trespass for an injury to property, will apply equally to this kind of action; and they need not be repeated in this place.

Assault and battery.

An assault may be proved by showing personal violence, or an attempt to do corporal injury to the plaintiff, as the holding up a weapon within reach of his person.(1) A battery includes an assault, and is the actual doing of an injury, be it ever so small, in an angry, revengeful, rude, or insolent manner.(2) An action for false imprisonment will be sustained by proof of the plaintiff having been deprived of his personal liberty by the defendant for some period of time, however short.(3) Where a magistrate's warrant has been shown to the plaintiff, and he goes before the magistrate at the desire of the constable, and without further compulsion, it seems that there is a sufficient imprisonment.(4) It has been said, indeed, that every imprisonment includes a battery, but this position has, in latter times, been expressly denied.(5)

(1) *Genner v. Sparks*, 1 Salk. 79; Bull. N. P. 15. But words will not amount to an assault, though they may sometimes explain a doubtful action. Bull. N. P. 15.

NOTE 1088.—AN ASSAULT.—It is not every threat where there is no actual personal violence that constitutes an assault; there must in all cases, be the means of carrying the threat into effect. A. was advancing in a threatening attitude, with an intention to strike B., if he had not been stopped; held, that it was an assault in point of law, though at the particular moment when it was stopped, he was not near enough for his blow to take effect. *Stephen v. Myers*, 4 Car. & Payne, 349.

(Presenting a gun, in a threatening attitude, is an assault (*Beach v. Hancock*, 7 Foster N. H. 223); but the abandonment and exposure of a bastard child does not constitute an assault upon it. *Regina v. Renshaw*, 20 Eng. L. & Eq. 593. The person who casts a lighted squib into a market-house, or drives a negro boy through a store by threatening him with a blow, or descends into another man's garden in a balloon, in such a way as to attract a crowd into the garden, is answerable for the mischief done in consequence of his act as a trespasser. *Scott v. Shepherd*, 2 W. Black. 892; 3 Wils. 403; *Vandenburg v. Truax*, 4 Denio, 464; *Guille v. Swan*, 19 John. R. 381.)

(2) Bull. N. P. 15. If the plaintiff declare for assault and battery, he may recover, upon proof of the assault alone. Bro. Tresp. pl. 40.

(3) Bull. N. P. 22.

(4) *Chinn v. Morris*, 2 C. & P. 361; *Pocock v. Moore*, 1 Ry. & Mo. 321. It is otherwise, where a warrant is used only as a summons, and the plaintiff voluntarily goes to a magistrate. See *Arrowsmith v. Mesuries*, 2 N. R. 211; *Homer v. Battyn*, Bull. N. P. 62; *Genner v. Sparkes*, 1 Salk. 78; *Russen v. Lucas*, 1 Ry. & Mo. 26; *Berry v. Adamson*, 6 Barn. & Cress. 528; *Simpson v. Hill*, 1 Esp. C. 3, 431.

(5) Bull. N. P. 22; *Emmett v. Lyne*, 1 N. R. 225. Keeping the key of a room, knowing that a man is imprisoned therein, has been held a trespass. 3 Wils. 377; by Lord Hardwicke, *Williams v. Jones*, Ca. temp. H. 301.

In an action for an assault, the intention is material.(1) But in order to constitute a battery, it is not necessary that the act should have been willful.(2) If any blame attaches to the defendant, he will be liable for the consequences of his actions, though he had no intention to do an injury. But if the injury was accidental on the part of the defendant, and might have been avoided by the plaintiff, if he had exercised ordinary care; or if it was altogether unavoidable, and no negligence or intention was imputable to the defendant, the defendant will be excused.(3)

If the declaration contained but one count, the plaintiff, after giving evidence of one assault, cannot waive that, and proceed to offer evidence of another.(4) If the declaration contain two counts, and the defendant suffers judgment by default as to one, and pleads "not guilty" to the other; and on the trial, one trespass only is proved, the defendant will be entitled to a verdict.(5) So, where a justification is pleaded to one

NOTE 1089.—Depriving a person of his personal liberty without lawful authority, is an assault in law, though no assault in fact is made; the one includes both offences, the act being unlawful. Per Baldwin, J., in *Johnson v. Tompkins*, 1 Bald. R. 571, 600. All parties who are proved to have taken any part in the assault, battery or imprisonment, are principals, and answerable for all acts done by themselves or by any others concerned in the transaction, by their order, consent or procurement, or in pursuance and furtherance of an object or enterprise in which they have all engaged, and which is illegal. Id. If two or more agree or combine to effect an unlawful purpose, each one of the party is answerable for all done in, or leading towards the accomplishment of the joint object, directly connected with, or naturally consequential. If the object and purpose is entered upon and commenced by the parties concerned, and other individuals, or a crowd assembled in consequence and consummate the act or join in its execution; the original parties are responsible for their conduct, though the immediate actors may be unknown to them, other than by the unlawful acts committed, intended or tending to effectuate the original object and purpose. Id. It is not necessary to bring it home to any such defendants; the law fastens the consequences of an illegal act upon them, which they have in any manner, as before mentioned, directly or indirectly done, brought about or caused. Id. Their mere presence, however, when the act is committed, does not make them accountable for it, without some participation on their part, or exciting, directing, consenting to or encouraging it; there must be some evidence of their acting, or causing others to act. Id.

If an illegal act is done under color of legal authority or process from an officer who had no jurisdiction of the subject matter, or whose order or process is made and issued in violation of the law, the judge or justice, and party procuring it, are trespassers; so is the officer and all who act under him, if the process is void on the face of it (10 Coke, 76), and his who procures such order on false pretences, is the most aggravated case. Id.

Trespass lies for arresting one not liable to an arrest. *Green v. Morse*, 5 Greenl. 291. Where the arrested has merely a personal privilege, as a witness, a juror, or a party attending court, trespass does not lie. Id. Trespass lies where the process is void or vacated, set aside or superseded, as illegally, unduly or irregularly sued out. *Hayden v. Shed*, 11 Mass. R. 500; *Plummer v. Bennett*, 6 Greenl. 421. But if the writ is good at the time, the arrest is not tortious. *Shaw v. Reed*, 16 Mass. R. 450.

(1) *Griffin v. Parsons*, Selw. N. P. 27; *Gilb. Ev.* 256; *Gibbon v. Pepper*, 2 Salk. 637.

(2) *Weaver v. Ward*, Hob. 134; *Underwood v. Hewson*, 1 Str. 596.

(3) *Wakeman v. Robinson*, 1 Bing. 213; *Gibbon v. Pepper*, 1 Lord Raym. 38. And see *Scott v. Shepherd*, 3 Wils. 403.

(4) *Stante v. Prickett*, 1 Campb. 473; *Downes v. Skrymshere*, 1 Brownl. 235.

(5) *Compere v. Hicks*, 7 T. R. 727.

of two counts, which is admitted by the replication, the plaintiff will fail unless he proves two trespasses at the trial.(1) And although the declaration contain many counts, if the defendant by his plea narrows the question to one transaction, as by alleging that the trespasses stated in the different counts were one and the same trespass, and issue is joined upon the defendant's plea; the plaintiff will not be allowed to give evidence of more than one act of trespass.(2)

The proof of a trespass at any time before the commencement of the action will be sufficient.(3) And the place where the trespass was committed is immaterial, whether it be within or out of the county in which the cause is tried; except in particular cases, under the provisions of special acts of Parliament.

If the assault appear on the trial of the cause, to be of such an aggravated nature, that, in the opinion of the court, the defendant might properly be tried for a felony, the plaintiff cannot maintain this action, without proof that the defendant has been tried on a criminal prosecution. The civil remedy is suspended, until the justice of the county is satisfied in respect to the public offence. But when this has been accomplished, the party will be entitled to his action, whether the trial of the offence end in a conviction or in an acquittal. The record of conviction, or of acquittal, is conclusive evidence, that there has been a trial of the prisoner for the specified offence; but, on the production of the record of acquittal, the defendant may prove, if he can, that the acquittal was by collusion of the plaintiff.(4)

A conviction for an assault before a magistrate, on the information of the injured party, is not evidence on an action for the same assault.(5) And it is laid down by Mr. Justice Buller, that the plaintiff cannot give in evidence a conviction at the suit of the king for the same battery; for it is a general rule, he says, that no record of conviction or verdict shall be given in evidence, but such whereof the benefit may be mutual; namely, such whereof the defendant, as well as the plaintiff, might have made use, and given in evidence, in case it had made for him.(6) But if a person, indicted for an assault, plead guilty to the charge, the

(1) *Atkinson v. Matteson*, 2 T. R. 172; *Oakley v. Davis*, 16 East, 82.

(2) *Gale v. Dalrymple*, 1 Ry. & Mo. 120; *Gibson v. Haukey*, 1 Ry. & Mo. 121, n.

(3) The rule respecting the mode of laying a trespass *diversis diebus et vicibus* has been before noticed. The defendant may be charged with assaulting *diversis diebus et vicibus*, but not with making an assault. *Burgess v. Freelove*, 2 Bos. & Pull. 425; *English v. Purser*, 6 East, 395.

(4) *Crosby v. Leng*, 12 East, 412, 416. (The record of conviction or acquittal will be received in evidence on the trial of the civil action to mitigate damages, &c. *Porter v. Seiler*, 23 Penn. State R. 424.)

(5) *Smith v. Rummens*, 1 Campb. 9. See Vol. I; Vol. II.

(6) *Bull. N. P.* 16.

record has been considered to be conclusive against him in an action for damages for the same assault.(1)

The general issue denies the fact of trespass.(2) If the defendant relies for his defence upon matter of jurisdiction, he ought to plead it, unless where, by the provisions of particular statutes, he is allowed to prove all the circumstances of his defence under the general issue. Evidence is admissible under this issue of facts in mitigation.

Mitigation.

In an action of trespass for false imprisonment against an individual who was not a peace officer, where the general issue only was pleaded, evidence of reasonable suspicion of the plaintiff's having been guilty of a felony was received in reduction of the damages.(3) And in trespass for false imprisonment against the captain of a ship, the defendant was in one case allowed to give evidence, under the general issue, of expressions used by the plaintiff at the time, tending to create mutiny and disobedience.(4) But in the case of *Watson v. Christie*, where evidence of a similar description was tendered, Lord Eldon rejected it, on the ground that, if the battery for which the action was brought could be justified on account of the necessity of maintaining discipline in the ship, the defence ought to have been put on the record, and his Lordship's direction was confirmed by the Court of Common Pleas.(5)

Plaintiff's first assault.

The most common defence is, that the plaintiff made the first assault; and this must be specially pleaded.(6) This plea must be supported by proof that the plaintiff first offered to strike the defendant; it is not necessary to show that the defendant was actually struck.(7) Every assault will not justify a battery: whether the degree of force used by the defendant was justified by the occasion, is a question to be determined on the evidence.(8) It has been doubted whether the usual terms in which this

(1) The contrary has, however, been ruled by the present lord chief justice at *Nisi Prius*.

A confession by the defendant on indictment against him may be given in evidence against him in a civil action for the same assault. *Eno v. Brown*, 1 Root, 528.

(2) As to what is sufficient to constitute an assault, battery, &c., *vide supra*, p. 515.

(3) *Chinn v. Morris*, 1 Ry. & Mo. 424. And see *Vin. Ab. Ev.* 16; 2 B. & P. 225 a. Whether such a defence could be pleaded without showing a previous felony committed depends on the fact of the defendant being a peace officer. *Beckwith v. Philby*, 6 B. & Cr. 635; *Samuel v. Payne*, Doug. 359. And see *Mure v. Kaye*, 4 Taunt. 34.

(4) *Bingham v. Garnault*, 1 Esp. Dig. 337.

(5) 2 Bos. & Pull. 225, and note, *Id.*

(6) Co. Litt. 282, b 283.

(7) Bull. N. P. 18; Gilb. Ev. 219. The expressions accompanying the plaintiff's acts are material evidence, where a blow has not actually been struck. Gilb. Ev. 256; 2 Keb. 545.

(8) Bull. N. P. 18. Nor will an assault, in general, justify a maiming (*Cooke v. Beal*, 1 Lord Raym. 177), unless it be violent. *Cockroft v. Smith*, 2 Salk. 647. As to what is sufficient justification of a battery, where process is resisted, see *Phillips v. Howgate*, 5 Barn. & Ald. 220.

plea is expressed make it, in all cases; incumbent on the defendant to prove that the assault committed by him was in proportion to the provocation received from the plaintiff. It seems, however, to be the better opinion, that, where the trespass is alleged in the declaration in general terms, and is justified in the like terms, if the defendant has inflicted a greater injury on the plaintiff than he ought to have done, the excess is properly the subject of a special replication.(1) In cases where it is necessary for the defendant, in order to justify the acts of violence complained of in the declaration, to set forth with particularity the nature of the provocation received, the conduct of the plaintiff justifying the trespass, as alleged in the plea, must be strictly proved.(2) Where the plain

(1) *Dale v. Wood*, 7 B. Moore, 33; *Bowen v. Parry*, 1 C. & P. 394; *Franks v. Morris*, 10 East, 79, n.; *Skinner*, 387. See *Phillips v. Howgate*, 5 B. & Ald. 220; *Cockcroft v. Smith*, 2 Salk. 642; *Bull. N. P.* 15.

(2) *Phillips v. Howgate*, 5 B. & Ald. 220; 1 Saund. 296, n. 1. See *Dale v. Wood*, 7 B. Moore, 33.

NOTE 1090.—In *Phillips v. Howgate*, the first count in the declaration stated, that defendant assaulted and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about; justification, that the defendant arrested the plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c. The defendant failed in proving that the plaintiff, while in custody, conducted himself so violently as to render it necessary that the defendant should strike him to prevent his escape, and then said, "let me get out of my difficulty, by saying it was a mere aggravation of the original trespass." But the court said no. The circumstance of the defendant having put matter in justification, of which no proof had been given, would not of itself vitiate the justification. But the proof given was not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he stated that the plaintiff resisted when in custody. That not being done, the court thought the justification was not proved, and that the plaintiff would be entitled to a verdict. In *Stammers v. Yearsley* (10 Bing. 35), the plaintiff complained of assault and battery, of being taken into custody along the streets, and of being imprisoned on a charge of an assault with intent to commit a felony: defendant pleaded, that plaintiff having assaulted him, defendant gave plaintiff in charge of a peace officer, who laid hands on him and took him before a justice. At the trial, although one assault only was proved, the facts pleaded were held to be an insufficient answer to the facts declared on. In *Bush v. Parker et al.* (1 Bing. N. C. 72), the plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing out of a field into and through a pond, and there imprisoning him. Plea, justifying the assaulting, seizing and laying hold of the plaintiff, and pulling and dragging him about; held, no sufficient answer to the entire charge in the declaration. *Tindal, Ch. J.*, said: "We have only to look to the pleadings here, and to apply our common sense to the allegation that the defendant dragged the plaintiff through a pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the plaintiff first complains. How much do the defendants justify? The assaulting, seizing and laying hold of the plaintiff, and a little pulling and dragging him about; altogether omitting to notice the allegation in the declaration that the plaintiff was forced through a pond. It is plain that this was one link in a chain of trespasses following each other, and not a mere aggravation of the first assault. If that assault alone were the gist of the action, and justifying the gist were to be considered a justification of all that followed, we might suppose a case in which, after the assault, the assailant might throw his adversary over a precipice and break his arm."

(An assault may be justified by showing that it was necessary in the defence of lands or goods;

tiff can justify his first assault he should reply the particular circumstances of his justification, as he cannot give them in evidence under the traverse of *de injuria*.(1)

Defence of possession.

The defendant, upon an issue joined on the plea of defence of possession, must prove that he was possessed of a house, or other property, and that the plaintiff disturbed him;(2) and he must, in general, show that he requested the plaintiff to depart, previous to the employment of any force to expel him, especially if a battery be charged;(3) unless the plaintiff's entry has been forcible.(4) A maiming or wounding cannot be justified under this plea;(5) nor a battery which is attended with circumstances of particular violence.(6) If, indeed, the provocation on the part of the plaintiff is not wholly inadequate to the resistance made by the defendant, the plaintiff ought to new assign.(7)

Imprisonment justified.

Where the defendant justifies the apprehending of the plaintiff under the statute 1 G. IV, c. 56, for committing a willful and malicious trespass on the defendant's property, if the plaintiff was acting in the assertion of a right of way, it is not necessary for him to plead that circumstance under the exception in the statute, but he may give it in evidence upon an issue joined on the defendant's plea of justification, because it shows that the trespass was not within the meaning of the statute, willful and malicious.(8) Where the plaintiff complains of having been arrested under an illegal warrant, it is not necessary for him to produce the warrant, for the defendant having taken upon himself to imprison the plaintiff, the onus

but the force used must not exceed the necessity of the case. *Scribner v. Beach*, 4 Denio Rep. 448. And this defence must be pleaded as well as proved. *Jewett v. Godall*, 19 N. H. 562. But the owner of the property cannot resist an officer with force so as to prevent him from making a levy. *Faris v. The State*, 3 Ohio (N. S.) 159; *The State v. Burt*, 25 Vt. 373.)

(1) *King v. Sheppard*, Carth. 281; Bull. N. P. 18.

(2) 2 Roll. Ab. 546; D. pl. 3. See *Kingsbury v. Collins*, 4 Bing. 202.

(3) *Green v. Goddard*, Salk. 641.

(4) *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78, or where the plaintiff makes resistance, 2 Salk. 641. In this case, the plea should set forth the circumstances, and it is more properly a plea of *son assault demesne*. 4 Taunt. 822.

(5) 2 Inst. 316; 2 Roll. Ab. 548.

(6) 2 Roll. Ab. 548, respecting throwing stones; *Sampson v. Morris*, 4 Taunt. 821, throwing water; *Gregory v. Hill*, 8 T. R. 299, where the plaintiff was knocked down; *Collins v. Renssion*, Say. 138, where the plaintiff was thrown off a ladder. In these cases, liberty will be given to move for judgment *non obstante veredicto*.

(7) By Lord Kenyon, Ch. J., *Weaver v. Bush*, 8 T. R. 81. See Willes, 17, n.; Bull. N. P. 13; 1 Saund. 296, n.

(8) By Best, Ch. J., *Looker v. Halcomb*, 4 Bing. 191. This statute is repealed by 7 & 8 Geo. IV, c. 27, and its provisions with some alterations re-enacted by 7 & 8 Geo. IV, c. 30. See *Butler v. Turley*, 1 Mo. & M. 54.

of justifying the imprisonment rests entirely with himself.(1) Where, in an action for false imprisonment, the defendant being a magistrate, justified the commitment of the plaintiff for a bailable offence, it was held that the plaintiff could not, under the general replication *de injuria*, give evidence of tender and refusal of bail.(2)

Where the defendant, in his plea, justifies a trespass of the nature alleged in the declaration, but he has been guilty of unnecessary violence, the excess cannot, in general, be proved unless under a new assignment.(3) Where there have been more than one assault or imprisonment, and the defendant pleads *son assault demesne*, if the defendant's plea be merely traversed, he will have a right to apply it to any assault which he can justify.(4) A new assignment, in such a case, is, in general, necessary to enable the plaintiff to give in evidence the circumstances of any other assault or imprisonment.(5)

SECTION III.

Of Evidence in an Action for Adultery, and in an Action for debauching the Plaintiff's Daughter.

The action for adultery, and that for debauching a daughter, have, in some points of view, been considered as actions on the case; but, for general purposes, in conformity with the most approved ancient forms and the most recent decisions, they are to be classed as actions of trespass.(6)

I. First, of the action for a criminal conversation with the plaintiff's wife.

Proof of marriage.

In this action, evidence of an actual marriage between the parties will

(1) *Holroyd v. Doncaster*, 3 Bing. 492.

(2) *Sayer v. Rochford*, 2 W. Bl. 1165. The defendant may justify for a cause different from that which he assigns at the time of the trespass. *Crowther v. Ramsbottom*, 7 T. R. 654; 12 Mod. 386.

(3) *Vide supra*, p. 512.

(4) See Vol. I.; *Downes v. Skrymshere*, 1 Brownl. 235.

(5) 1 Will. Saund. 299 a; Roll. Ab. tit. Trial C, pl. 3. The plaintiff may, however, give in evidence as many trespasses as there are counts in the declaration, and the plaintiff must prove as many justifications (Bull. N. P. 17; Will. Saund. 299 a); unless the justification to any count be admitted by a new assignment. *Atkinson v. Matteson*, 2 T. R. 172; *Oakley v. Davis*, 16 East, 82. And *vide supra*, p. 513.

(6) *Woodward v. Walton*, 2 N. R. 476; *Ditcham v. Bond*, 2 Maule & Selw. 436. The ground for these actions being considered actions of trespass, appears to be, that there was a writ applicable to them in the register, before writs on the case were framed by the clerks in chancery. But it has been said, that the trespass may be waived, and an action on the case brought. *Holroyd, J., Parker v. Bailey*, 4 Dow. & Ryl. 215.

be necessary; the cohabitation of the parties as man and wife, or the reputation of an existing marriage, or the plaintiff's acknowledgment of the woman as his wife, are not sufficient to maintain the suit.(1) A different rule, as Lord Mansfield observed in the case of *Morris v. Miller*,(1) would be subject to this inconvenience, that it might render persons liable to such actions, upon the evidence made by the very parties who bring the action. And in the case of *Birt v. Barlow*,(2) where the subject was much considered, Lord Mansfield observed: "That this is the only civil case where it is necessary to prove an actual marriage. In other cases, cohabitation and reputation are equally sufficient. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by bad persons giving the name and character of wife to women to whom they are not married, in such an action a marriage in fact must be proved."

Marriage register.

The recent marriage acts specify in what churches or chapels marriages may be duly solemnized. The registers, or the copies of registers of marriages, are also, by an express provision, made receivable in evidence.(3) If the register is not produced, but the marriage is proved, as it may be, by a witness who attended at the ceremony, without the corroborating

(1) *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 170.

NOTE 1091.—The mere confessions of the defendant are not sufficient to prove the marriage of the plaintiff, in an action for criminal conversation with his wife. Said in *The People v. Humphreys*, 7 John. R. 314.

Fenton v. Reed, 4 John. R. 51; *The People v. Humphreys*, 7 Id. 314; *Commonwealth v. Norcross*, 9 Mass. R. 492; *Same v. Littlejohn*, 15 Id. 163; *State v. Roswell*, 6 Conn. R. 446. In a prosecution for lewd and lascivious cohabitation, confession was received as evidence of the marriage. *Crayford's Case*, 7 Greenl. 57. The court distinguish that case from one for criminal conversation. But in *Farray v. Hallacher* (8 Serg. & Rawle, 159), the point decided was, that the declaration of the defendant that he knew the woman was married, and therefore he seduced her, was admissible in evidence in proof of the marriage. To this point, also, see *Rigg v. Curgenven*, 2 Wils. 395. (See *Harman v. Harman*, 16 Ill. 85.)

* * The case of *Morris v. Miller*, in the text, has often been criticised. See 2 Starkie on Ev. p. 252, n. c; and 1 Stephen's N. P. p. 11, n. b. It is condemned by Mr. Greenleaf (2 Gr. Ev. § 49); and it seems difficult to distinguish this from other cases of admissions which are admitted every day. See Index to Vols. I and II of the text, tit. *Admissions*; and 1 Gr. Ev. § 209. Defendant's admission where marriage was in foreign country, has been held sufficient in an indictment for adultery. *Cayford's Case*, 7 Greenl. 57; *Regina v. Simmonsto*, 1 Car. & Kirw. 164, S. P. * *

(2) Doug. 170.

(3) 4 G. IV, c. 76; 6 G. IV, c. 92. See *R. v. Northfield*, Doug. 658, and *Taunton v. Wyborn*, 2 Campb. N. P. C. 297, as to the proof of lawful place of celebration, before the late statute. Concerning parish registers, see *ante*.

(Proof of the handwriting of parties, accompanied by an examined copy of the register, is sufficient in such actions. *Bain v. Mason*, 12 Eng. Com. Law, 124. The manner of the marriage is not material (*Deane v. Thomas*, 22 Id. 544); though informal it will be rendered sufficient, with evidence of cohabitation. *Cathewood v. Caslon*, 41 Id. 237.)

evidence of the register, it does not appear necessary to prove, in addition, the publication of banns, or a license of marriage; for, though the marriage is absolutely void without one or the other of these sanctions, yet it seems not unreasonable to presume from the fact of the marriage, that the marriage has been duly solemnized, especially as the solemnization of marriage, without either a license or the publication of banns, is so highly penal.(1)

The parish register is not the only legitimate proof of the fact of marriage, though, in general, it may be the most satisfactory;(2) one who has been present at the solemnity is as competent to speak to that fact, as the register itself: for there is no principle of evidence which makes the register indispensably necessary, as a higher species of proof; nor is there any provision of that kind in the Marriage Act, one great object of which was to facilitate and preserve, as much as possible, the evidence of marriages, not to limit or narrow the proofs; and the registration is not essential to the legality of a marriage. The same remark may be made on the testimony of the attesting witnesses in the marriage entry, as compared with that of any other persons who attended the wedding: the evidence of the former is not of a higher order, nor is it to be resorted to in any degree superior to the evidence of the other class of witnesses. But an entry of a marriage in a day-book, is not admissible in evidence if the entry has been afterwards made in the register.(3)

The entry in the marriage register proves a marriage, but not that the parties married are the persons whose marriage is in question. Some evidence of identity, therefore, will be necessary; and this may be proved in various different ways. It may be proved, for instance, by some person acquainted with the parties, who was present at the marriage. This is one mode; and such a witness is fully as competent as any of the persons who officiated at the ceremony; since it must constantly happen that neither the minister nor the clerk, nor any of the subscribing witnesses, have been since acquainted with the married couple, in which case they would not be able to prove the identity.

Subscribing witnesses.

Another mode of proving the identity is by proof of the handwriting of the parties in the original register;(1) and this also may be satisfactorily proved by persons acquainted with the parties and their handwriting,

(1) See *Allison's Case*, Russ. & Ry. C. C. 109.

(2) *R. v. St. Devereux*, 1 Bl. 367; *Reed v. Passer*, Peake's N. P. C. 305.

(3) *May v. May*, Str. 1075; *Lee v. Meacock*, 5 Esp. C. 177.

(4) The expressions used by Mr. Justice Buller, in the report of the case of *Birt v. Barlow*, seem at first sight to imply, that if the original is produced, the subscribing witnesses are the proper persons to be called to prove the handwriting. He is reported to have said, "The original register is not necessary to be produced; and it is only where that is required, that the subscribing witnesses must be called."

without the evidence of either of the subscribing witnesses named in the register. There appears to be no peculiar advantage that would result from calling such a subscribing witness. The reason why the evidence of a subscribing witness is indispensable in the case of a deed or other private document, will not in any degree apply to this subject, nor are the cases in the least analogous; for there the testimony of the subscribing witness is necessary as antecedent proof, and for the purpose of introducing the document in evidence; on the contrary, the register proves itself; it is directed to be kept as a public book, and is accompanied with every means of authenticity; it may be considered in the nature of a record, and need not be produced nor proved by subscribing witnesses.(1) And if a subscribing witness were called, what, in ordinary cases, would he be able to prove? Perhaps, he may never have seen either of the parties at any other time except at the marriage; or, perhaps he may never have seen any other specimen of their handwriting, besides their signature in the register; so that, in truth, for the purpose of proving the handwriting, and to establish the identity of the parties, a subscribing witness may be one of the most ill-informed and useless witnesses that can be produced.

In addition to these proofs, there are several other modes of ascertaining the identity of the parties. Suppose, as Lord Mansfield said, in the case of *Birt v. Barlow*, the bell ringers were called, and were to prove that they rung the bells, and came immediately after the marriage, and were paid by the parties; or suppose persons called who were present at the wedding dinner, and there saw the parties treated as the married couple: or suppose it were proved, that the person whose maiden name is mentioned in the register, always bore that name till the day of marriage; but on that day and ever since has borne the plaintiff's name; all these, and many others that might be mentioned, are distinct marks of identity.

Foreign marriage.

A marriage celebrated abroad, whether by English subjects or foreigners, must be according to the law of the country where the marriage takes place;(2) and, in proving a foreign marriage, some evidence of the law of the foreign state must be given. The testimony of learned professors or practitioners, the opinion of eminent writers in books of great legal credit

(1) 1 Dough. 174, by Lord Mansfield.

(2) *Middleton v. Janverin*, 2 Hagg. Consist. R. 437; *Scrimshire v. Scrimshire*, Id. 395; *Lacon v. Higgins*, 3 Stark. N. P. C. 183. As to marriages in British Settlements, *Lautour v. Teesdale*, 8 Taunt. 833; *R. v. Brampton*, 10 East, 282; and see 1 Roll. Ab. tit. Baron & Feme, 341, pl. 21; *Haydon v. Gould*, Salk. 119; *R. v. Fielding*, 5 St. Tr. 610; *Collins v. Tissot*, 6 Mod. 155; *Dyer*, 359; *Wigmore's Case*, 2 Salk. 438; *Reed v. Passer*, Peake's N. P. C. 232; *West v. Chamberlain*, 2 Shower, 300; *R. v. Hodnet*, 1 T. R. 96; *Holt v. Ward*, 2 Str. 937; *Swinb.* 74. Scotch marriages, *Dalrymple v. Dalrymple*, 2 Haggard Const. R. 54; *Hartford v. Morris*, Id. 430. Irish marriages, *Smith v. Maxwell*, 1 Ry. & Mo. 80, 82, note. Marriages between English subjects in an English ambassador's chapel abroad, are declared valid by 4 G. IV, ch. 91.

and weight, and the certified adjudications of foreign tribunals, seem admissible for this purpose.(1) The marriages of Jews and Quakers in this country are not affected by the marriage acts.(2)

Defendant's acknowledgment of plaintiff's marriage.

It has been before observed, that the reputation of a marriage, and cohabitation of the parties as man and wife, are not sufficient evidence of the fact of marriage to support this action. In the case of *Norris v. Miller*,(3) where it was proved, that articles of settlement had been executed by the plaintiff and his wife, purporting to be made after the marriage, with the privity of her relations; that she always bore the name of his wife, and was so considered by the relations on both sides; and that the parties cohabited as man and wife; this evidence was held to be insufficient. It appears further, from the report of this case, that there was some evidence of an acknowledgement by the defendant of the adultress being the plaintiff's wife; "the defendant having confessed to the landlord of the lodgings (to which he resorted after the elopement), that she was the wife of Captain Morris (the plaintiff), and that he had committed adultery with her." This was stated to be the evidence on one side, and not questioned on the other. Lord Mansfield, and the rest of the court, appear to have considered this evidence, not as an unqualified and clear acknowledgment of the marriage, but rather as a mere admission that the person in question was reputed to be plaintiff's wife, and therefore that it could not dispense with the strict proof of an actual marriage.(4) This decision does not warrant the conclusion that a distinct and full acknowledgment of the marriage, made by the defendant himself, will not be evidence of the fact as against him, and sufficient to dispense with the more formal and strict proof of marriage. And in the case of *Rigg v. Curgenvan*, where the case of *Morris v. Miller*, was cited, it was said by the court, that if it were proved that the defendant had seriously recognized that he knew the woman to be the plaintiff's wife, it would be evidence proper to be left to the jury, without proving the marriage.(5)

(1) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 81; *Lindo v. Belisario*, 2 Hagg. 248; *Middleton v. Janverin*, 2 Hagg. 441; and see *Hartford v. Morris*, 2 Hagg. 81. But the witness must be conversant with the foreign law, and not merely a native of the country. *Anon.*, cited 10 East, 287, and see *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17. As to the proof of foreign laws, see Vol. I.

(2) As to the marriages and divorces of Jews, *Horn v. Noel*, 1 Campb. 61; *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17; *Lindo v. Belisario*, 1 Hagg. Consis. R. 225, 247, App. p. 9; *Goldsmid v. Bromer*, 1 Hagg. 324. Of Quakers, 1 Hagg. App. p. 9, n. Of Dissenters, 1 Haggard App. 8, n.

(3) 4 Burr. 2057.

(4) Bull N. P. 28.

(5) 2 Wils. 399.

NOTE 1092.—Although the evidence of confession seems admissible upon principle, yet it is quite clear that a jury would be fully warranted in refusing to find the fact of marriage upon

Proof of adultery.

With respect to the proof of the act of adultery, it is enough to say, that whatever convinces the jury of the consummation of the act, will be sufficient for this purpose.(1) "It is a fundamental rule," said Sir William Scott, in one of his admirable judgments,(2) "that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely, indeed, that the parties are surprised in the direct fact of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference, as a necessary conclusion; and unless this were the case, and unless this was so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion, cannot be laid down universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject, is, that circumstances must be such, as would lead the guarded discretion of a reasonable and just man to the conclusion."

Any number of adulterous acts may be proved within the limits of the time specified in the declaration; and in addition to this, with a view of explaining the nature of the intimacy between the parties, indecent familiarities may be proved, even earlier than the first mentioned day, though not a previous criminal connection.(3)

such evidence when better evidence might be adduced. 2 Stark. Ev. 251, *u. c.* In *Deane v. Thomas* (1 Moo. & Malk. 361), proof was made by the register according to the forms of the society of Quakers, and held sufficient.

(1) *NOTE* 1093.—The confessions of the party charged, uncorroborated by other circumstances, are inadmissible to prove the adultery. *Baxter v. Baxter*, 1 Mass. R. 346; *Holland v. Holland*, 2 Id. 154, and *vide Doe v. Roe*, 1 John. Cas. 25. But this doctrine does not apply to common-law actions. It is only in case of bill filed for a divorce in chancery, or a libel in the Ecclesiastical Court. On an issue awarded in New York to try the fact of adultery, the confessions of the defendant were formerly not admissible (51st General Rule of Chancery, 1806); yet on a reference to a master, it was always receivable. *Betts v. Betts*, 1 John. Ch. R. 197. And the old rule, excluding it on a feigned issue, seems to be repeated by the rules of 1830. *Vid.* Rule 180, of 1830.

* * See tit. *Confessions* in Index to Vols. I and II of the text; 1 Gr. Ev. §§ 214–219; *Mortimer v. Mortimer*, 2 Hag. Con. R. 315. A divorce has been decreed on confession alone, where all suspicion of collusion was repelled and the contrary established. *Vance v. Vance*, 8 Greenl. 132; *Owen v. Owen*, 4 Hagg. Eccl. R. 261. * *

(2) *Loveden v. Loveden*, Dr. Haggard's Consist. Rep. Vol. 2, p. 2. And see *Cadogan v. Cadogan*, 2 Haggard, 4, n.; *Chambers v. Chambers*, 1 Haggard, 444; *Williams v. Williams*, *Ibid.* 294; *Elwes v. Elwes*, *Ibid.* 277.

(3) *Duke of Norfolk v. Germaine*, Harg. State Trials, Vol. 8, page 35, where the Statute of Limitations was pleaded, and evidence of prior indecent familiarities was given, to explain an illicit intercourse within the time of limitation.

Letters.

In general, the wife's letters to the husband are not evidence for him against the defendant.(1) Yet to this rule there are exceptions; as, where the letters have been written by her during an absence from her husband, and are offered as evidence of her disposition towards him. If they had lived for some time necessarily separate (as in one case(2) where they were servants in different families), or even if there has been only an accidental temporary absence,(3) the letters of the wife to the husband, written during the separation, and before any suspicion of her misconduct, are admissible as showing her demeanor to her husband. It does not seem indispensably necessary, unless a ground is laid for imputing collusion, to explain the reason of the wife living apart from her husband at the time of the correspondence.(4) Some evidence should, however, be given that the letters were written at a period which would make them admissible: where the letter was read to the witness by the wife at the time she was writing it, the evidence was considered sufficient.(5)

Mutual conduct of husband and wife.

The state of feeling, and the degree of mutual affection between the parties, before their acquaintance with the defendant, are material circumstances for the consideration of the jury in estimating the degree of injury which the plaintiff has received. It is the general tenor of their feelings, and the prevailing habit of their daily intercourse, which best show a state of happiness. Circumstances of this nature may be proved by those who have been in habits of intimacy with the family. And a witness will be allowed to state the opinion which he formed of the wife's affection for her husband, from the anxiety which she has expressed concerning him, and from her mode of speaking of him during his absence.(6) Proof of a settlement and a provision for children are also proper circumstances of aggravation.(7)

Evidence for the defendant.

As the plaintiff is bound to prove an actual marriage, so it will be open to the defendant to prove, if he can, the marriage invalid and

(1) NOTE 1094.—In an action of crim. con., letters written by the wife to third persons before she became acquainted with the defendant, and in which she mentioned her husband, are receivable in evidence to show the affection. *Willis v. Bernard*, 5 Car. & Payne, 341; 8 Bing. 276; 1 Moore & Scott, 584.

* * And see 1 Stephens' N. P. p. 241; 2 Gr. Ev. § 57. * *

(2) *Edwards v. Crook*, 4 Esp. N. P. C. 39.

(3) *Trelawney v. Coleman*, 2 Stark. N. P. C. 191; S. C., 1 Barn. & Ald. 30.

(4) 2 Stark. N. P. C. 191.

(5) 2 Stark. N. P. C. 191; 1 Barn. & Ald. 30.

(6) *Trelawney v. Coleman*, 2 Stark. C. 192.

(7) Bull. N. P. 26 b.

void.(1) And if the defendant can show that the plaintiff consented to the adulterous intercourse;(2) or that he suffered his wife to live in a state of prostitution, by which the defendant was drawn into the criminal connection;(3) the plaintiff cannot in such a case maintain this action. But if the wife's conduct was without the privity of the husband, it will only go in mitigation of damages, however profligate she may have been.(4) It has been held, in one case, that if the husband and wife were parted by articles of separation at the time of the unlawful intercourse, it is a bar to the action.(5) But the propriety of this decision has been questioned; and the principle of it has been held not to extend to a case where, by the articles of separation, the husband does not renounce all future intercourse and society with his wife, and all assistance to be derived from her in respect of the education of the children.(6)

Circumstances in mitigation of damages.

The circumstances in extenuation, to lower the amount of damages, will vary with every varying case.(7) Proof of the wife's tainted character, as that she had before been a prostitute, or eloped with another;(8) or proof that she made the first advances of a criminal nature to the defendant;(9) or proof of the husband's profligate habits, and his criminal connection with other women;(10) or that he felt no affection for his wife, turning her out of his house, and refusing to maintain her, before the in-

(1) *Standen v. Standen*, Peake's N. P. C. 32; *Taunton v. Wyborn*, 2 Campb. 297. And see *R. v. Billingham*, 3 Maule & Sel. 250; *R. v. Burton on Trent*, Id. 537; *R. v. St. Faith's*, 3 D. & R. 348, cases on the publication of banns. By the last Marriage Act, a marriage is valid, though the license is fraudulently obtained by a minor, without his parents' consent. *R. v. Birmingham*, E. T. K. B.

(2) *Duberley v. Gunning*, 4 T. R. 651; 1 Sel. N. P. 11, note 4; *Hodges v. Wyndham*, Peake's N. P. C. 27.

(3) *Smith v. Allison*, Bull. N. P. 27, overruling *Gibber v. Sloper*, Bull. N. P. 27; 1 Sel. N. P. 11; *Finler v. Foster*, Hagg. Cons. R. Vol. 1, p. 146.

(4) *Ibid.* It seems that the plaintiff's connection with other women after the marriage, is not evidence in bar of the action. *Bromley v. Wallace*, 4 Esp. 237, overruling *Wyndham v. Lord Wycomb*, 4 Esp. C. 16.

(5) *Weedon v. Timbrel*, 1 Esp. 16; 5 T. R. 357; *Bartelot v. Hawker*, Peake's C. 7.

(6) *Chambers v. Caulfield*, 6 East, 248. It was also held that the case of *Weedon v. Timbrel* did not apply, because the consent of trustees was necessary to the separation, and this had not been given.

(7) *Mitigation of damages*.—See *Winter v. Henn*, 4 Car. & Payne, 494; *Calcroft v. Harborough*, 4 Id. 499. See *Smith v. Master*, 15 Wend. 270.

* * And see 1 Steph. N. P. p. 26, *et seq.*; 2 Gr. Ev. § 56. * *

(8) Bull. N. P. 27, 296.

(9) *Coote v. Bertz*, 12 Mod. 232; *Gardiner v. Jadis*, MS. case, 1 Sel. N. P. 25; 1 Haggard's Consist. Rep. 147. For this purpose, the wife's letters to the defendant may be given in evidence, though they are not in general admissible for him. *Elsam v. Fawcett*, 2 Esp. C. 562; Bull. N. P. 28.

(10) Bull. N. P. 27; *Bromley v. Wallace*, 4 Esp. N. P. C. 257; by Lord Kenyon, in *Duberley v. Gunning*, 4 T. R. 655.

tereourse with the defendant;(1) or that he connived at the indecent familiarities of the defendant,(2) and showed the utmost indifference about her reputation and character; these are some of the many circumstances which manifestly ought to have a very considerable effect with the jury in reducing the amount of damages. It seems that the defendant cannot give evidence of the general reputation that the wife was, or had been, a prostitute: though, perhaps, after having laid a foundation, by proving her being acquainted with other men, such general evidence may be admitted.(3) The defendant will not be allowed to prove acts of misconduct subsequent to the trespass complained of.(4)

One defence, as we have seen, is, that the plaintiff connived at his wife's elopement. In such a case, proof may be admitted, on the part of the plaintiff, of the wife's declarations,(5) made at the time of the elopement, as to her intention and purpose in leaving his house; for the question, in effect, is, whether the husband knew that she was about to elope, or whether he believed that her intention was as she represented.(6)

Evidence of character.

If the wife's character for chastity has been attacked, whether by the testimony of witnesses called on the part of the defendant, or by the course adopted in the cross-examination of the plaintiff's witnesses, evidence in support of her character will be properly admitted, either in chief or by way of reply.(7) Even though the cross-examination may have failed in its object, yet perhaps the plaintiff might be properly allowed, in the progress of his case, to produce some evidence in favor of her character; for an imputation once thrown out is generally apt to excite suspicion; and unless, at least, the imputation is retraced in the most unqualified terms, so as to leave not a trace behind, the evidence of character appears to be made necessary by the course which the other party has adopted in the defence. However, it seems that Lord Kenyon doubted of the propriety of admitting such evidence, in a case where some imputation had been unsuccessfully made on the character of the plaintiff.(8) Lord Kenyon is reported to have said, in that case: "Although the cross-examination of the plaintiff's witness had been directed

(1) Bull. N. P. 27.

(2) Bull. N. P. 27; 4 T. R. 655, 658.

(3) Bull. N. P. 27.

(4) 2 Esp. 562.

(5) Where the adultery was committed on board a ship during a voyage, a witness may be asked, on the part of the plaintiff, whether the wife did not keep a journal, and whether she stated for what purpose she kept it. *Jones v. Thompson*, 6 Car. & Payne, 415.

(6) *Hoare v. Allen*, 3 Esp. N. P. C. 276.

(7) See *Bamfield v. Massey*, 3 Campb. 460; *Dodd v. Norris*, 3 Campb. 519. Cases of seduction.

(8) *King v. Francis*, 3 Esp. 116.

to impeach the character and conduct of the plaintiff, he did not think that this authorized him to break through the rule of evidence, by going into proof of character, as that character stood unimpeached by the testimony of the witnesses examined, who had denied the imputation intended to be conveyed."

II. Secondly, of the action for assaulting and debauching the plaintiff's daughter.

II. Action for debauching the plaintiff's daughter.

This action is considered to be an action of trespass, although the real foundation of the action is not violence, but the loss of service, which the plaintiff is supposed to have sustained in consequence of the seduction.(1) This is the only legal foundation for the action; but beyond such a loss, which in most cases is merely imaginary, the plaintiff will be allowed to recover damages, aggravated by the injury done to the object of his affection.(2) However difficult it may be, said Lord Ellenborough, in one of the cases on this subject,(3) to reconcile to principle the giving of greater damages on such a ground, the practice is become inveterate, and cannot now be shaken.

Loss of service.

It is not necessary to prove an actual contract for service, but the relation of master and servant must subsist, at least in some degree, though a very slight degree will be sufficient.(4) Proof of the most trifling acts

(1) *Woodward v. Walton*, 2 New Rep. 476; but it seems the trespass must be waived, and an action on the case brought.

The action may be maintained by one who has adopted an orphan as his own child (*Irwin v. Dearman*, 11 East, 23); or by one standing in the place of a parent (as an aunt) even during the parent's life (*Edmonston v. Machell*, 2 T. R. 4); or by a master who is not related to the party seduced. *Fores v. Wilson*, Peake's N. P. C. 55. See *Hall v. Hollander*, 4 Barn. & C. 663.

(2) NOTE 1095.—* See *Steph. N. P.* 2356 to 2358; 2 Gr. Ev. § 579, and notes. And see *Hewitt v. Prime*, 21 Wend. 79; *Bartley v. Richtmyer*, 2 Barb. S. C. R. 182. * *

(Actual loss of service need not be shown to maintain the action; it is enough to show that the party bringing the action had a legal right to her services, without showing that he exercised the right. *Mulvehall v. Millward*, 1 Kernan R. 343. The child being a minor, the father has a right to her services, and may maintain the action. *Martin v. Payne*, 9 John. R. 387; *Dean v. Peel*, 5 East, 45; *Blaymire v. Haley*, 6 Mees. & W. 55; *Grinnell v. Wells*, 7 Man. & Gran. 1033. Where the child lives out, a step-father cannot maintain the action (*Bartley v. Richtmeyer*, 4 Comst. 38); nor can the father, where the child has been bound out to service. *Dain v. Wycoff*, 3 Selden R. 191.

The action will lie where the relation of master and servant exists, though the father be not entitled to her services. *Kelly v. Donnelly*, 5 Md. 211; *Kendrick v. McCrary*, 11 Geo. 603. See further as to the ground of the action, *Knight v. Wilcox*, 18 Barb. 212, and the measure of damages, *McAulay v. Birkhead*, 13 Ired. 28.)

(3) 11 East, 24. And see *Fores v. Wilson*, Peake N. P. C. 54; *Tullidge v. Wade*, 3 Wils. 19; and cases in MS. cited in 2 Selw. N. P. 1001.

(4) *Postlethwaite v. Parkes*, 3 Burr. 1878; *Bennett v. Alcott*, 2 T. R. 167. The relation of servant, for the purpose of this action, may exist, though the daughter is married. *Harper v. Luffkin*, 7 Barn. & Cress. 387.

of service (such as the milking of cows,(1) or making tea for the plaintiff), will enable the plaintiff to maintain this action of trespass for assaulting and debauching his daughter. The daughter's attendance on the parent in sickness is another act, which may be considered an act of service, and amply sufficient for the purposes of such an action. Indeed, if the slightest act of service were not sufficient, the action would necessarily be confined to the lower ranks of life, in which the daughter is literally a servant; and could never be extended to the higher order of society, where the injury is often of a more aggravated kind. However, some evidence of this kind, slight as it may be, will be absolutely necessary; and it seems, on principle, to be equally necessary, whether the daughter is of full age or under age.(2)

A different rule, with respect to the necessity of proving acts of service, has been adopted in the action of trespass for breaking and entering the plaintiff's house, and debauching his daughter. In the case of *Cock v. Wortham*,(3) the Court of King's Bench determined, that where the loss of service is the foundation of the action, as in trespass for *assaulting the servant*, there the loss of service must be proved; but where it is laid only in aggravation of damages, as in an action for breaking and entering the plaintiff's house, there although the loss of service is not proved, yet the plaintiff will be entitled to a verdict, and the damages as well as for the seduction, as for the trespass in entering the house.

Residence with father.

Although the daughter be a minor, yet if she were resident in another person's family at the time of the seduction, without any intention of returning to her father, the action cannot be maintained. And this rule has been applied to a case where the daughter was not receiving wages, and might have returned home if she pleased, and although she actually did return to her father, whilst under age, in consequence of the seduction, and was maintained by him.(4) If, indeed, she was merely absent on a visit, and had an intention of returning, although she were of full age, the action lies;(5) or if it be proved that her absence was contrived by the defendant, who hired her as his servant with a design to seduce her.(6)

(1) *Bennett v. Alcott*, 2 T. R. 168; by Lord Tenterden, Ch. J., *Carr v. Clarke*, 2 Chit. 261; *Manvell v. Thompson*, 2 C. & P. 303.

(2) See *Jones v. Brown*, Peake's C. 235. By Buller, J., *Bennett v. Alcott*, 2 T. R. 168. That the action may be sustained, though the daughter is about twenty-one years of age, see *Bennett v. Alcott*, 2 T. R. 167; *Booth v. Charlton*, 5 East, 47, n.; *Tullidge v. Wade*, 3 Wils. 18; *Dean v. Peel*, 5 East, 45.

(3) 2 Str. 1054. More fully reported from MS. 1 Selw. N. P. 999.

(4) *Dean v. Peel*, 5 East, 45; *Carr v. Clarke*, 2 Chitty, 260.

(See, *contra*, *Mulvehall v. Millward*, 1 Kernan N. Y. R. 343.)

(5) *Johnson v. MacAdam*, 5 East, 47, n.

(6) *Speight v. Oliveira*, 2 Stark. N. P. C. 493.

Proof of the defendant having given the daughter a promise of marriage, before he seduced her, is not admissible.(1)

Proof of promise of marriage not admissible.

The breach of such an engagement may be made the subject of another distinct action; and it is an injury to the daughter, not to the parent.(2) The terms, however, upon which the defendant was allowed to visit the daughter, may be proved; as, that he professed to be her suitor, and was received as such by the family.(3) In the case of *Dodd v. Norris*,(4) where the cross-examination of the daughter was intended to show, that she had surrendered herself to the defendant with extreme indelicacy, and had been guilty of levity of conduct, it was insisted, that a promise of marriage might be proved for the purpose of explaining under what circumstances, and with what prospects, she admitted the familiarity of the defendant; but Lord Ellenborough refused to admit the evidence, and ruled, that the utmost limit to which the re-examination could properly go, would be to inquire, whether the defendant had paid his addresses to her in an honorable way.

Evidence of character.

With respect to evidence admissible on the part of the plaintiff as to the character of the daughter in point of modesty, this will depend upon the manner in which the daughter's character is impeached by the defendant. In the case of *Dodd v. Norris*,(5) where the daughter had been cross-examined as to the supposed indelicacy and grossness of her conduct in submitting herself to the embraces of the defendant, and it was proposed to call witnesses to speak to her general character, with a view of repelling the imputations upon her modesty, Lord Ellenborough ruled that such evidence could not be received, as no evidence of her bad character had been given on the part of the defendant; and that the proper time for explaining her conduct was on the re-examination. In another case,(6) it was held by Lord Ellenborough, that where a specific breach of chastity is proved by the defendant's witnesses (as that the daughter has had a criminal connection with another person before her acquaintance with the defendant), still that evidence of general character is not admissible, and that the plaintiff ought to be restricted to the disproving of the specific

(1) *Tullidge v. Wade*, 3 Wils. 18.

(2) In an action brought by the father for the seduction of his daughter, she cannot be a witness to prove a promise of marriage by the defendant, in aggravation of the damages, for she has her own right of action for the breach of the promise. *Foster v. Scofield*, 1 John. 297.

* * But see authorities cited in the two preceding notes. * *

(3) *Elliott v. Nicklin*, 5 Price, 641.

(4) *Dodd v. Norris*, 3 Campb. 519; *Elliott v. Nicklin*, 5 Price, 641.

(5) 3 Campb. N. P. C. 519.

(6) *Bamfield v. Massey*, 1 Campb. N. P. C. 460.

breach of chastity alleged by the defendant. Such general evidence has, however, been admitted in several cases, where the daughter has been charged with acts of misconduct or prostitution with other persons than the defendant, as where the charge has been conveyed by means of the cross-examination of the daughter, as where witnesses have been called to speak to the facts.(1)

Damages.

The plaintiff, as was before stated, may recover damages beyond the loss of service. Indeed, the loss of service is in most cases merely imaginary; the real injury is the wound to the parent's feelings.(2) The highest legal authorities have declared, that damages may be properly given as a compensation for the loss which the father has sustained, in being deprived of the society and comfort of his child, and from the dishonor which he receives.(3) An inquiry, therefore, into the circumstances of the father's family, the general good conduct of the family, and the number of his children, has been properly allowed. In a case,(4) where such evidence was proposed and objected to, Lord Eldon received the evidence; he said: "In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to his child. In such a case, I am of opinion, the jury may take into their consideration all that he can feel from the nature of the loss. They may look upon him as a parent losing the comfort, as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children whose morals may be corrupted by her example."

The daughter is clearly a competent witness to prove the seduction, and other facts of the case; and it is the constant practice to admit her evi-

(1) As to the admissibility of general evidence of character on the part of the *defendant*, *vide supra*, p. 529.

(2) * * See *ante*, note 1095. * * (The verdicts usually rendered show clearly that the damages are estimated with reference to the real injury inflicted, and not at all with reference to the theoretical principle on which the action is founded. 1 Kern. 343. And it is held that the jury may take into view the wounded feelings of the plaintiff, and not only recompense him, but punish the defendant according to the aggravation of his offence. *Knight v. Wilcox*, 18 Barb. 212; 4 Comst. 38.

The action usually brought for seduction is an action on the case, alleging the debauching of plaintiff's servant; the action being founded on the relation of master and servant, and loss of service the gist of the action.)

(3) So held by Lord Ellenborough in the case of *Southernwood v. Ramsden*, MS. case reported in 2 Selw. N. P. 1001, and by Lord Eldon in *Chambers v. Irwin*, b; by Ch. J. Wilmot, *Tullidge v. Wade*, 3 Wils. 19; *Irwin v. Dearman*, 11 East, 23.

(4) *Bedford v. M'Kowl*, 3 Esp. N. P. C. 119. The plaintiff may recover in damages the amount of a surgeon's bill, though not actually paid; but a physician's fees, if not actually paid, cannot be taken into the account. *Dixon v. Bell*, 1 Stark. N. P. C. 289.

dence.(1) On her cross-examination, she is not compellable to answer the question, whether she has been connected with other men.(2)

The defendant, in mitigation of damages, may show the loose character of the daughter; or that the injury to the plaintiff has resulted from his own or his wife's improper, negligent, and imprudent conduct. Where the plaintiff had permitted the defendant, whom he knew to be a married man, to visit his daughter as a suitor, Lord Kenyon held, that an action for seduction could not be maintained.(3)

CHAPTER XV.

OF THE EVIDENCE IN AN ACTION OF TROVER.

THE action of trover is a special action on the case, to recover the value of personal goods, which the defendant has wrongfully converted to his own use. And the declaration, in its general form (where the plaintiff does not sue in a particular character, as executor, or assignee of a bankrupt, &c.), states shortly, that the plaintiff was lawfully possessed of the goods in question, as of his proper goods and chattels, and that being so possessed he lost them, and that afterwards they came into the hands and possession of the defendant, who converted them to his own use.

Property in goods.

Where the right to the goods, the subject of the action, is disputed, the plaintiff will have to prove his property in them.(4) And he must show that they belonged to him at the time of the conversion by the defendant.(5) The property of the plaintiff in the goods may be either abso-

(1) *Cock v. Wortham*, 2 Str. 1064. See *Farmer v. Joseph*, Holt's N. P. C. 451, where it was held, that the evidence of the daughter was not indispensably necessary.

(2) *Dodd v. Norris*, 3 Campb. N. P. C. 519.

(3) *Raddie v. Schoolt*, Peake's N. P. C. 240.

(4) *NOTE* 1096.—*Higgin v. Mortimer*, 6 Car. & Payne, 616.

Where a toll of corn has been customarily taken, by dipping into the sack so as to bring out a certain quantity, and the collector varied from the proper mode (by *sweeping* instead of *lifting* the toll), so as to take more; held, that trover lay against him for the excess. *Norman v. Bell*, 2 Ad. & El. 188.

(The plaintiff must show title to the property, where it is not admitted, at the commencement of the suit (*Clapp v. Glidden*, 39 Maine, 448); and it must appear that he has a present right to the property. *Clark v. Draper*, 19 N. Hamp. 419; *Ashmead v. Kellogg*, 23 Conn. 70; *Heine v. Anderson*, 2 Duer R. 318.)

(5) *Horwood v. Smith* (2 T. R. 750), where the purchaser of stolen goods, in market overt, was held not liable in trover, having sold them again before the conviction of the felon. And see *Phillips v. Robinson*, 4 Bing. 106.

* * On the subject of this action, generally, see 3 Steph. N. P. 2660 to 2716; 2 Gr. Ev. §§ 636-649. * * (See also *Green v. Clarke*, 2 Kern. N. Y. R. 343.)

lute,(1) or special(2) (such as a carrier has, or a consignee or factor, or a sheriff taking goods in execution). A right of property is sufficient to enable a party to maintain this action, though he has never had possession.(3) And the mere possession of a chattel confers a title on the possessor against wrongdoers.(4) In every case, it is necessary for the plaintiff to prove, either that he was in actual possession of the goods which have been converted, or that he was entitled to the immediate possession of them.(5)

Vesting of property.

Numerous questions having arisen respecting the manner in which the ownership of goods may be transferred, so as to create such a vested right of property in them as will be sufficient to maintain the action of trover, it is proposed to give a few examples of very frequent occurrence. In contracts for the sale of goods, where nothing is stipulated as to the time of delivery, or time of payment, and all that the seller has to do with them is complete, the property in the goods vests in the buyer immediately, subject only to the seller's lien for the price. If the goods are sold upon credit, and nothing is agreed upon as to the time of delivery, the buyer is immediately entitled to the possession, and the right of possession and right of property vest at once in him.(6) Trover cannot be maintained

(1) 2 Saund. 47 b, n.

(2) Bull. N. P. 33; Bro. Ab. Tresp. 67; Morrison v. Gray, 2 Bing. 260; Waring v. Cox, 1 Campb. C. 369; Sargent v. Morris, 3 Barn. & Ald. 376. And see Roberts v. Wyatt, 2 Taunt. 268. It has been held, that a landlord, who distrains goods, has not such a property in him as will enable him to maintain trover. Moneux v. Goreham, Selw. N. P. 1303; R. v. Cotton, Parker, 121.

(3) 2 Saund. 47 a, n.; Hudson v. Hudson, Latch. 214; Biddulph v. Arthur, 2 Wils. 23; Bull. N. P. 35; by Eyre, Ch. J., Fowler v. Down, 1 Bos. & Pull. 47.

(4) Sutton v. Buck, 2 Taunt. 302; Armorie v. Delamire, 1 Str. 505, the well known case of The Chimney Sweeper's Boy. And see Barton v. Hughes, 2 Bing. 173. It has been held in one case, that, after offering written evidence, the plaintiff cannot recur to his possessory title. Sheriff v. Cadell, 2 Esp. C. 616.

In trover, actual possession, coupled with acts of ownership, seems sufficient *prima facie* evidence of title. Jones v. Sinclair, 2 N. H. R. 319, and cases cited. Evidence of actual possession, or the right to actual possession at the time of the conversion, is sufficient. *Id.*

(Where the general owner brings an action against a bailee, he must prove a conversion which ends the contract of bailment. Harvey v. Epes, 12 Gratt. 163; Woodman v. Hubbard, 5 Foster. 67; Stewart v. Spedden, 5 Md. 433. See Morgan v. Ide, 8 Cush. 420.)

(5) Gordon v. Harper, 7 T. R. 9; Pain v. Witaker, 1 Ry. & Mo. 99; Smith v. Plomer, 15 East. 607; Farrant v. Thompson, 5 B. & Ald. 826; Channon v. Patch, 5 B. & C. 897. In Loeschman v. Machin (2 Stark. N. P. C. 311), it was held, that where the hirer of a chattel sells it, the lender may bring trover against a *bona fide* vendee. And see Wilkinson v. King, 2 Campb. C. 335.

* * See *post*, note 1100. * *

(6) By Bailey, J., in Bloxam v. Sanders, 4 B. & C. 948; Tarling v. Baxter, 6 Id. 360. See Hinde v. Whitehouse, 7 East, 571; Phillimore v. Barry, 1 Campb. C. 513. The property will be revested in the seller, by rescinding the contract. Pattison v. Robinson, 5 Maule & Sel. 105; Salte v. Field, 5 T. R. 211.

for goods contracted to be sold, before their individuality, quantity, and price is ascertained ;(1) or whilst anything remains to be done to the commodity by the seller.(2) When goods are to be delivered at a distance from the seller, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off.(3)

Stoppage in transitu.

The vendee's right of possession is liable to be defeated, before the actual or constructive delivery of the goods, in case of his insolvency, if the vendor stop them *in transitu*.(4) A constructive delivery, sufficient to defeat the vendor's right in this respect, may be effected by means of the transfer of a bill of lading ;(5) or, as it seems, of a dock warrant ;(6) or of a delivery note directed to a wharfinger, if received by him ;(7) and, in some cases, by the receipt of a warehouse rent by the vendor.(8)

With respect to the transfer of the property in bank notes and negotiable securities payable to the bearer, the general rule is, that the delivery of them vests in the transferee a right to them, without regard to the title of the person transferring them.(9) It is, however, incumbent on the re-

(1) *Austen v. Craven*, 4 Taunt. 644; *White v. Wilks*, 5 Id. 176; *Busk v. Davis*, 2 Maule & Sel. 397; *Wallace v. Breeds*, 13 East, 522. See *Whitehouse v. Frost*, 12 Id. 614.

(2) *Hanson v. Meyer*, 6 East, 614; *Shipley v. Davis*, 5 Taunt. 617; *Simmons v. Swift*, 5 B. & C. 857; *Withers v. Lyss*, 4 Campb. C. 237; *Ward v. Shaw*, 7 Wend. 404.

(3) By *Holroyd, J.*, *Fragano v. Long*, 4 B. & C. 223. See *Alexander v. Garder*, 1 Bing. N. C. 671.

(4) NOTE 1097.—* * On the right of vendor to stop the goods, *in transitu*, see the learned notes to the leading cases of *Lickbarrow v. Mason*, 1 Sm. L. C. p. 388, *et seq.*; *Chitty on Contr.* (7th ed.) 432—437, and notes. * *

(5) *Lickbarrow v. Mason*, 2 T. R. 63; *Cuming v. Brown*, 9 East, 506; *Solomons v. Nissens*, 2 T. R. 674. (See also *Simmons v. Anderson*, 7 Rich. S. C. 67.)

(6) *Lucas v. Dorrien*, 7 Taunt. 278; *Zwinger v. Samuda*, 7 Taunt. 265; *Keyser v. Suse*, 1 Gow, 58; *Spear v. Travers*, 4 Campb. N. P. C. 251.

(7) *Harman v. Anderson*, 2 Campb. C. 243; *Hammond v. Anderson*, 1 N. R. 69; *Holt v. Griffin*, 10 Bing. 246.

(8) *Hurry v. Maagles*, 1 Campb. C. 452. See *Greeves v. Hepke*, 3 B. & Ald. 131; *Phillimore v. Barnes*, 1 Campb. C. 513. As to the distinction between a delivery to an agent of the vendee, and a middleman, see *Coates v. Railton*, 6 B. & C. 422; *Dixon v. Baldwin*, 5 East, 175; *Scott v. Pettet*, 3 B. & P. 369. As to the effect of a part delivery, see *Crawshay v. Eades*, 1 B. & C. 181; *Slubey v. Hayward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 N. R. 69. As to the point, whether the *transitus* is at an end, see *Tucker v. Humphrey*, 4 Bing. 516; *Bartram v. Farebrother*, Id. 579. A delivery which will satisfy the Statute of Frauds, vest the property in the vendee in the absence of insolvency, or defeat the right of stoppage *in transitu*, is to be considered, in each case, upon different principles.

(9) By *Holroyd, J.*, in *Wookey v. Pole*, 4 B. & Ald. 9; *Miller v. Race*, 1 Burr. 452, case of a bank note; *Grant v. Vaughan*, 3 Id. 1516, case of a draft on a banker; *Peacock v. Rhodes*, Doug. 636, case of a bill of exchange indorsed in blank; *Wookey v. Pole*, 4 B. & Ald. 9, case of an exchequer bill; *Gorgier v. Mieville*, 3 B. & C. 45, case of a Russian bond.

NOTE 1098.—A promissory note, payable to the bearer, made in England, is by the statute of 3 and 4 Anne, c. 9, transferable by delivery in a foreign country. *De La Chaumette v. The Bank of England*, 2 Barn. & Adol. 385.

ceiver of a negotiable instrument which has been lost, to show that he has given a valuable consideration for it, and has taken it *bona fide*, in the usual course of business, and with due caution.(1) If he has taken it under circumstances which ought to have excited the suspicion of a prudent man, he cannot retain it.(2) The loser must, on his part, prove that he used due diligence in apprising the public of his loss.(3) It is not necessary for him to prove the mode in which he lost the possession of the instrument.(4)

Chattel in progress.

Where a chattel is to be manufactured upon a special contract, by the terms of which given portions of the price are to be paid according to the progress of the work, it seems that the payment of the installments vests the property of the chattel so in progress in the purchaser.(5) A verbal gift of a chattel, without actual delivery, does not pass the property, at least as against the donor.(6) And the property is not changed by a sale, where goods have been obtained through the means of a deliberate fraud, without any intention of paying for them.(7) Where the full value of an

(1) * * See the cases, *supra*, in these notes, relating to lost bills, &c.; 1 Am. Lead. Cas. 158—182, *passim*. * *

(Where the maker of a note hands it to the defendant to get the money on it, and the latter misapplies it, the action of trover may be maintained against him for the note. *Murray v. Burling*, 10 John. R. 172. So where a draft belongs to the acceptor, and the drawer having it in his possession transfers it to the defendant with notice, the acceptor may maintain the action of trover for the draft. *Evans v. Kymer*, 1 Barn. & Adol. 528. See also *Buck v. Kent*, 3 Vt. R. 99. So where a promissory note is wrongfully negotiated, before its legal inception, the maker may maintain the action of trover against the person so misappropriating or converting it to his own use, without showing that he has paid the note. *Decker v. Mathews*, 2 Kernan (N. Y.) Rep. 313.

Plaintiff in all such cases must show title to the instrument. *Herring v. Tilghman*, 13 Fred. 392; *Killian v. Carrol*, Id. 431. The action does not lie for conversion of a note after it has been paid. *Lawmore v. Berry*, 19 Ala. 130.)

(2) *Gill v. Cubitt*, 3 B. & C. 477; *Egan v. Threlfall*, 5 Dow. & Ry. 326, n.; *Down v. Halling*, 4 B. & C. 330; *Snow v. Peacock*, 3 Bing. 406; *Beckwith v. Corral*, Id. 444; *Snow v. Leatham*, 2 C. & P. 314.

(3) *Beckwith v. Corral*, 3 Bing. 444; *Snow v. Peacock*, Id. 406.

(4) *Down v. Halling*, 4 B. & C. 330. As to what may be presumptive evidence of particular notes having belonged to the plaintiff, see *Greenstreet v. Carr*, 1 Campb. N. P. C. 551.

(5) By Lord Tenterden, Ch. J., in *Woods v. Russell*, 5 Barn. & Ald. 946. A certificate had likewise been signed, to enable the purchaser to have the ship registered in his name. The rule in the text does not hold, where the advances are not expressly stipulated for, and regulated by the progress of the work. See *Muckiow v. Mangles*, 1 Taunt. 318; *Bishop v. Crawshaw*, 3 Barn. & Cress. 416; *Goode v. Langley*, 7 Barn. & Cress. 26.

(The delivery of the manufactured or furnished article transfers the title. *Andrews v. Durant*, 1 Kernan (N. Y.) R. 35.)

(6) *Irons v. Smallpiece*, 2 B. & A. 551. See *Bro. Ab. Trespass*, 303; *Hudson v. Hudson*, Latch. 214; 2 Saund. 47 a, n.; *Bunn v. Markham*, 7 Taunt. 226.

(7) By Gibbs, Ch. J., *Noble v. Adams*, 7 Taunt. 60. See *Taylor v. Plumer*, 3 Maule & Selw. 562; *Hawse v. Crowe*, 1 Ry. & Mo. 414; *Gladstone v. Hadwen*, 1 Maule & Selw. 517; *Earl of*

article has been recovered, in trover, the property is changed by judgment and satisfaction of the damages; but, where small damages are given, on the ground that an action may be maintained against other parties, the judgment and execution do not alter that property.(1) The property in goods does not pass by an award.(2)

If the possession of the goods, or right of possession is not proved as stated in the declaration, the plaintiff will fail; as where the plaintiff sued as assignee of two partners, and the declaration stated that the partners were possessed of the goods, but it appeared that some of the goods had belonged exclusively to one of the partners, Lord Kenyon held, that, with respect to these goods, the plaintiff could not recover.(3) A plaintiff may declare on his own possession, and prove his title as assignee of a bankrupt, or as executor.(4) And the non-joinder of other parties as plaintiffs, is only material as affects the damages, unless it be taken advantage of by plea in abatement.(5)

Trover for written document.

In an action for a bond, or other document in writing, the description of the bond, as proved, must correspond with that in the declaration in point of date, sum, and other particulars; though a very general description on the record will suffice.(6) The plaintiff in this action will be allowed to give parol evidence of the contents of the document, to support the general description in the declaration, without having given a previous notice to the defendant to produce the original; because, from the nature of the suit, the defendant must know that he is charged with the possession of the instrument.(7)

Bristol v. Wilmore, 1 Barn. & C. 514; Kilby v. Wilson, 1 Ry. & Mo. 178; Rapp v. Latham, 2 Barn. & Ald. 795; Parker v. Gillies, 2 Campb. 336, n. Goods are not bound by a sale without authority, unless a market overt. Wilkinson v. King, 2 Campb. C. 335; Loeschman v. Machin, 2 Stark. N. P. C. 311. A sheriff's sale vests the property, though the judgment is erroneous (Manning's Case, 8 Co.), provided the goods of the proper person have been seized. Farrant v. Thompson, 3 Stark. N. P. C. 130. * * See Chitty on Contr. (7th ed.) 406—417, and notes. * *

(1) By Holroyd, J., Morris v. Robinson, 3 Barn. & Cress. 206. See Knight v. Legh, 4 Bing. 589.

(2) Hunter v. Rice, 15 East, 100. As to the vesting of goods in executors and administrators, *vide infra*, "Action by executor." Wooley v. Clark, 5 Barn. & Ald. 746; Com. Dig. Administrator, B, 10; Shaw v. Harvey, 1 Ad. & El. 920.

(3) Cock v. Tunno, Selw. N. P. C. 1316.

(4) Bull. N. P. 37. See Bernasconi v. Farebrother, 7 Barn. & Cress. 379.

(5) Bloxham v. Hubbard, 5 East, 407; Addison v. Overend, 6 T. R. 766; Sedgeworth v. Overend, 7 T. R. 279. See Nathan v. Buckland, 2 B. M. 153.

Two persons jointly interested in a chattel, having made a joint demand of it, may, notwithstanding, maintain separate actions of trover in respect of it against a person who unjustly detains it. Bleaden v. Hancock, 4 Car. & Payne, 152. The damages may be severed. (See M'Crillis v. Hawes, 38 Maine R. 566.)

(6) Wilson v. Chambers, Cro. Car. 262; 3 Bos. & Pull. 145, 146.

(7) How v. Hall, 14 East, 274; by Bayley, J., Colling v. Treweek, 6 Barn. & Cress. 394.

Conversion, what amounts to.

The plaintiff is also to prove a wrongful conversion of the goods by the defendant, this being the main bearing of the action. And if it appear from the evidence that the defendant wrongfully took the plaintiff's goods, it is an actual conversion, and no request to re-deliver them need be proved.(1) The disposing of another person's property is a conversion of it, for which the defendant is liable in an action of trover, though he acted under unavoidable ignorance, and not for his own benefit.(2) A conversion, though alleged to be to the defendant's use, may be proved by showing that the defendant destroyed the property.(3) If a conversion has once taken place, it cannot be cured.(4)

A conversion is a positive tortious act, and it is not sufficient for the plaintiff to prove mere negligence.(5) An accidental loss of goods by a carrier is not a conversion.(6) Though the destruction of a chattel by a tenant in common will amount to a conversion of it, yet, if it is merely altered, so as to be applied to its general and profitable use, and the plaintiff is not prevented from taking and using it in its altered state, there will not be a sufficient conversion to maintain the action of trover.(7) Where a partner, when solvent, had sold the partnership effects, it was held that

(1) *Bruen v. Roe*, 1 Sid. 264. And see *Summerset v. Jarvis*, 3 Bro. & Bing. 2, action by bankrupt against his assignees.

(The wrongful taking of personal property is a conversion, the property being retained. *Pharis v. Carver*, 13 B. Mon. 236. But where the property comes fairly into a person's possession, the owner must demand it or show some act of the bailee or party in possession that amounts to a conversion of the property. *Harvey v. Eppes*, 12 Gratt. Rep. 153; *Woodman v. Hubbard*, 5 Foster, 67.)

(2) *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwall*, 4 Maule & Selw. 259; *Parker v. Goding*, 2 Str. 813; *Baldwin v. Cole*, 6 Mod. 212; 5 Barn. & Ald. 249, cases of conversion by servants; *Devereux v. Barclay*, 2 Barn. & Ald. 702, case of a misdelivery by mistake. The using of goods without the owner's license (*Bull. N. P.* 46; *Lord Petrie v. Henage*, 12 Mod. 120), or dealing with them contrary to his orders (*Syeds v. Hay*, 4 T. R. 260), are clearly acts of conversion. The delivery of the bill of lading of goods and receiving the value, is a conversion. *Jackson v. Anderson*, 4 Taunt. 24.

(3) By Lord Tenterden, *Keyworth v. Hill*, 3 Barn. & Ald. 658.

(4) *Countess of Rutland's Case*, 1 Roll. Ab. 5 L, pl. 1; *Wyatt v. Blades*, 3 Campb. N. P. C. 396. The redelivery of the property will go on only in mitigation of damages.

(5) *Bromley v. Oxwell*, 2 B. & P. 438.

(6) *Ross v. Johnson*, 5 Burr. 2825; 6 Hill R. 588; 4 Bing. 476.

(7) *Fennings v. Lord Grenville*, 1 Taunt. 241, trover for a whale. And see respecting conversion by tenant in common. *Bernardiston v. Chapman*, Bull. N. P. 34; *Heath v. Hubbard*, 4 East, 110; *Barton v. Williams*, 5 Barn. & Ald. 395; *Smith v. Burridge*, 4 Taunt. 684; *Holliday v. Camsell*, 1 T. R. 658. In *Jackson v. Anderson* (4 Taunt. 24), an action of trover was sustained for dollars, where the defendant had disposed of the dollars belonging partly to the plaintiff and partly to himself, though the property had never been severed.

(Where two persons put their wheat into a common bin, and one of them afterwards sells the whole, he is liable in an action of trover for the wheat so sold belonging to his co-tenant. The voluntary mingling of the wheat makes the parties tenants in common, and the disposal of the entire mass by one of the co-tenants subjects him to an action of trover. *Nowlen v. Colt*, 6 Hill R. 461.)

the detention by the vendee of the property sold, would not render him liable, as for a conversion of it, to the assignees of that partner (who subsequently failed), and of the partner who was a bankrupt at the time of the sale.(1)

Demand and refusal. When necessary.

Where the goods, the subject of the action, have come into the possession of the defendant by the delivery of the plaintiff, or of a third person, or by finding, it is necessary, at least where the defendant merely detains them, to prove that he has refused to deliver them up, upon a demand being made by the plaintiff.(2) Thus, where trover was brought by the assignees of a bankrupt for goods collusively sold by the bankrupt, on the eve of his bankruptcy, it was held to be a case within this rule, and that a demand and refusal must be proved.(3) It seems, however, that a demand and refusal are not necessary, where the defendant receives the property in question from a third person, after notice of the plaintiff's title; or where he disposes of it in any way;(4) or where the plaintiff delivers it upon compulsion.(5) And where goods that have been found, are made use of, or are misused, it seems that the conversion is complete without any demand being made.(6) Although the plaintiff has himself delivered the property to the defendant, yet the subsequent misuser of it will be an actual conversion; as where a box is delivered to a carrier, and he breaks it open;(7) or where goods given to him to carry are misdelivered.(8)

(1) *Fox v. Hambury*, Cowp. 445.

(2) 1 Sid. 264; *Bruen v. Roe*, Bull. N. P. 44. See *Baldwin v. Cole*, 6 Mod. 212; *M'Combie v. Davis*, 6 East, 538; *Hoare v. Parker*, 2 T. R. 376; by *Bailey, J.*, *Bishop v. Shillito*, 2 Barn. & Ald. 329; and notes to *Wilbraham v. Snow*, 2 Will. Saund. 47.

NOTE 1099.—* * In *Mount v. Herick* (5 Hill, 455), trover was held not to be maintainable against a servant, upon his refusal to deliver; and that where a demand was necessary, such a refusal, by his servant, would not charge the master. And see *Mitchell v. Williams*, 4 Hill, 13, and *Holbrook v. Wight*, 24 Wend. 169, as to proof of a joint conversion, where the suit is against several. * * (See also *Ingalls v. Bulkley*, 15 Ill. 224.)

(3) *Nixon v. Jenkins*, 2 H. Bl. 135; 5 East, 407. *Secus*, where goods are in the disposition of the bankrupt at the time of the bankruptcy. *Soames v. Watts*, 1 C. & P. 400. See *Stewart v. Spedden*, 5 Md. 433.

(4) See *Lovell v. Martin*, 4 Taunt. 799; *Truettal v. Barandon*, 1 B. Moore, 543; *Bloxham v. Hubbard*, 5 East, 407. In *Featherstonaugh v. Johnson* (8 Taunt. 238), the defendant was held liable as for conversion, where he had sold goods consigned to him, in ignorance of the real owner's title. See *Stiernhold v. Holden*, 4 Barn. & Cress. 5.

(5) *Summersett v. Jarvis*, 3 Bro. & Bing. 2.

(6) *Mulgrave v. Ogden*, Cro. Eliz. 219; *Fordsdick v. Collins*, 1 Stark. 173. See *Samuel v. Morris*, 6 Car. & Payne, 620.

(7) 2 Salk. 655. See *Richardson v. Atkinson*, 1 Str. 576. See *Syeds v. Hay*, 4 T. R. 460.

(8) *Stephenson v. Hart*, 4 Bing. 476; *Devereux v. Barday*, 2 Barn. & Ald. 702; *Youl v. Harbottle*, Peake's N. P. C. 68. It seems, that a false assertion of a carrier respecting the delivery of property is not evidence of a conversion. *Attorsol v. Briant*, 1 Campb. N. P. C. 409.

A demand and refusal is only evidence of a conversion ;(1) before it is entitled to any weight whatever, it must be proved that the party making the refusal had it in his power to deliver up the article demanded.(2) And a mere qualified refusal, if the grounds for not delivering the property are reasonable, will not amount to a conversion ; as where the party making the refusal is ignorant who is the real owner of the property, and requires to be satisfied respecting the ownership ;(3) or where a servant has received the custody of property from his master, and requires that his master be applied to, before he delivers it up.(4) But where the defendant is proved to be in possession of the plaintiff's goods, and on their being demanded, gives an unqualified refusal, he will be guilty of a tortious conversion, unless he can establish an adverse right to the immediate possession.(5) And the refusal of the defendant may be evidence of a conversion at an antecedent period ; as where deeds were in the possession of the defendant prior to *Michaelmas* term, and the demand and refusal were proved to have been made on the day after that term, the court held it to be evidence of a conversion before the commencement of the term.(6)

How proved.

A written demand of goods, left at the defendant's house, is sufficient, and it is not necessary to make a personal demand.(7) And a demand of payment is a good demand to support the action.(8) If the demand is in writing, and a verbal demand is made at the same time, having no reference to the writing, either may be proved as evidence of the conversion.(9) The mere non-compliance with a demand, may, in particular cases, be equivalent to an express refusal.(10) It is not, in most cases, sufficient to prove a refusal made by the general agent of the defendant ; it

(1) Chancellor of Oxford's Case, 10 Rep. 566; Mires v. Solebay, 2 Mod. 244; Bull. N. P. 44.

(2) Smith v. Young, 1 Campb. N. P. C. 440.

(3) Green v. Dunn, 3 Campb. N. P. C. 215, n. And see Solomons v. Dawes, 1 Esp. N. P. C. 81, where satisfaction was required respecting the authority of the agent demanding the property; Pattinson v. Robinson, 5 Maule & Selw. 105; Gunston v. Nurse, 2 Bro. & Bing. 449; Everest v. Wood, 1 C. & P. 75; 2 Bulst. 312; 2 Bos. & Pull. 464; Bull. N. P. 46; Weymouth v. Boyer, 1 Ves. jun. 424. It is not sufficient to prove mere evasive excuses. Severin v. Keppel, 4 Esp. N. P. C. 157.

* * See the cases cited *ante*, note 1099. * *

(4) Alexander v. Southey, 5 Barn. & Ald. 247; Mires v. Solebay, 2 Mod. 244.

(5) See Dewell v. Moxon, 1 Taunt. 391, where the possession was obtained by means of a contract with the plaintiff. Baldwin v. Cole, 6 Mod. 212; M'Combie v. Davis, 6 East, 538. *Vide infra* p. 543.

(6) Wilton v. Girdlestone, 5 Barn. & Ald. 847. In Morris v. Pugh (3 Burr. 1243), Lord Mansfield, C. J., said, that under the circumstances of that case, if the refusal had been after the action brought, it should have been left as evidence of a conversion before the bringing of the action.

(7) Logan v. Houlditch, 1 Esp. N. P. C. 22.

(8) Thompson v. Shirley, 1 Esp. N. P. C. 31. A demand of fixtures will not be a sufficient demand of household articles, not properly fixtures. Colegrave v. Dias Santos, 2 B. & C. 76.

(9) Smith v. Young, 1 Campb. N. P. C. 440.

(10) Watkins v. Wooley, 1 Gow. N. P. C. 69.

must be shown that, in the particular fact of the refusal, he acted under the defendant's special direction.(1)

Parties to conversion.

An action of trover may be brought against any persons who were parties to the conversion. Thus, if a person sues out an execution against a bankrupt, and the sheriff sells the goods in the possession of the bankrupt, the assignees may bring trover against the sheriff; and also against the person suing out the execution, if he can be proved to have been a party to the conversion; as if he has given a bond to secure the sheriff, or has received the money levied.(2) An allegation of a joint conversion by husband and wife, may be proved by showing that the plaintiff was deprived of his property through their means; it is not essential to the proof of the conversion, that any joint benefit should have arisen to the defendants.(3) And it seems, that proof of a conversion by the husband alone, would entitle the plaintiff to a verdict against him, though the evidence failed as to the wife.(4) Where trover is brought against a corporation, it does not seem necessary to show that the conversion was authorized by an instrument under seal.(5) In an action against several defendants, it is necessary to show a joint act of conversion, in order to entitle the plaintiff to a verdict against all; and although in general, an assent to a conversion for the benefit of a party will make him a wrongdoer, yet in order to have this effect, he must be shown to have been in a situation to have originally commanded the conversion.(6)

Proof a conversion before the bill filed, though after the writ of *latitat* returned, will support the action.(7) If the defendant insists, that the action was commenced before the cause of action accrued, and with this

(1) *Pothonier v. Dawson*, Holt's N. P. C. 384; *Everest v. Wood*, 1 C. & P. 75. In *Jones v. Hart* (2 Salk. 441), it was held, that the refusal to re-deliver goods pawned, by a pawnbroker's servant, was evidence of a conversion, against the master. See *Saunderson v. Baker*, 3 Wils. 309. *Vide supra*.

(2) 2 Will. Saund. 471, n.; *Rush v. Baker*, 2 Str. 996; Bull. N. P. 41. The sheriff is liable, though he seized without notice of the bankruptcy, and paid over the money before the issuing of the commission. 4 Maule & Selw. 260; *Price v. Helyar*, 4 Bing. 597.

(3) *Keyworth v. Hill*, 3 Barn. & Ald. 685, when the conversion was laid, as being "to their own use."

(4) 2 Will. Saund. 47, n.

(5) *Yarborough v. Bank of England*, 16 East, 6; *Duncan v. Proprietors of the Surrey Canal*, 3 Stark. N. P. C. 50.

* * That the appointment of an agent, and a *fortiori*, the nature and scope of the agent's authority, may be implied from the adoption or recognition of his acts by a corporation, "is now the settled doctrine, at least in America," Story on Agency, p. 33. And see 2 Kent C. 614, (6th ed.) and notes; and Angell & Ames on Corp. 256-321.

(6) *Nicoll v. Glennie*, 1 Maule & Selw. 588. Trover against bankrupts together with their assignees.

(7) *Foster v. Bonner*, (action for trespass,) Cowp. 454; *Best v. Wilding*, 7 T. R. 5. (Action for use and occupation.)

view refers to the Nisi Prius roll, which shows that the bill was filed of a term generally without any special memorandum, so that it refers to the first day of that term, whereas the conversion was on a subsequent day; the plaintiff, in answer to this, may produce the writ, and if that appears to have been sued out after the time of the conversion, the objection is at an end.(1) Or, even if there is a special memorandum of the filing of the bill, it may be shown that the bill was actually filed on a subsequent day.(2)

Damages.

In an action of trover for a written security, the damages are usually estimated according to the amount of the sum secured. On a bill of exchange, the damages are usually calculated according to the amount of the principal and interest due upon the bill at the time of the conversion.(3) The value of the property, however, at the time of the conversion, is not necessarily the measure of the damages to be found by the jury; they may find, as damages, the value at a subsequent time, at their discretion.(4) Where an action of trover was brought for a policy, which was invalid, but upon which an insurance office had gratuitously paid the amount insured, it was held, that the plaintiff could not recover more than the value of the parchment.(5) A part owner, who sues alone, is only entitled to recover the value of his share in the property for which the action is brought.(6) Though the defendant produce the goods in court, he cannot compel the plaintiff to accept them, together with the costs incurred by him, as the action is for damages.(7)

Defence.

The defendant, under the general issue of not guilty, will be at liberty to prove his title to the property in question; for, if the property belonged to him, he cannot be charged with a wrongful conversion. Or he may disprove the plaintiff's title, by showing that the property belongs to other persons; and this, although he received his possession from the plaintiff.(8) And he may prove facts which amount to a

(1) *Morris v. Pugh*, 3 Burr. 1242.

(2) *Wilton v. Girdlestone*, 5 Barn. & Ald. 847.

(3) *Mercer v. Jones*, 3 Campb. N. P. C. 477. See *Greening v. Wilkinson*, 1 C. & P. 625. See *Decker v. Mathews*, 2 Kern. 313.

(4) *Greening v. Wilkinson*, 1 C. & P. 625.

(5) *Wills v. Wells*, 2 B. Moore, 247.

(6) *Addison v. Overend*, 6 T. R. 766; *Nelthorpe v. Dorrington*, 2 Lev. 113; *McCribbs v. Hawes*, 38 Maine, 566.

(7) See *Watts v. Phipps*, Bull. N. P. 49; *Olivant v. Berino*, 1 Wils. 23; *Whittow v. Fuller*, 2 W. Bl. 902; *Mackinson v. Rawlinson*, 9 Price, 460; *Combe v. Sanson*, 1 D. & R. 201.

The return of the property can be shown in mitigation of damages only. *Conrah v. Hale*, 23 Wend. 462. See *Otis v. Jones*, 21 Id. 394.)

(8) *Laclough v. Towle*, 3 Esp. 114; *Philips v. Robison*, 4 Bing. 109, where plaintiff's title

license;(1) or that the conversion complained of was done, by authority of law, in distraining for rent, though the proceedings may have been irregular.(2) He may likewise prove that the property in question was affixed to the freehold.(3) And it seems that he may show that the plaintiff has discharged other parties to the conversion.(4)

In answer to the proof of a demand and refusal, the defendant may show that he had a right to detain the property under a claim of lien.(5) The right of a general lien—that is, of a lien for a general balance—is founded on a contract between the parties, either expressed or implied. Such a lien may be established by evidence of an express contract between the parties, in the particular instance; or a contract may be collected from the usual course of dealing between the parties, for where

had expired. And see *Nathan v. Buckland*, 2 B. Moore, 153. It seems that it is not sufficient to show, from loose expressions of the plaintiff, that he has been discharged under an insolvent act, subsequently to the conversion; the proceedings ought to be produced. *Summersett v. Adamson*, 1 Bing. 75.

(1) *Clarke v. Clarke*, 6 Esp. C. 61; *Bond v. Astock*, 2 Bulstr. 280, cases of urgent necessity, amounting to a license in law.

(2) *Wallace v. King*, 1 H. Bl. 13. See *Shipwick v. Blanchard*, 6 T. R. 298, case of a wrongful distress.

(3) *Lee v. Ridsen*, 7 Taunt. 188.

(4) *Dufresne v. Hutchinson*, 3 Taunt. 117.

(5) NOTE 1100.—* * As to parties who may detain by virtue of a lien, and the circumstances under which it may be lost, see Chitty on Contr. (7th ed.) tit. *Lien*; Addison on Contr. same title; Smith's Merc. Law, pp. 457–464; Stephens' N. P. titles Carrier, Factor, Wharfinger; 1 Sm. L. Cases, 431, *et seq.* in the notes to *Lickbarrow v. Mason*. And see the following recent decisions, illustrating various points of the general subject. A vendor of land, who has conveyed the legal estate to the vendee, cannot retain the title deeds for the unpaid purchase money. *Goode v. Burton*, 1 Welsby, Hurlstone & Gordon, 187. A cow was put to pasture under an agreement that she should be security for her keep. Plaintiff removed the cow without paying the debt, and defendant seized her in the high road. The agreement was held to be a good defence on action of trespass, under a plea that the cow was not the plaintiff's. *Richards v. Symons*, 8 Adolph. & El. (55 Com. L.) R. 90. But one who merely provided food for animals, *e. g.* an *agister* or a livery stable keeper, has not a lien for the keep of the animals except by special agreement. Per *Bronson, J.*, in *Grinnell v. Cook*, 3 Hill, 485. See the same case for a learned discussion respecting the lien of innkeepers; also *Peet v. McGraw*, 25 Wend. 653. If the possession of goods have been obtained of a common carrier, upon the fraudulent promise of the consignee to pay the freight as soon as they are delivered, the lien is not gone, and replevin may be maintained against the consignee. *Bigelow v. Heaton*, 6 Hill, 43; S. C., 4 Denio, 496. And see *Angell on Carriers*, tit. *Lien*. A lien on property found exists only where a reward for it has been promised. *Wentworth v. Day*, 3 Metc. 352. And a lien for salvage can only be acquired as a reward for hazards incurred in rescuing property from the perils of storms upon the ocean, and does not exist in respect of goods wrecked upon a navigable river, at a great distance from the main sea, although within the ebb and flow of the tide. *Baker v. Hoag*, 3 Barb. S. C. R. 203; *Cross on Lien*, 25. As to the lien of mechanics, see *Grogory v. Stryker*, 2 Denio, 628; *Pierce v. Schenck*, 3 Hill, 28; *Grinnell v. Cook*, Id. 491; *Cross' Law of Lien*, chapter 21; *Story on Bail* (3d. ed.) §§ 421, 422 a; 2 Kent C. 588; 1 Cowen's Tr. (2d ed.) 289. And on the subject, generally, see Kent C. (6th ed.) tit. *Lien*. See, also, 1 Am. L. Cases, 492–497, as to the lien of factors, under the English and New York statutes; Id. 542–544, as to such lien at common law and by virtue of commercial usages. * *

there is evidence of prior dealings upon the footing of such an extended lien, the jury may reasonably presume that they continued to deal upon the same terms.(1) Or a particular contract may be implied from the fact of the plaintiff having previously received a formal notice that the defendant would not deal with any one, unless under the express condition of a general lien;(2) here the terms, on which the defendant insists, must be traced distinctly to the knowledge of the other party;(3) the proof of an advertisement to this effect in a public paper, without proof of its being seen by the plaintiff, will not be sufficient.(4)

Usage of trade.

A contract for a general lien may be inferred also from the general dealings of other persons engaged in the same employment; with respect to which, it may be observed that the dealings must be so general, so long established, and of such notoriety, that they may be presumed to have been known to the one party at the time of his dealing with the other; whence the inference is to be drawn, that these parties dealt upon the same footing as all others with reference to the known usage of the trade.(5) The proof of the general usage of trade, as a foundation for the claim of a general lien, will be required to be stronger and fuller in some cases than in others; in the case of a carrier, for instance, who sets up such a claim, more decisive evidence of a long established usage is necessary than in the case of wharfingers, whose right has been more frequently acknowledged in courts of law.(6) The carrier's claim of a lien for the general balance is not founded on the common law, and has been watched with great jealousy;(7) he ought, there-

(1) *Rushforth v. Hadfield*, 6 East, 519. Another case between the same parties, 7 Id. 224; *Aspinall v. Pickford*, 3 B. & P. 44, n. a; *Green v. Farmer*, 4 Burr. 2220.

(2) By *Bailey, J.*, *Wright v. Snell*, 5 B. & Ald. 353; *Kirkman v. Shawcross*, 6 T. R. 15. It has been doubted whether carriers, innkeepers, &c. (who are under common-law obligations) could, by notice, entitle themselves to a right of general lien. This point seems to have been conceded in favor of carriers, Id. And *vide infra*.

(3) *Kirkman v. Shawcross*, 6 T. R. 15.

(4) *Boydell v. Drummond*, 11 East, 144, n.

(5) 6 East, 519; 7 East, 224; 7 B. & C. 216.

* * See *ante*, note 1100, as to liens. As to commercial usages, generally, 1 Smith's L. Cases, 410-418, in the notes to *Wigglesworth v. Dallison*; and also *ante*, notes 804, 806. * *

(6) Respecting the lien of wharfingers, see *Naylor v. Mangles*, 1 Esp. C. 110; *Richardson v. Goss*, 3 B. & P. 119; *Spears v. Hartley*, 3 Esp. C. 81; *Holderness v. Collinson*, 7 B. & C. 216, where a general lien for wharfage, laborage, and warehouse rent at Hull, were denied. As to the latter claim, see *R. v. Humphrey*, 1 M'L. & Y. 173.

NOTE 1101.—And the wharfinger does not lose his lien where the vessel is removed without his consent. If he afterwards regain the possession, he is restored to his rights. *Johnson v. The McDonough*, 1 Gilpin, 101. See as to the lien of seamen, upon the proceeds of a wrecked vessel, which has been sold for their wages, *Brackett v. Sundry articles, &c.*, 1 Gilpin, 184.

(7) 6 East, 230; 7 East, 528; *Oppenheim v. Russel*, 3 Bos. & Pull. 42; *Butler v. Woolcot*, 2 N. R. 54; *Wright v. Snell*, 5 Barn. & Ald. 353.

fore, to make out a very strong case, on cogent proof of ancient, numerous and important instances in which the claim has been allowed.(1) These particular instances will be open to much observation; they may not be old, or not numerous; or the circumstances of the parties may not be well understood, or private rights might have been waived; or it might happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of other goods of much higher value; or the instances may have been in the case of solvent persons, who were liable, at all events, to answer for their general balance; or, perhaps, the instances have not been brought home to the knowledge of the party against whom the claim is now made.(2)

Possession abandoned.

A lien will, in general, be abandoned by relinquishing possession of the property to which the lien attaches;(3) though it may revive if the possession is regained, after the property has been fraudulently removed for the purpose of defeating the lien.(4) And in one case, where an insurance broker had parted with the possession of a policy upon which he had a lien, and, on hearing unfavorable reports of the circumstances of his principal, obtained from him the policy, on pretence of receiving the average, it was holden that the lien revived.(5) But the principle of this decision seems inconsistent with those cases in which it has been determined that a right of lien cannot be originally acquired by means of false representations.(6)

The right to detain goods under a claim of lien will not avail the defendant, where the plaintiff, on demanding the property, has made a formal tender of satisfaction, offering to discharge the defendant's claim.

(1) * * See note *ante*. And for a very learned and instructive discussion of the subject of commercial usages, see Duer on Ins. pp. 179-195; Id. 255-282, with the *proofs and illustrations*. * *

(2) See *Rushforth v. Hadfield*, 7 East, 228. By *Bayley, J.*, *Holderness v. Collinson*, 7 Barn. & Cress. 217. Bankers, attorneys, factors, packers, insurance brokers, have a right of general lien. As to the cases in which the right to a general lien has been established or denied, see *Selw. N. P. tit. Trover*.

(3) *Krouger v. Wilcox*, Ambl. 252; *Sweet v. Pym*, East, 4; *Hartley v. Hitchcock*, 1 Stark N. P. C. 408; *Kinloch v. Craig*, 3 T. R. 119. See *Christie v. Lewis*, 8 Taunt. 422. It seems that a right of lien may be lost by a delivery of possession which would not be sufficient to satisfy the Statute of Frauds, or prevent a stoppage *in transitu*. As to the point, whether a delivery of part of the property will divest the right of lien, see *Hanson v. Meyer*, 6 East, 614; *Ex parte Gwyne*, 12 Ves. 379; and *Crawshay v. Eades*, 1 Barn. & Cress. 181; *Hammond v. Anderson*, 1 N. R. 69; *Stubey v. Hayward*, 2 H. Bl. 504. Cases of stoppage *in transitu*.

(4) *Wallace v. Woodgate*, 1 Ry. & Mo. 193. See *Brown v. Hankey*, 2 T. R. 113; *Ex parte Doughty*, 1 Mont. Dig. 493; *Ex parte Cheesman*, 2 Eden, 181.

(5) *Whitehead v. Vaughan*, Co. B. L. 547. And see *Levy v. Bernard*, 8 Taunt. 149.

(6) *Madden v. Kempster*, 1 Camp. N. P. C. 12; *Burn v. Brown*, 1 Stark. N. P. C. 292. And see *Sweet v. Pym*, 1 East, 4.

And, if the defendant insisted on his right to detain the goods, not on the ground of his having a lien upon them, but on some other ground quite distinct (as on the plea that the goods were his property), without noticing his claim of a lien, he cannot, at the trial, for the first time, resort to such a defence, which he must be understood to have waived.(1)

Where a person has bestowed his labor or money on any chattel, and has a right to retain it until his charge is satisfied, this right is called a right to a particular lien, which is favored in law. It seems to have been originally confined to cases, where a party, by the common law, was obliged to receive goods as in the instance of carriers, innkeepers, millers, &c.(2) But the right has, in modern times, been much extended; and, in many cases, tradesmen have been considered as entitled to a particular lien, who were under no such obligation at common law.(3) The right of a particular lien attaches to all the parts of an entire work; and therefore, where a printer had delivered certain numbers of a work, he was held entitled to retain those which remained in his possession, till he was paid for the whole.(4) A vendor of the goods has a lien for the price so long as the goods remain in his possession.(5)

In cases of bankruptcy, the defendant, in an action of trover, is sometimes entitled to retain goods, on the ground of a mutual credit between himself and the bankrupt, whose assignees are seeking to recover the property. This species of statutory lien does not exist in every case of a deposit of goods where the owner of the goods is indebted to the deposi-

(1) *Boardman v. Sill*, Camp. N. P. C. 410. See *White v. Gainer*, 2 Bing. 23, where the expressions were not considered as amounting to a waiver of lien.

(2) *Skinner v. Upshaw*, *Ld. Raym.* 752, 867; *Ex parte Ockenden*, 1 Atk. 235. And see *Hartford v. Jones*, *Salk.* 654, where goods had been saved from a wreck. A master of a vessel has a lien on the luggage of his passengers, for the passage money (*Wolf v. Summers*, 2 Campb. N. P. C. 631), but he has no lien on the ship for repairs. *Hussey v. Christie*, 9 East, 426. See *Smith v. Plummer*, 1 Barn. & Ald. 582. With respect to the owner's lien for freight, see *Christie v. Lewis*, 8 Taunt. 422; *Wilson v. Kymer*, 1 Maule & Selw. 157. As to the lien of innkeepers, see *Thompson v. Lacy*, 3 Barn. & Ald. 283; *Jones v. Thurlow*, 8 Mod. 170; *Johnson v. Hill*, 3 Stark. N. P. C. 172. It seems that an innkeeper cannot sell a horse for its keep, unless in London. *Jones v. Pearle*, Str. 556. See *Yelv.* 67; *Farries*, 1 Salk. 18; 7 East, 229.

(3) *Ex parte Deeze*, 1 Atk. 228; by Gibbs, Ch. J., *Hollis v. Claridge*, 4 Taunt. 809; *Ship carpenters*, *Franklin v. Hosier*, 4 Barn. & Ald. 343; *Ex parte Shank*, 1 Atk. 234; *Ex parte Bland*, 2 Rose, 91; *Printers*, *Blake v. Nicholson*, 2 Maule & Selw. 167; *Dyers*, *Clarke v. Gray*, 4 Esp. C. 178. (There are conflicting cases respecting their right to a general lien. See *Rose v. Hart*, 8 Taunt. 500.) *Tailors*, 3 Maule & Selw. 169; 9 East, 433. It has been recently held at Nisi Prius, that a livery stable keeper, has not a lien on horses in his stable for their keep. *Wallace v. Woodgate*, 1 Ry. & Mo. 194. (See also *Fox v. McGregor*, 11 Barb. 41.)

(4) *Blake v. Nicholson*, 3 M. & S. 167; *Chase v. Westman*, 5 M. & S. 180. (13 B. Mon. 239.)

(5) By *Bailey, J.*, *Bloxam v. Saunders*, 4 Barn. & Cress. 948; *Ex parte Lord Seaforth*, 1 Roae, 306; *Houlditch v. Desanges*, 2 Stark. N. P. C. 337, where the person claiming the lien had obtained a verdict for the price.

See *Chapman v. Lathrop*, 6 Cowen, 110; 4 Mass. R. 405; *Harris v. Smith*, 3 Serg. & Rawle, 20; 17 Mass. R. 606; *Ward v. Shaw*, 7 Wend. 404; *Outwater v. Dodge*, 7 Cowen, 36; *Lupin v. Marie*, 6 Wend. 77. (*Moore v. Newbury*, 6 McLean, 472.)

tory, but is only allowed where the credits existing between the parties would, in their nature, terminate in debts, and a pecuniary balance; as where there is a debt on one side, and on the other a delivery of property, with directions to turn it into money.(1)

Lien of agent.

It seems that an agent has not a right of lien for the work done by others, whom he has set to work upon the property of his principal.(2) And though a lien may be derived through the acts of agents or servants acting within the scope of their employment, yet it has been held, that, where a tradesman had been employed by a servant to repair his master's property, and the tradesman had never had any orders from the master before, he could not detain the property till he was paid the price of the repairs.(3)

A general right of detaining goods may be waived by a special agreement between the parties respecting the time and mode of payment;(4) but not by an agreement merely for the payment of a specific sum, without any stipulation as to the time and mode of payment.(5) The taking of a security is not necessarily an abandonment of the right of lien, but only where it is inconsistent with such right, as where there is no reason to suppose that the security will not be paid, although it may not be actually due.(6)

Mitigation of damages.

The defendant, in mitigation of damages, may prove that he has re-delivered the property subsequently to the conversion of it;(7) or he may produce the goods in court, at the trial, for the purpose of being re-delivered;(8) or where his liability arises from having intermeddled with

(1) *Rose v. Hart*, 8 Taunt. 503; *Olive v. Smith*, 5 Taunt. 58; *Ex parte Deeze*, 1 Atk. 228; *Sampson v. Burton*, 2 Bro. & Bing. 89; *Key v. Flint*, 8 Taunt. 21; *Easum v. Cato*, 5 Barn. & Ald. 861, where the property was not in the actual possession of the party to whom the bankrupt was indebted. These decisions appear not to be affected by the recent Bankrupt Act, *Eden's B. L.* 184. That a deposit by way of security for a loan implies a right to sell, see *Pothonier v. Dawson*, *Holt's C.* 383. As to the point, whether an equitable right, without actual possession will support a lien, see *Nichols v. Client*, 3 Price, 547; *Taylor v. Robinson*, 8 Taunt. 648; *Heywood v. Warring*, 4 Campb. N. P. C. 291.

(2) By Lord Ellenborough, *Hussey v. Christie*, 9 East, 428; *Smith v. Plummer*, 1 Barn. & Ald. 582.

(3) *Hiscox v. Greenwood*, 4 Esp. N. P. C. 174.

(4) By Lord Ellenborough, *Chase v. Westmore*, 5 M. & S. 186; by Bayley, J., *Bloxam v. Saunders*, 4 Barn. & Cress. 948; *Winter v. Anson*, 1 S. & S. 434.

(5) *Chase v. Westmore*, 5 Maule & Selw. 180; *Crawshay v. Homfray*, 4 Barn. & Ald. 52. See *Christie v. Lewis*, 2 Bro. & Bing. 412.

(6) *Stevenson v. Blakelock*, 1 Maule & Selw. 543; *Hornecastle v. Farran*, 3 Barn. & Ald. 500; *Cowell v. Simpson*, 16 Ves. 275; 1 Turn. 191.

(7) *Bull. N. P.* 46.

(8) See *Watts v. Phipps*, *Bull. N. P.* 49; *Fisher v. Prince*, 3 Burr. 1363; *Earl v. Holderness*, 4 Bing. 462.

the goods of a deceased person, as executor *de son tort*, he may prove that he has paid debts of the deceased.(1)

Statute of Limitations.

Where more than six years have elapsed since the conversion of the plaintiff's goods, the Statute of Limitations will be a defence to the action. And the case will not be altered by the circumstance that the plaintiff did not know of the conversion till within the period of six years from the commencement of the suit.(2) Where a demand and refusal is necessary to constitute the conversion, the Statute of Limitations will, in general, begin to run only from the time of the refusal.(3) It has been held, in one case, that a right of lien would attach upon goods, though the demand in respect of which it arose had been barred, as to the remedy, by the Statute of Limitations.(4)

The defendant cannot object that he has before paid damages on account of the same act of conversion, if he has been sued by a person claiming in a different right;(5) and, although it has been seen that a material variance in setting forth a written instrument is a ground of non-suit in this action, yet neither a minute description, or extreme accuracy will be required.(6)

The real owner of a chattel is competent to give evidence of property in himself.(7) Where the question was, whether the sheriff had lawfully seized the goods of A., under an execution against another person, that person was held an incompetent witness to disprove an assignment of the goods from himself to A., for the effect of his evidence would be to pay his own debt with the goods which had been seized.(8) The declarations

(The defendant may also show in mitigation of damages that he has an interest or special property in the goods derived from a bailee who had bestowed labor and value upon them. *Hyde v. Cookson*, 21 Barb. N. Y. 92.)

(1) Bull. N. P. 48; *Whitehall v. Squire*, Carth. 104; *Mountford v. Gibson*, 4 East, 441. It seems the better opinion, that the defendant will not be entitled to a verdict, though he can show that the payments amount to the full value of the property claimed.

(2) *Granger v. George*, 5 Barn. & Cress. 150. It was intimated by the court, that the case might have presented a different view, if the plaintiff had been prevented, by the fraud of the defendant, from obtaining knowledge of what had been done: as to which point, *vide supra*, p. 449, *u. l.*

(3) *Wortley Montague v. Lord Sandwich*, 7 Mod. 99; Bull. N. P. 47. *Vide supra*, p. 449.

(4) *Spears v. Hartley*, 3 Esp. C. 81. See *Higgins v. Scott*, 2 Barn. & Adol. 413. * * And see *Chitty on Contr.* (7th ed.) p. 806, and note. * *

(5) *Knight v. Legh*, 4 Bing. 595.

(6) *Harrison v. Vallance*, 1 Bing. 45. *Vide supra*, 538.

(7) *Nix v. Cutting* 4 Taunt. 18; *Ward v. Wilkinson*, 4 Barn. & Ald. 410; *Josephs v. Adkins*, 2 Stark. 80. In *Morris v. Bottomley* (4 Bing. 649), it was doubted whether a person alleged to have sold the property both to the plaintiff and defendant, was competent to prove the priority of the sales without a release.

(8) *Bland v. Ansley*, 2 N. R. 331. See *Nathan v. Buckland*, 2 B. Moore, 153.

of a party, in whose right the defendant claims to retain the possession of property, are evidence against him.(1)

CHAPTER XVI.

OF EVIDENCE IN AN ACTION FOR DEFAMATION.

IN treating of this subject, the most convenient plan will be, to consider at the same time the action for slander, together with the action for a libel. And it may be observed, generally, of both these actions, that the leading points to be proved, are, first, the speaking or publication of the slanderous matter stated on the record; secondly, the proof of facts alleged as a necessary inducement to the action; and lastly, the extent of damage which the plaintiff had sustained.

I. Of the proof of publication.

Proof of words spoken as averred.

The publication of slanderous words, which have been spoken, is to be proved by some person present when the defendant spoke them. And the words must be proved, as stated in the declaration.(2) An averment of words spoken affirmatively is not supported by proof of words spoken by way of interrogation.(3) And if the words are laid as having been spoken to the plaintiff, it will be a variance if they were spoken to a third

(1) *Harrison v. Vallance*, 1 Bing. 45.

(2) NOTE 1102.—Statement in the declaration: "I will do my best to transport him, as he has been working for me some time, and has been robbing me all the while." Proof: "He has worked for me some time, and has been continually robbing me;" held, no variance. *Doncaster v. Hewson*, 2 M. & Ry. 176. The words *laid* and the words *proved*, must be substantially the same; it will do if you prove so many of them as are actionable; so held, in an action of slander. *Johnson v. Toit*, 6 Binn. 121. The plaintiff declared him a *strong thief*. Proof: that he called him a *thief*. Held sufficient, because the only material word is thief. *Id.*; *Dyer*, 75.

* * See 2 Gr. Ev. § 414, and notes. * *

(Plaintiff will not be permitted to prove the speaking of words not complained of in the declaration; though he may prove the repetition of the words charged on different occasions. *Root v. Lowndes*, 6 Hill R. 518; *Campbell v. Butts*, 3 Comst. 174. Such proof cannot be given to show malice. *Howard v. Sexton*, 4 Id. 157. And where the plaintiff alleges the speaking of certain English words, he will not be permitted to prove the speaking of equivalent words in another language. *Keenholts v. Becker*, 3 Denio R. 346; *Norton v. Gordon*, 16 Ill. 405. Nor can the plaintiff set forth in his complaint the tenor and effect of the words spoken; he must set forth the words spoken, or at least the substance of them. *Forsyth v. Edmiston*, 5 Duer R. 653. And on the trial it will be sufficient to prove the speaking of substantially the words charged. *Williams v. Miner*, 18 Conn. 464. Plaintiff need not prove the whole words charged. *Nichols v. Hayes*, 13 Id. 155.)

(3) *Barnes v. Holloway*, 8 T. R. 150.

person concerning him.(1) If they are alleged as having been spoken in the English language, it will be a variance if they were spoken in a foreign language.(2) It is not sufficient to prove equivalent words of slander.(3)

Proof of part.

It is not necessary to prove the whole of the words alleged on the record, but only some material part of them;(4) and damages may be given for such of the actionable words as are proved,(5) precisely as, in other actions, the plaintiff recovers to the extent of his proof. Where all the words constitute one entire charge, they must be all proved;(6) but it is not necessary to prove the whole of a continuous sentence alleged on the record, provided the meaning of the words proved is not varied by the omission of the others.(7)

It is sufficient to prove a publication of the slander substantially in the mode alleged, though it be not made to all the persons specified. Thus, if the allegation is that the defendant spoke the words in the presence and hearing of a certain person named, and of other persons, this would be supported by proving them to have been spoken in the presence of the other persons only.(8)

Publication of libel.

The publication of a libel may be in various forms; as by distributing it, or repeating its contents in the presence of others, or sending it to a third person. The writing of a copy of the libel, though manifestly not of itself a publication, is said to be evidence of a publication; but this must be understood with reference to the circumstances of the case.(9) It has been said, that the mere possession of a libel which has been published is evidence to prove a publication by the possessor.(10) Though, indeed, in one case, it was held by Lord Ellenborough that a person who had a

(1) Bull. N. P. 5; *Rex v. Berry*, 4 T. R. 217.

(2) *Zenobio v. Axtell*, 6 T. R. 162. For other cases of variance in the proof of oral slander, see *Hancock v. Winter*, 7 Taunt. 205, where the statement of the party's opinion only was proved; *Walters v. Mace*, 2 Barn. & Ald. 756; *Solomons v. Medex*, 2 Stark. N. P. C. 191.

(3) By *Lawrence, J.*, *Maitland v. Goldney*, 2 East, 434; *Harrison v. Stratton*, 4 Esp. C. 218; *Lady Ratcliffe v. Shubly*, Cro. Eliz. 224. In Buller's N. P., p. 5, it is said to be sufficient to prove the substance of the words. But this doctrine seems now overruled. See *Rex v. Berry*, 4 T. R. 218. It seems not sufficient for the witness to swear that the defendant used the words, or words to the like effect. *Hussey v. Cooke*, Hob. 294.

(4) *Maitland v. Goldney*, 2 East, 434, by *Lawrence, J.*; *Compagnon v. Martin*, 2 Bl. R. 790.

(5) *Id.*

(6) *Flower v. Pedlee*, 2 Esp. N. P. C. 491.

(7) *Orpwood v. Barks*, 4 Bing. 261; *Dyer*, 75; *Cro. Jac.* 407.

(8) Bull. N. P. 5; Tr. *per pais*, 362.

(9) *Lambe's Case*, 9 Rep. 59, b; and see *Rex v. Beare*, 1 Lord Raym. 417; *Salk.* 418; *Rex v. Burdett*, 4 Barn. & Ald. 95.

(10) *Rex v. Beare*, *Salk.* 418; *Hawk. c.* 28, § 13; *Anon.* 1 Ventr. 31; *Carth.* 407; 5 Rep. 125; *Hob.* 62. See observations upon these cases in *Lord Camden's judgment in Entick v. Carington*, 11 St. Tr. 321.

copy of a libelous caricature, and who showed it to another, on being requested to do so, was not thereby liable to an action for maliciously publishing it.(1) To prove the defendant author of a libel, evidence of other libels written by the same person, and concerning the same subject, has been admitted in corroboration of a witness, who showed the defendant to be the author of the libel which was the subject of the suit.(2)

Letters to plaintiff.

An action on the case cannot be maintained for the slanderous contents of a sealed letter which is delivered into a party's own hands.(3) Though it has been held that, where the defendant knew that the plaintiff's letters were usually opened by a clerk, there was sufficient evidence for the jury to consider whether the defendant did not intend the letter to come into the hands of a third person, and that this would be a publication.(4) It seems, however, that there must be an actual making known of the contents to support this action, and that the mere intention that they should be known by a third person is insufficient.(5)

Though printing a libel may be an innocent act, yet, unless qualified by circumstances, it shall *prima facie* be understood a publishing, for it will be presumed to have been delivered to the compositor and other subordinate workmen.(6) Printing in a newspaper is considered a publication, unless it be shown that the newspaper was suppressed, and never published.(7)

(1) *Smith v. Wood*, 3 Campb. N. P. C. 323.

(2) *Rex v. Pearce*, Peake's N. P. C. 106.

NOTE 1103.—Though a letter, written confidentially, by the correspondents of a foreign mercantile house, contain very strong expressions concerning third persons engaged in mercantile operations, imputing to such persons "notoriety for everything but fair dealing, and a strict adherence to their engagements," yet, *semble*, that those expressions will not, *per se*, take away the privilege which attaches to such communications, and make the letter a libel. *Ward v. Smith*, 4 Car. & Payne, 302.

* * As to privileged communications, see 2 Kent C. (6th ed.) p. 22, n. c; 1 Starkie on Slander (new ed.), 262–267. And see *Gilbert v. The People*, 1 Denio, 40; *O'Donoghue v. McGovern*, 23 Wend. 23; *Thorn v. Moser*, 1 Denio, 488; *Smith v. Kerr*, 1 Barb. S. C. R. 155; *Hoar v. Wood*, 3 Metc. R. 193. * *

(Where the defendant pleads, first, a denial of publication, and second, matter in justification and excuse, the plaintiff must, under the New York practice, prove the publication; pleading matter in justification does not admit the publishing. *Mathews v. Beach*, 4 Seld. 173. Malice is presumed from the fact of publication (*Washburn v. Cooke*, 3 Denio R. 110); but may be disproved by the *res gestæ* accompanying the act of publication. *Taylor v. Church*, 4 Seld. N. Y. R. 452. See further, as to what are privileged communications, *Washburn v. Cooke*, *supra*; *Suydam v. Moffatt*, 1 Saund. S. C. R. 459; *Warner v. Paine*, 2 Id. 195; *Cook v. Hill*, 3 Id. 341; *Stanley v. Webb*; 4 Id. 21, 120; 4 Selden N. Y. R. 452; *Taylor v. Church*, *supra*.)

(3) *Barrow v. Lowellin*, Hob. 62; *Phillips v. Jansen*, 2 Esp. N. P. C. 623; *Rex v. Wagener*, 2 Stark. N. P. C. 245. See 2 Bl. R. 1038; 1 T. R. 110.

(4) *Delacroix v. Thevenot*, 2 Stark. N. P. C. 63.

(5) See Hob. 62.

(6) *Baldwin v. Elphinston*, 2 Bl. R. 1037.

(7) *Baldwin v. Elphinston*, 2 Bl. R. 1037.

The mode of proving a person to be the publisher or proprietor of a newspaper, has been much facilitated by a late act of Parliament,(1) the principal object of which was to prevent the mischiefs arising from the printing and publishing of newspapers by persons unknown. It has been determined in the construction of this act, that an affidavit, containing all the particulars required by the act, together with a copy of the newspaper produced from a stamp-office, containing the libel, and corresponding exactly with the description in the affidavit, is not only evidence of the publication by the parties named, but evidence also that the paper was published in that particular county, where the affidavit specifies it to have been printed.(2) This would be good evidence of such a publication under the 9th section, without the aid of the 11th section, which last renders it most clearly admissible. The publication may be proved by the original affidavit, signed by the defendant as the sole proprietor of the paper, and specifying the place where it was intended to be published, together with proof that a copy of the paper, containing the alleged libel, had been there purchased.(3) If a certified copy of the affidavit is produced in evidence purporting to have been sworn before a distributor of stamps in the country, it ought to be proved that he had authority to take the affidavit, unless the affidavit itself state the fact; if the *jurat* purport that the officer had such authority, further proof will not be necessary.(4) The delivery of a newspaper to the officer of the stamp-office, as required by the act, is sufficient evidence of a publication.(5) To prove the publication of a newspaper, an unstamped copy may be given in evidence, and the witness may swear that similar papers were published: it is not necessary to produce a copy which has been actually published.(6)

Publication by agent.

If the defendant is a bookseller, and the libel is sold in his shop by a person acting there as his servant, this is *prima facie* evidence of a publication by the bookseller himself;(7) for it is presumed that the master is

(1) St. 38 G. III, c. 78.

(2) *R. v. Hart and White*, 10 East, 94; *R. v. Hunt*, 31 Howell's St. Tr. 376.

(3) *R. v. White*, 3 Campb. N. P. C. 100.

(4) *Rex v. White*, 3 Campb. N. P. C. 99.

(5) *Rex v. Amphlett*, 4 Barn. & Cress. 35.

(6) *Rex v. Pearce*, Peake's N. P. C. 106.

NOTE 1104.—Proof that the defendant accounted for the stamp duties of the paper in question, is proof of publication. *Cook v. Ward*, 6 Bing. 409.

The proprietor of a newspaper is criminally answerable for what appears in it; the presumption arising from proprietorship may be rebutted and an exemption established. *Rex v. Gutch*, 1 Moo. & Malk. 433.

(7) *R. v. Almon*, 5 Burr. 2689. The pamphlet in this case also imported to have been printed for the defendant. See *Wilnot's* opinions, 246; *Com. Dig. Libel*, B 1; *Plunkett v. Cobbett*, 5 Esp. N. P. C. 136. See *Barnard v. Nutt*, K. B. 308; *R. v. Dodd*, 2 Sess. c. 33; *R. v. Woodfal*, Hawk. 545, n.

acquainted with what his servant does in the course of his business. But, in general, an authority to commit an unlawful act will not be presumed, and, therefore, in order to charge the defendant, it has been held, not sufficient to show that a libel was written by his daughter, who was authorized to write his general letters on business.(1) Where the defendant had made certain communications to the reporter of a newspaper, who sent them in writing to the editor, it was held, that what the reporter published might be considered as published by the defendant.(2)

Variance in proof.

After proof of the publication by the defendant, the libel itself is to be read; and, on comparing that part of it which the declaration professes to exhibit, with the corresponding part in the original libel, if there appear to be a variance in the sense—that is, if the part set forth in the record convey a different idea from that conveyed in the corresponding part of the libel, it is a material variance, and the plaintiff will not be entitled to recover on that count in which such a variance occurs. Thus, where the libelous passages contained in one of the counts of the declaration were set out, as if they formed one entire and continuous part of the libel from which they were taken, but the meaning of the sentence was materially altered by the omission of the name of the person alluded to, Lord Ellenborough held, that the plaintiff could not recover on that count.(3) And if any references are omitted, the insertion of which would vary the sense of the libel, it is a ground of nonsuit.(4) If any words are inserted, with a view to express the meaning intended to be conveyed;(5) or if any omission or alteration of a letter is made, which renders a word of a different signification, it is a fatal variance.(6) But if the omission or addition of a letter does not change the word, so as to make it another word, the variance will be immaterial.(7) A libel written in a foreign language, ought to be set forth in the declaration, both in the original and in the

(1) *Harding v. Greening*, 1 B. Moore, 477.

(2) *Adams v. Kelly*, 1 Ry. & Mo. 177. And see *Burdett v. Cobbett*, 5 Dow, 301. In the case of *Adams v. Kelly*, it was held necessary to produce the written communication to the editor; as to which point see *R. v. Pearce*, Peake's N. P. C. 106.

(3) *Tabart v. Tipper*, 1 Campb. N. P. C. 352. See also *Bell v. Byrne*, 13 East, 554; *Cooke v. Hughes*, 1 Ry. & Mo. 116; *R. v. Solomon*, 1 Ry. & Mo. 253, where a distinction is taken between indictments for perjury and libel.

(4) *Ibid.*, and *Cartwright v. Wright*, 5 B. & Ald. 715.

(5) *R. v. Taylor*, 1 Campb. 404, indictment for perjury. A declaration professing to set out the libel in substance is bad in arrest of judgment. *Wright v. Clements*, 3 B. & Ald. 503. And see *Blizard v. Kelly*, 2 B. & C. 283. A count for imposing the crime of felony, means a charge before a magistrate. *Cook v. Cox*, 3 Maule & Sel. 110.

(6) *Rex v. Drake*, Holt's R. 426; 2 Salk. 660; 3 Salk. 224.

(7) 2 Salk. 660; *Rex v. Beach*, 1 Leach C. C. 158; S. C., Cowper, 229, where *understood* was written for *understood*. And see *Rex v. May*, 1 Doug. 193; *R. v. Hart*, 2 East P. C. 977.

English translation ; and the translation must be proved to the court by a person acquainted with the language in which the libel is written.(1)

II. Secondly, as to the proof of averments, which are necessary by way of inducement to the action.

Words spoken of plaintiff in his profession or business.

Words or other slanderous matter, which are actionable only so far as they attack the plaintiff's character with reference to his profession, office or trade, must be clearly proved to have been published concerning him in relation to such profession or business ; and it must be proved, also, that the plaintiff is of the particular profession, or of that situation of life described by the pleadings.(2) But if the words are actionable from their general import, and not only as bearing on his professional character, proof of his profession or business, though wanted for the purpose of increasing the amount of damages, will not be essentially necessary in support of the action.

1. Proof of legal qualification, when averred.

If the plaintiff, in his declaration, allege a legal qualification to practice in a particular profession, and the words are actionable only as spoken of him with reference to such profession, a legal qualification must be proved. When the plaintiff's qualification depends on some documentary appointment, it has been doubted whether it is sufficient to show that he has acted in the particular capacity in which the words affect him.(3) Proof of the plaintiff's documentary appointment may be made indispensable, in consequence of the averments in his declaration. Thus, in an action for slanderous words spoken of the plaintiff in his profession of physician, an allegation " that he had duly taken the degree of doctor of physic," must be strictly proved by formal proof of the degree ; even though it were not necessary, in general, for the party to show that he has regularly taken his degree, yet, in this case, the proof is indispensable, in consequence of the allegation in the declaration. This was the ground on which the case of *Moises v. Thornton*,(4) appears to have been determined ; and though, in that case, the defamatory words themselves related to a want of

(1) *Zenobio v. Axtell*, 6 T. R. 162 ; *R. v. Peltier*, 2 Sel. N. P. tit. Libel.

(2) * * See *Van Tassel v. Capron*, 1 Denio, 250. * *

(Words spoken of a physician falsely, imputing to him general ignorance or want of skill in his profession, are actionable in themselves, on the ground of presumed damage ; as where the words were, " Doctor Secor killed my children ; he gave them tea-spoonfull doses of calomel, and they died, &c." *Secor v. Harris*, 18 Barb. 425. See also *Camp v. Martin*, 23 Conn. R. 86. When words are slanderous in consequence of having been spoken of a person in reference to his trade or business, it must be shown that they were so spoken. *Lewis v. Chapman*, 19 Barb. 252 ; *Wadsworth v. Bentley*, 22 Eng. Law & Eq. 176.)

(3) The court were equally divided upon this point in *Smith v. Taylor*, 1 N. R. 196.

(4) 8 T. R. 303, 308.

diploma, that circumstance was not adverted to by the court, as any additional reason for requiring such evidence.

2. Where the slander admits the qualification.

Where the words, which are the subject of the action, amount to a distinct acknowledgment of the plaintiff's professional qualification, it will be sufficient to prove, that he practiced in that character, and proof of a legal qualification will not be necessary.(1) If a defendant (said Mr. Justice Heath in the case of *Smith v. Taylor*)(2) has admitted the title, by virtue of which the plaintiff sues, this amounts to *prima facie* evidence that the plaintiff is entitled to sue. It is upon the same principle, that, in a prosecution for a libel, if the libel itself show that certain acts of outrage have been committed, this is evidence against the defendant, in support of an averment of the commission of such outrages.(3) This rule depends upon the force and effect of an admission.

3. Where the slander denies the qualification.

Where the abuse relates to the want of qualification, the plaintiff, it is said, must prove his qualification;(4) and, in support of this, a *Nisi Prius* decision of Mr. Justice Buller is cited.(5) There, the action being brought against the defendant for calling the plaintiff a quack, and the averment being, "that the plaintiff had used and exercised the profession of a physician," Mr. Justice Buller held, that proof of the plaintiff having practiced(6) as a physician was not sufficient; and that it was necessary to produce the plaintiff's diploma; this was accordingly done, and the plaintiff recovered. Chief Justice Mansfield, in citing this case, considers the opprobrious term, which was the subject of the action, as being used in opposition to the description of a physician regularly qualified; and that, as the word was used in this sense, proof of a diploma would be necessary.

The degree of doctor of physic may be proved by the original book of the university or corporation, which contains an entry of the degree having been conferred; or it may be proved by an examined copy of this entry.(7) Or if the medium of proof is a diploma, purporting to be granted by an university, and to bear the university seal, the instrument must be

(1) *Berryman v. Wise*, 4 T. R. 366; *Smith v. Taylor*, 1 New Rep. 196; *Pearce v. Whale*, 5 Barn. & Cress. 39.

(2) 1 New Rep. 208. And see *Yorsani v. Clement*, 3 Bing. 432.

(3) 4 Maule & Selw. 548. See Mr. Justice Bayley's judgment there.

(4) By Mansfield, C. J., in *Smith v. Taylor*, 1 New Rep. 207, 204.

(5) *Pickford v. Gutch*, cited by counsel in *Moises v. Thornton*, 8 T. R. 305, n., and cited by Mansfield, C. J., 1 New Rep. 204.

(6) Evidence that the plaintiff practiced with success and reputation for several years, is, *per se*, sufficient evidence of his being a physician in an action of slander. *Brown v. Mills*, 2 Rep. Const. Ct. 235.

* * *McPherson v. Chedeall*, 24 Wend. 24; *Finch v. Gridley*, 25 Wend. 469. * *

(7) *Moises v. Thornton*, 8 T. R. 303, 307.

properly authenticated and proved by legal evidence.(1) If the written instrument is produced as the original act of the university which conferred the degree, it must be proved, that the seal affixed is the seal of the university ;(2) and with respect to the proof of the seal, it will not be necessary to produce the witness who saw the seal affixed,(3) but the seal ought to be proved by one who knows it to be the seal of the university. If the instrument is produced as a copy of the original act of the university, it must be proved in the usual way as a copy ; for the university cannot under their seal give evidence that the plaintiff had taken such a degree. The degree of doctor of laws, and other degrees of the same kind, may also be proved by the entry, or by an examined copy of the entry in the books which contain the act of the university conferring the degree.(4)

In the case of *Moises v. Thornton*, from which these points have been extracted, the proof offered for the purpose of authenticating the diploma, was, that the professors, by whom the instrument purported to be signed, had been heard to acknowledge their signatures ; in addition to this, a certificate from the professors was given in evidence, which certified the granting of the diploma, and the affixing of the university seal ; and it was further proved that the officer, whose duty it was to affix the university seal to their public acts, had acknowledged the seal affixed to the diploma, to be the seal of the university ; his evidence was adjudged to be insufficient and the nonsuit at the trial was affirmed.

By 6 G. IV, c. 133, § 7, the common seal of the company of apothecaries in London is sufficient proof of the authenticity of the certificate to which such seal is affixed ; but it is necessary to prove the seal affixed to be the genuine seal of the society.(5)

The regular proof of a person being an attorney is, either by the production of the original roll, signed by the party on his admission, together with proof of his signature, as evidence of the identity of the party ; or by an examined copy of the roll, together with the admission. Or the fact of a person of the same name being an attorney, may be shown by the entry in the book of the chief clerk, kept in the master's office, into which the names of all attorneys are copied by the chief clerk from the original roll ; and the admission, or some other proof, as for example, of practice as an attorney, will then be wanted to show that this person is the party whose qualification is in question.(6)

(1) *Moises v. Thornton*, 8 T. R. 307.

(2) S. C., p. 307, by Grose, J.

(3) S. C., p. 307, by Lawrence, J.

(4) S. C., p. 307.

(5) *Chadwick v. Bunning*, 1 Ry. & Mo. 306. And see, respecting the qualifications of Surgeons and Apothecaries, 1 Ry. & M. 309 ; *Sherwin v. Smith*, 1 Bing. 204 ; *Germare v. Valon*, 2 Campb. N. P. C. 144 ; *Woodgan v. Somerville*, 7 Taunt. 401. (See 14 & 15 Vict. c. 99, § 8, dispensing with any other proof than the certificate under seal.)

(6) *R. v. Crossley*, 2 Esp. N. P. C. 526. And see *Jones v. Stevens*, 11 Price, 251 ; *Pearce v.*

Other circumstances besides the professional character of the plaintiff are frequently stated as matter of inducement, and these must be proved wherever they are material to the defamatory nature of the libel or words. Thus, in an action by an attorney for words reflecting on him in the conduct of a cause, it has been held, that the proceedings in the cause must be produced in evidence.(1) But it is not necessary to prove the whole of the matters set forth in the inducement, provided sufficient is proved to show the nature and tendency of the defamation. Thus, where the plaintiff alleged that he was of two trades, and that the defendant intending to injure him in his several trades, had spoken certain words of him in one of his trades; it was held sufficient to prove that he was of that trade concerning which the defendant was charged to have spoken the words.(2)

Colloquium.

Where a colloquium is laid *of and concerning* the plaintiff in a particular character, or of and concerning the matters in the inducement,(3) it was formerly considered that everything which followed the words "*of and concerning*" must be precisely proved. It is now, however, settled that this allegation does not compel the plaintiff to prove formally and precisely that the libel or words relate to every part and particular of the matter so previously stated, but that it satisfies all he has taken upon himself to prove, if he shows that the libel relates substantially to the matters previously alleged by way of introduction, in such a manner as that the defamation contained in the libel is of the character and effect which the plaintiff has described.(4) And where the declaration alleges that the li-

Whale, 5 Barn. & Cress. 39. An admission of the plaintiff as an attorney, some years before the time of the publication, without proof of his having taken out certificates, or having practiced, is not sufficient. *Lewis v. Walter*, 3 Barn. & Cress. 138.

(1) *Parry v. Collis*, 1 Esp. N. P. C. 399. And see *Teasdale v. Clement*, 1 Chitty's R. 603, where the inducement was, the plaintiff had carried a dead body to Surgeon's Hall; and *R. v. Holt*, 5 T. R. 436.

(2) *Figgins v. Cogswell*, 3 Maule & Selw. 369. And see *Hall v. Smith*, 1 Maule & Selw. 287; *Lord Churchill v. Hunt*, 2 Barn. & Ald. 685.

(3) Without such a colloquium, the libel may frequently be bad in arrest of judgment; as where it does not manifestly relate to the matters in the inducement. *Clement v. Fisher*, 7 Barn. & Cress. 459.

(4) By Lord Tenterden, Ch. J., in *May v. Brown*, 3 Barn. & Cress. 123. In this case the proof varied as to circumstances which were held immaterial to the defamatory nature of the libel. In which respect the case differed from *Shepherd v. Bliss*, 2 Stark. N. P. 510; *Solomon v. Medex*, 1 Stark. 191.

NOTE 1105.—See *Gibson v. Williams*, 4 Wend. 320.

Averments are the subject of proof, though innuendoes are not.

The understanding and opinions of witnesses are not admissible to show how the words were understood. *Van Vechten v. Hopkins*, 5 John. R. 211. That is the province of the court to determine, from a perusal of the libel, whether it was intended to apply to the plaintiff or not; but whether the libel was *published of and concerning the plaintiff*, is a question of fact, which belongs to the court and not to the jury to decide. The *intention* of the defendant is not the subject of proof. *Gibson v. Williams*, *supra*.

bel was *of and concerning* several things, it is not necessary to prove that it was *of and concerning* each ;(1) unless the libelous matter was *of and concerning* one indivisible proposition, and not a proposition containing distinct branches.(2)

Innuendo.

Where, indeed, the plaintiff in stating a libel, connects it by innuendo with a particular allegation, then he will be bound to prove a libel relating to the matter contained in the allegation.(3) Thus, where the declaration stated that the plaintiff was treasurer and collector of certain tolls, and the defendant spoke of and concerning the plaintiff as such treasurer and collector, with an innuendo that the words related to the plaintiff as such treasurer and collector, it was held, that the plaintiff was bound by the innuendo, to prove that he was both treasurer and collector.(4) In an action for words which may be understood to convey a charge either of felony or fraud, although they would be actionable in the latter sense as well as the former, if the declaration contains an innuendo, that the defendant thereby meant to impute felony to the defendant, this must be made out in evidence.(5)

III. As to the proof of malice.

Malice when inferred.

Malice, in common acceptation, means ill-will against a person, but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse. In an ordinary action for words, or a libel, it is not necessary to produce any extrinsic evidence of malice, though such evidence is frequently given to increase the damages. Where the publication is defamatory, the law infers malice, unless anything can be drawn from the circumstances attending the publication to rebut that inference. In actions indeed, for such slander as is *prima facie* excusable, on account of the cause of speaking or writing it, as in the case of servant's character, confidential advice, or communications to persons who ask it, or have a

Slander will not lie against a person called on for the payment of a note, alleged to have been signed by him as *surety*, for the speaking of words denying his signature, and that he ever gave authority to affix his name to the note. *Andrews v. Woodmonsee*, 15 Wend. 233. An *innuendo*, that by the speaking of such words, defendant meant to impute the crime of *forgery* to the maker, will not help the case. *Id.*

(See also *Harrison v. Bush*, 32 Eng. L. & Eq. 173; *Shilfer v. Gooding*, 2 Jones' Law N. C. 175.)

(1) *Lewis v. Walter*, 7 Barn. & Cress. 188.

(2) *R. v. Horne*, Cowp. 72.

(3) *By Bayley, J., May v. Brown*, 7 Barn. & Cress. 128.

(4) *Sellers v. Tell*, 4 Barn. & Cressw. 655, respecting the use of an innuendo, see *Goldstein v. Foss*, 4 Bing. 489; *S. C.*, 6 Barn. & Cressw. 154; *Hankes v. Hawkey*, 8 East, 427; *Holt v. Schofield*, 6 T. R. 691; *Barham's Case*, 4 Rep. 20 a; 1 Wms. Saund. 243, n. 4.

(5) *Smith v. Cary*, 3 Campb. N. P. C. 461. See *Oldham v. Peake*, 2 Bl. R. 959; *Black v. Holmes, Fox & Smith, Jr.* Rep. 39.

right to expect it, malice, in fact, must be proved by the plaintiff. But this is an exception to the general rule;(1) and it has been said, that the question of malice in an action for libel or slander ought not to be submitted to the jury, unless it involves the consideration of the fact, whether the defamation was in the nature of a privileged communication.(2) Where a jury was directed to find whether the alleged libel submitted to their consideration was a privileged communication, and in case of their being of that opinion, whether it were attended with express malice, and the jury negatived the existence of express malice, but gave a verdict and damages for the plaintiff, it was held that the plaintiff was entitled to retain the damages; for the jury must be considered to have been of opinion that the communication was not privileged, and in that case, malice in law is implied from doing a hurtful act for which there is no excuse.(3)

Proof of other libels.

Though the jury must give damages only for the libel or words which are the subject of the action, yet evidence is admissible of other words or libels which show the defendant's malice towards the plaintiff in defaming him in the manner charged in the declaration.(4) It is not necessary that the other words should have been spoken to the same individual as those which are mentioned in the declaration;(5) or at the same time, or, indeed, before the commencement of the action.(6) And the distinction which

(1) By Bayley J., *Bromage v. Prosser*, 4 Barn. & Cressw. 253; by Bayley, J., *R. v. Harvey*, 2 Barn. & Cressw. 261—265; by Lord Kenyon, *R. v. Perry*, *Ersk. Speeches*, Vol. 2; by Le Blanc, J., *Rex v. Creevey*, 1 Maule & Selw. 273. Respecting the evidence of malice in giving servants characters, *Edmondson v. Stephenson*, see *Bull. N. P.* 8; *Weatherstone v. Hawkins*, 1 T. R. 110; *Hargrave v. Le Breton*, 4 Burr. 2425. Evidence that the character given was false is admissible. *Rogers v. Clifton*, 3 Bos. & Pull. 587; *King v. Waring*, 5 Esp. C. 13.

(2) 4 Barn. & Cressw. 258.

NOTE 1106.—See *Ward v. Smith*, 6 Bing. 749.

In *Picton v. Jackman* (4 Car. & Payne, 257), there was contradictory testimony, and the judge left it to the jury to say whether or no they believed the communication to be confidential; and that it was not necessary in such a case for him to tell them, in distinct terms, that if they believed the evidence, they must find their verdict for the plaintiff.

(Though malice is implied from the act of publishing (*Washburn v. Cooke*, 3 Denio, 110), actual malice may be disproved by evidence of what was said by the defendant in the act of, or in directing the publication. *Taylor v. Church*, 4 Selden R. 452; *Bush v. Prosser*, 1 Kernan N. Y. R. 347.)

(3) *Blackburn v. Blackburn*, 4 Bing. 408.

(4) *Charlter v. Barrett*, *Peake's N. P. C.* 32; *Mead v. Daubigny*, *Id.* 168; *Lee v. Huson*, *Id.* 223; *Cook v. Field*, 3 Esp. N. P. C. 133; *Plunkett v. Cobbett*, 5 Esp. N. P. C. 136; *Rustell v. Macquister*, 1 Campb. N. P. C. 49; *Finnerty v. Tipper*, 2 Campb. N. P. C. 72.

(The rule now is, that the plaintiff cannot be permitted to prove other slanderous words or libels not set forth in the complaint, in aggravation of damages (*Vincent v. Dixon*, 5 Ind. 270), unless the Statute of Limitations has already run against the words which are proposed to be proved. *Root v. Lowndes*, 6 Hill R. 518.)

(5) *Mead v. Daubigny*, *Peake's N. P. C.* 168.

(6) *Rustell v. Macquister*, 1 Campb. N. P. C. 49, n.; *Cook v. Field*, 2 Esp. N. P. C. 133.

was at one time made between words actionable and such as are not actionable (that in the latter case, other words might be given in evidence, but not in the former),(1) has been since properly overruled.(2) Where a libel had been published in a weekly paper, evidence of similar papers purchased at the defendant's shop shortly before the trial, is admissible to show that the paper was regularly published, and that the libelous publication was deliberately made.(3) And in an action for words imputing perjury, the plaintiff has been allowed to prove that, subsequently to the speaking of the words, the defendant preferred an indictment against him for the same perjury.(4)

In the case of *Finnerty v. Tipper*,(5) which was an action for a libel published in a periodical work, Mansfield, C. J., refused to admit in evidence subsequent numbers of the same work, unless they expressly referred to the libel for which the action was brought; for the subsequent publication, he said, might contain the most scandalous imputations, while the former libel may have been almost nothing; and the necessary consequence must be, that the jury would give damages for the second libel in an action for the first, although the defendant would not have the same opportunity of proving the truth of its contents as if it were made the subject of a distinct action. The chief justice was of opinion, that the same restriction was proper, and had been observed, in actions for words spoken, namely, that the subsequent words ought to refer to the same subject;(6) and he drew a distinction between the case then before him and that of *Carr v. Hood*, which had been cited for the admissibility of the evidence; the defence there was, that the publication in question was a fair criticism on the writings of the plaintiff, and, therefore, any other papers published by the defendant which tended to show that he was actuated by malice in publishing the libel complained of, were admissible evidence.

As the ground for admitting evidence of other words or libels is to show the intention of the party, where it is equivocal, and not for the purpose of enhancing the damages, Lord Ellenborough rejected evidence of this nature, in a case where there was no doubt respecting the intention of the defendant.(7)

(1) *Mead v. Daubigny*, Peake's N. P. C. 125.

(2) *Rustell v. Macquister*, 1 Campb. N. P. C. 49. See *Lee v. Huson*, Peake's N. P. C. 166.

(3) *Plunkett v. Cobbett*, 5 Esp. N. P. C. 136.

(4) *Tate v. Humphrey*, 2 Campb. N. P. C. 73, n. And see *Chambers v. Robinson*, Str. 691.

(5) 2 Campb. 72.

(6) On a review of the cases which have been above cited, it will be found, that, in the greater number of them the subsequent words or libels offered in evidence expressly referred to those which were the subject of the action; and in others, as *Lee v. Huson* and *Rustell v. Macquister*, it does not appear from the reports whether they had or had not such a reference.

(7) *Stuart v. Lovell*, 2 Stark. N. P. C. 93. The determination of the point as to the intention does not, however, seem to be within the province of the judge.

Character.

Witnesses cannot be examined, on the part of the plaintiff, as to particular facts, for the purpose of falsifying the assertions in the alleged libel, where there is no justification on the record.(1) And, on the point of general character, it has been recently determined, that evidence is inadmissible, on the part of the plaintiff, whether there be a justification upon the record or not.(2) Such proof, indeed, seems to have been admitted, where the action has been for slanderous expressions used in giving the character of a servant, on the ground that general character was in some degree in issue, and that it was incumbent on the plaintiff to prove express malice.(3)

IV. As to the proof of damage.

Special damage.

It is a well-known rule, that when words are in themselves actionable, it will not be necessary to state any special damage(4) in the declaration, as it manifestly is, if the words are not actionable; and in neither case can evidence be admitted of any particular loss or injury, sustained by the plaintiff in consequence of the defamation, unless it be specifically stated on the record.(5) If the declaration state, that in consequence of certain words spoken of the plaintiff, A. B. and other persons left off dealing with him, the plaintiff cannot, under this statement, prove that another person,

(1) *Stuart v. Lovell*, 2 Stark. N. P. C. 93. * * See *post*, note 1108. * *

(2) *Cornwall v. Richardson*, 1 Ry. & Mo. 305.

(3) *King v. Warring*, 5 Esp. 13; *Rogers v. Clifton*, 3 Bos. & Pull. 587. In the former case, evidence of the plaintiff's character, before he entered the defendant's service, was admitted.

(In *Bromage v. Prosser* (4 B. & C. 255), Bayley, J., says: "Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse.

In *New York*, the defendant may now plead and prove matters in mitigation which do not amount to a justification (*Bush v. Prosser*, 1 Kernan N. Y. R. 347); or facts that tend to prove the truth of the words complained of as slanderous. *Bisby v. Shaw*, 2 Id. 67. See also *West v. Walker*, 2 Swan (Tenn.) 32. As to what evidence may be given under the general issue, see *Stanley v. Webb*, 21 Barb. 148.)

(4) NOTE 1107.—In *Saville and wife v. Sweeny* (4 Barn. & Adol. 514), it was held, that where the wife kept a boarding-house, and lived apart from her husband; and the declaration stated special damage to her business by the words spoken, she ought not to be joined in the action; the words being only actionable in respect of damage to the business, and that damage being solely the husband's.

In *Tilk v. Parsons* (2 Car. & Payne, 201), which was an action by a baker for words charging plaintiff with using bad flour, and the declaration stated that several persons named discontinued buying his bread; held, that the person of whom they used to buy the bread would not be asked what reason they gave for ceasing to take it any longer; the persons themselves must be called.

* * *Hallock v. Miller*, 2 Barb. S. C. R. 630, S. P. * * (See *Kendall v. Stone*, 2 Sand. 269, as to slander of title.)

(5) Respecting what written publications are actionable, without proof of special damage; see *Levi v. Milne*, 4 Bing. 195; *Villers v. Mousley*, 2 Wils. 493; *Thorley v. Ld. Kerry*, 4 Taunt. 355.

not named, has left off.(1) If the plaintiff declare for loss of a marriage, the name of the individual who was to have married the plaintiff must be stated, and proved as alleged.(2) In an action for slander of title, a statement that the plaintiff, in consequence of the words, lost the sale of his lands, is too general; and the fact of a particular individual, not named, having declined to purchase, cannot properly be proved under such a statement.(3) But it is sufficient if the special damage is stated with as much certainty as the nature of the case reasonably admits of; and therefore where a dissenting minister complained that, in consequence of the defendant's slander, his congregation had discontinued giving him the profits which he otherwise would have received, it was held unnecessary for him to state the names of the persons composing his congregation.(4)

Cause of damages.

The plaintiff is not entitled to recover damages arising from the wrongful act of a third person, though the act may have been done in consequence of the defendant's misrepresentation; as in the case of *Vicars v. Wilcocks*,(5) where the damage proceeded from the wrongful dismissal of the plaintiff from his service before the term of it had expired. And the special damage must not be too remote a consequence of the words or libel.(6) Thus, in a case where a manager of a theatre complained of a libel upon a performer, in consequence of which she refused to sing, and his theatre was thereby more thinly attended; Lord Kenyon held that the injury was too remote to be connected with the cause assigned for it.(7)

The next question is, What evidence is admissible under the plea of Not guilty.

It is an established rule, that in ordinary actions for slander, the defendant will not be permitted, under this issue, to prove the truth of the defamatory words, even in mitigation of damages; if he intend to justify the words as true, the justification ought to be set forth, formally on the record, that the plaintiff may be prepared to defend himself.(8) But if the plaintiff with a view to show the defendant's malice, proves other de-

(1) *Bull N. P.* 7. The persons who have left off dealing are the proper witnesses of the fact, and their declarations cannot be proved. *Tilk v. Parsons*, 2 C. & P. 201. See *Ashley v. Harrison*, 1 Esp. 48, as to the proof of the loss of profits of a theatre.

(2) *Hewitt v. Jones*, Cro. Jac. 499; *Witherand v. Clarkson* 2 Lutw. 1295; *Id.* Raym. 1007, where the plaintiff was not allowed to prove the loss of marriage with a person of a different name from that stated.

(3) *Lowe v. Harwood*, Sir W. Jones, 196; *Tasburgh v. Day*, Cro. Jac. 484.

(4) *Hartley v. Herring*, 8 T. R. 130.

(5) 8 East, 1. And see *Morris v. Langdale*, 2 Bos. & Pull. 184.

(6) * * See 2 Gr. Ev. §§ 254, 256, 267, 269, 271, 275, 420, on the subject of damages. *Sedgwick on Damages*, p. 63, *et seq.*, and 487, 548. * *

(7) *Ashley v. Harrison*, 1 Esp. N. P. C. 48.

(8) *Underwood v. Parke*, 2 Str. 1200; *Bull. N. P.* 9; *Smith v. Richardson*, Willes, 20; by *Holroyd, J.*, 5 Barn. & Ald. 646.

famatory words on the same subject, besides those set out in the declaration, in that case, the defendant not having had an opportunity of justifying by pleading the truth, may prove the truth of this fresh defamatory matter under the general issue.(1) The defendant may give evidence of the truth of the words spoken by him, under this issue, where the action is founded entirely on the special damage.(2)

The defendant has, in several cases, been permitted to show, in mitigation of damages, that before and at the time of the publication of the supposed libel, the plaintiff was generally suspected of the crime imputed to him;(3) but it has been recently determined in the Court of Exchequer, that evidence of the plaintiff's bad character is not admissible, in mitigation of damages, under the general issue.(4) In the case of *Wyatt v. Gore*,(5) the defendant was allowed to ask a witness whether the substance of the libel had not previously appeared in a newspaper.

In an action for libel, the defendant cannot, either in bar of the action, or in mitigation of damages, give in evidence other libels published of him by the plaintiff, which do not distinctly relate to the same subject as the libel on which the action is brought, and which cannot be said to have provoked that particular libel.(6) And it seems that general evidence of the plaintiff having been in the habit of libeling the defendant is equally inadmissible.(7)

(1) *Collins v. Loder*, Bull. N. P. 10; *Warne v. Chadwell*, 2 Stark. N. P. C. 457.

(2) *Watson v. Reynolds*, 1 Mo. & M. 2.

NOTE 1108.—In action for a libel, which is only libelous on a man in the execution of his office, where the plaintiff has stated, by way of inducement, his due discharge of its duties, the defendant cannot on the general issue give evidence of negligence in discharging them in answer to that action. *Dance v. Robson*, 1 Moody & Malk. 294.

(3) *Ld. Leicester v. Walter*, 2 Campb. N. P. C. 251; — *v. Moor*, 1 Maule & Selw. 284; *Williams v. Callender*, Holt's N. P. C. 307. See also the words of Gibbs, Ch. J., in Holt's N. P. C. 303, 535. See also *Binns v. Stokes*, 27 Miss. (5 Cush.) 239; but see *Tidman v. Ainslie*, 38 Eng. Law & Eq. 567; *Dame v. Kenney*, 5 Foster, 318.

(4) *Jones v. Stevens*, 11 Price, 235. In *Waitman v. Weaver* (Dowl. & Ry. N. P. C. 10), it was held, that the defendant, under the general issue, could not prove facts to negative the presumption of malice. And in *Snowden v. Smith*, it was ruled by Chambre, J., that general evidence could not be given where a jurisdiction was pleaded. 1 Maule & Selw. 286, n. In *Mawbry v. Barker* (Lincoln Sum. Assizes, 1826), where a justification was pleaded, together with the general issue, general evidence was admitted, by Lord Tenterden, Ch. J., as the safer course.

NOTE 1109.—The general bad character of the plaintiff must be shown. *Bodwell v. Swan*, 3 Pick. 376.

* * It may be shown under the general issue, even though defendant has pleaded a justification, and give evidence in support of that plea. *Hamer v. McFarlin*, 4 Denio, 509. * *

(5) Holt's N. P. C. 302. And see *East v. Chapman*, 1 Mo. & M. 46, where evidence that the libel was a correct account of the proceedings at an inquest, was admitted, in mitigation.

(6) *May v. Brown*, 3 Barn. & Cress. 125. See also *Maynard v. Beardsley*, 7 Wend. 560, and *Gould v. Weed*, 12 Id. 12. Papers and facts referred to may be proved (*Nash v. Benedict*, 25 Wend. 645), but not similar facts. *Barthelmy v. The People*, 2 Hill R. 248.

(7) *Wakley v. Johnson*, 1 Ry. & Mo. 422. See *May v. Brown*, 3 Barn. & Cress. 125. In *Finerty v. Tipper* (2 Campb. C. 77), general evidence of the above nature was considered admissi-

An accord and satisfaction may be proved under the general issue. And in a late case, (1) Lord Ellenborough allowed proof on the part of the defendant, that the plaintiff had agreed to waive the action, in consideration that the defendant would destroy certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed; this evidence was admitted as showing an accord and satisfaction.

Privileged communications.

Where the defence is, that the words were spoken or published, not in the malicious sense imputed by the declaration, but in an innocent sense, or on an occasion which warranted the publication, (2) this the matter may, it seems, be given in evidence under the general issue. (3) It was observed by Lord Ellenborough, in the case of *Tabart v. Tipper*, (4) that a publication is not a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality. And it is a sufficient defence to this action if the words were spoken confidentially upon advice asked, or by way of honest advice, to regulate the conduct of a third person. (5) If the words were spoken by the defendant as counsel in enforcing what his client informs him of (being pertinent to the matter in issue), or in commenting upon the facts proved in evidence; (6) or if the libel complained of is a true report of a judicial proceeding not merely of a preliminary nature, and respects a person who is a party to the investigation, and is not accompanied by any comments of a slanderous nature; (7) it seems that these circumstances

ble in mitigation of damages. With respect to libels of the editors of newspapers on each other, see *Herriot v. Stuart*, 1 Esp. C. 437; *Sturt v. Lowell*, 2 Stark. C. 95.

(1) *Lane v. Applegate*, 1 Stark. C. 97.

(2) * * See *ante*, note 1103; and see 2 Gr. Ev. § 421, n. 1. * *

(3) *Fairman v. Ives*, 5 Barn. & Ald. 642. In *Stockley v. Clement* (4 Bing. 167), it was intimated by Chief Justice Best, in delivering the decision of the court, that where a libel contained matter which would make it a privileged communication, the facts ought to be specially pleaded. See *Curry v. Walter*, 1 Bos. & Pull. 525.

(4) 1 Campb. N. P. C. 352. With respect to criticisms on literary compositions, and works of art, and places of public entertainments, see *Soade v. Knight*, 1 Mo. & M. 74; *Carr v. Hood*, 1 Campb. N. P. C. 355, n.; *Dibdin v. Bostock*, 1 Esp. N. P. C. 29. On a petition to Parliament, *Dunne v. Anderson*, 1 Ry. & Mo. 287.

(5) *Pasley v. Freeman*, 3 T. R. 61; *Bromage v. Prosser*, 4 Barn. & Cress. 247; *M'Dougal v. Claridge*, 1 Campb. N. P. C. 267; *Robertson v. M'Dougall*, 4 Bing. 670. On slander of title, see *Watson v. Reynolds*, 1 Mo. & M. 1; *Smith v. Spooner*, 3 Taunt. 246; *Pitt v. Donovan*, 1 Maule & Selw. 639; *Hargrave v. Le Breton*, 4 Burr. 2422; *Rowe v. Roach*, 1 Maule & Selw. 304. A publication will not be privileged if the legal object may be obtained by means less injurious. *Browne v. Croome*, 2 Stark. N. P. C. 297.

(6) It seems, that if the observations of a counsel are not relevant to the matter in issue, he is nevertheless not responsible in a common action of slander. By *Holroyd, J.*, *Flint v. Pike*, 4 Barn. & Cress. 481. See *Hodgson v. Scarlett*, 1 Barn. & Ald. 252; *Wood v. Gunston*, *Styles*, 462; *Brook v. Montague*, Cro. Jac. 90.

(7) *Curry v. Walter*, 1 Bos. & Pull. 525; *Lewis v. Clement*, 3 Barn. & Ald. 702; 3 Bro. &

will be a sufficient defence to an action for defamation, without being specially pleaded. And many other cases might be cited in illustration of the same general rule.(1)

Justification that another first spoke the words.

The defendant has been allowed, under certain circumstances, to justify the repetition of slanderous words, which have been spoken by another ;(2) he must then state the very words that have been used,(3) and prove some

Bing. 297 ; S. C., *Lewis v. Walter*, 4 Barn. & Ald. 613 ; *Flint v. Pike*, 4 Barn. & Cress. 473 ; *Duncan v. Thwaites*, 3 Barn. & Cress. 556 ; *Rex v. Fleet*, 1 Barn. & Ald. 379 ; *M'Gregor v. Thwaites*, 3 Barn. & Cress. 24.

(1) Many cases in illustration of this rule are collected in the notes to *Lake v. King*, 1 Saund. 130.

(2) NOTE 1110.—* * *Holroyd and Best, J's*, in *Lewis v. Walter*, 4 B. & Adol. 611 ; and *Best, Ch. J.*, in *De Crespigny v. Wellesley*, 5 Bing. 392, *contra* ; and *Ward v. Weeks*, 7 Bing. 211, also involves the contrary doctrine. The words, in that case, were spoken by the defendant, and one Bryce, who was present, without the defendant's authority, had communicated them to Bryer. Bryer, in consequence, had refused to trust the plaintiff, and such refusal was the gravamen of the injury for which the suit was brought. On a motion for a new trial, because of a rejection of evidence offered by the plaintiff that Bryer had heard the words from Bryce, as having been spoken by defendant, *Tindal, Ch. J.*, very justly observed, that "no effect whatever followed from the first speaking of the words to Bryce : if he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage." And the motion for a new trial was denied. It is true, that the proof offered was held to be a variance from the declaration, but it is evident from the language of the court, that the decision would have been the same if the question of variance had not been presented. In *Keenholts v. Becker* (3 Denio, 346), the opinion was intimated by *Beardsley, J.*, that where slanderous words are repeated, innocently and without an intent to defame, the author of the slander should be held liable for injuries resulting from it as thus repeated ; but that it might be otherwise where the repetition was itself slanderous, and the injurious consequences arose, in part at least, from the second slander. The decision in *Ward v. Weeks* enunciates the simpler, and it is conceived the better doctrine. The circumstance upon which the liability of the original utterer of the words is made, by *Mr. Justice Beardsley*, to depend, seems quite inadequate as a foundation on which to support an exemption or a liability. Exemption or liability is not made to depend upon the intention of a party, or the direct consequence of his own act, but upon the intention and the consequence of the act of another person, over whom he has no control, and for whose conduct, upon general principles of reason and of law, he is in no way responsible. And see *Lewis v. Walter*, 4 Barn. & Ald. 605 ; *Bodwell v. Swan*, 3 Pick. 376 ; *Clark v. Munsell*, 6 Metc. 373. In *Smith v. Ashley* (11 Metc. 367), the defendant had published in his newspaper a contributed article, which he supposed to be a mere fancy sketch having no personal application. It was held, that he was not liable, although the article was intended by the writer to be libelous, and to apply to the plaintiff, and that the plaintiff's remedy was only against the writer. *Dexter v. Spear*, 4 Mason, 115, S. P. But these cases are easily distinguished from *Ward v. Weeks* (*supra*), on the ground that the writer is the real publisher of the libelous matter, and the printer his mere agent or servant. And *contra* to the point in the text, see 2 Kent C. (6th ed.), p. 20, n. a, and the authorities there cited. * *

(3) *Maitland v. Goldney*, 2 East, 426 ; *Lord Northampton's Case*, 12 Rep. 133. This defence will not be sufficient, unless the defendant has, at the time of repeating the slander, offered himself as a witness ; and it is not available where the words have become actionable only in consequence of having been put into writing by the defendant. *M'Gregor v. Thwaites*, 3 Barn. & Cress. 24 ; *Lewis v. Walter*, 4 Barn. & Ald. 605. See *Kelly v. Dillon*, 5 Ind. 426.

material part of them. Such a defence, however, it has been held, is inadmissible under the general issue, and must be specially pleaded.(1)

The defendant has a right to have the whole of the publication read, from which the passages charged are extracts.(2) And if the libel refer to a newspaper as containing the particulars of the defamatory matter, he may give the newspaper in evidence.(3)

In an action for a libel, where the general issue is pleaded, and also a special justification, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if, in the outset of the trial, the plaintiff thinks fit to call any evidence to repel the justification, he will not be permitted to give further evidence in reply.(4)

CHAPTER XVII.

OF EVIDENCE IN AN ACTION ON THE CASE FOR A MALICIOUS PROSECUTION OR ARREST.

1. Action for malicious prosecution.

THE next action to be considered, is an action on the case for a malicious prosecution; in which the plaintiff will have to prove, that proceedings have been instituted against him in the manner described in the declaration; that they originated in the malice of the defendant, and without probable cause; and that all such proceedings are determined; and, lastly, the damages sustained.

The fact of the prosecution is usually proved by the production of the record, or of an examined copy.(5) And it seems that it is not sufficient to give in evidence the original indictment; because it does not prove the caption, which is a material averment in the declaration.(6) If the prosecution was by means of a charge preferred before a magistrate, the proceedings should be produced; or, in case they have been lost, secondary evidence should be given. And where the proceedings have been laid

(1) *Mills v. Spencer*, Holt's N. P. C. 534.

(2) *Cook v. Hughes*, 1 Ry. & Mo. 112; *R. v. Lambert and Perry*, 2 Campb. N. P. C. 398.

(3) *Mullet v. Hulton*, 4 Esp. N. P. C. 248; *Weaver v. Lloyd*, 1 C. & P. 296. In *Wyatt v. Gore* (Holt's N. P. C. 303), the witness was questioned by the defendant as to the contents of a newspaper in which the libel had appeared, and which was not produced.

(4) *Browne v. Murray*, 1 Ry. & Mo. 254.

(5) See Vol. II, Chap. 1; *Leggatt v. Tollervey*, 14 East, 302, where the record was admitted, though obtained without due authority.

(6) *Edwards v. Williams*, 2 Esp. D. N. P. 37.

aside as useless, secondary evidence will be admissible, after slight proof of their destruction.(1)

Some evidence of the identity of the defendant must also be given, and that he was the prosecutor in the proceedings, which are charged to be malicious. One of the grand jury, before whom a bill of indictment has been preferred, may, it has been said, be called to prove the fact that the defendant was the prosecutor.(2) The indorsement of the defendant's name on a bill of indictment, which has been laid before the grand jury, shows, that he was sworn to the bill, though it is not the only competent proof of that fact; but it is not any evidence of his being the prosecutor.(3)

The prosecution, which is charged to be malicious, must be shown to have been determined;(4) otherwise it may possibly happen, that the plaintiff may recover in the action, and yet, if the prosecution is not determined, may be afterwards convicted of the original charge. If the bill of indictment was returned by the grand jury not a true bill, or if the plaintiff was acquitted on the trial of the prosecution, these facts can only be proved by the original record, or by an examined copy of the record.(5) An allegation, that the plaintiff was duly and in a lawful manner acquitted by a jury of the country, is proved by the record, from which it appears, that the jury found the plaintiff not guilty, and thereupon judgment was entered, that the plaintiff should go acquitted.(6) And the action will not be defeated by showing that the plaintiff was acquitted on a defect in the indictment.(7) An entry of a *nolle prosequi* by the attorney-general is not such a termination of the prosecution as will enable the plaintiff to maintain this action, because new process may issue on the same indictment.(8)

With respect to variances in the proof of those averments in the declaration which refer to the previous legal proceedings, it has been before mentioned, that a material distinction is now clearly established between allegations of matter of substance, and allegations of matter of description.(9) The former are to be substantially proved; the latter must be

(1) *Freeman v. Askell*, 2 B. & C. 496.

(See *Holmes v. Johnson*, *Busbee Law N. C.* 44, 395. So as to a malicious proceeding in bankruptcy. *Farlie v. Danks*, 30 Eng. Law. & Eq. 115.

(2) *Sykes v. Dunbar*, Sel. N. P. 1305; *Freeman v. Arkell*, 1 C. & P. 137.

(3) *Bull. N. P.* 14; per Holt, Ch. J., *Johnson v. Browning*, 6 Mod. 216; *Girlington v. Pitfield*, 1 Vent. 47.

(4) *Fisher v. Bristow*, 1 Doug. 215. (See also *Clark v. Cleveiland*, 6 Hill R. 344.)

(5) *Cole v. Hanks*, 3 Mon. R. 206.

(6) *Hunter v. French*, Willes, 517.

(7) *Pippet v. Hearn*, 5 B. & Ald. 634. It was said, by the court, that if the indictment be good or bad, the plaintiff is equally subject to the disgrace of it, and put to the same expense.

(As to the effect of a conviction before the justice, see *Burt v. Place*, 4 Wend. 591.)

(8) *Goddard v. Smith*, 6 Mod. 261; 1 Salk. 21.

(9) *NOTE* 1111.—If there is misjoinder of action, advantage can be taken on general demurrer, in arrest of judgment or on error. In *Hensworth v. Fowkes* (4 Barn. & Adol. 449), the declaration ("in a plea of trespass on the case") stated that the defendant, intending to injure the plain-

proved literally.(1) An allegation in a declaration, that a plaintiff was acquitted by a jury in the court of our lord the king before the king himself at Westminster, before the chief justice, is not supported by a record which shows that the trial took place before the chief justice at Nisi Prius.(2) A variance in the title of the magistrate, before whom the information was laid, is fatal.(3) And where it was stated in the declaration that the defendant imposed upon the plaintiff the crime of felony, but, on production of the information, it appeared that the charge amounted only to a civil injury, it was held a fatal variance, notwithstanding the warrant was to arrest the plaintiff on suspicion of felony.(4)

In the case of *Purcell v. Macnamara*,(5) it was held not to be necessary to prove the exact day of the plaintiff's acquittal, as laid in the declaration, inasmuch as it appeared to have been before the action brought; for here the averment was not by way of description of the record. So on the trial of an action for maliciously indicting the plaintiff for an assault, it appeared that the charge, as stated in the warrant, was for violently assaulting the defendant; whereas the charge alleged in the declaration was for assaulting and beating, and the charge, proved by witnesses to have been brought before the magistrate, was for assaulting and striking; the Court of Common Pleas held, that as the declaration did not profess to describe the warrant, and had represented the charge correctly in substance, the variance was not material.(6) In another case, where the de-

tiff in his good name, and to cause his dwelling-house to be searched for stolen goods, and to procure him to be imprisoned, went before a justice, and falsely, maliciously, and without probable cause, charged that certain specific goods of defendant, had been feloniously stolen, and that he suspected that said goods were concealed in the plaintiff's dwelling-house, and upon such charge, defendant procured the justice to grant a warrant, authorizing a constable, with necessary assistance, to enter the plaintiff's house, to search for the *said* goods; and the defendant with other persons, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the *said* goods by such persons, and the door of such house, and a pantry therein to be broken to pieces, and the plaintiff and his family to be disturbed in possession, and his goods to be carried away. The general conclusion was, that by means of the premises, the plaintiff was injured in his good name and trade, put to expense and hindered in his business. A count in trover was added. Held, on general demurrer, by Taunton and Patterson, Justices (Littledale, J., *dissentiente*), that the acts of violence alleged to have been acts done, in pursuance of the warrant, and in consequence of the charge made by the defendant, and that they were stated as mere matter of aggravation; and consequently, that the whole count containing the statement was in case.

(As to the effect of variances between proof and pleading, see *ante*, Chap. 1 of this volume.)

(1) *Purcell v. Macnamara*, 9 East, 157; *Phillips v. Shaw*, 4 B. & Ald. 435; *Stoddart v. Palmer*, 3 B. & C. 2; *Bevan v. Jones*, 4 B. & C. 405; *Green v. Bennet*, 1 T. R. 656.

(2) *Woodford v. Ashley*, 11 East, 508.

(3) *Walters v. Mace*, 1 Chitty's C. 507.

(4) *Leigh v. Webb*, 3 Esp. C. 165.

(5) 9 East, 157. And see *R. v. Hucks*, 2 Stark. N. P. C. 521. That the insertion of the words "*prout patet per recordum*" is not conclusive upon the question of the averment being matter of description contrary to a *dictum* of Lord Ellenborough in *Purcell v. Macnamara*, see *Stoddart v. Palmer*, 3 Barn. & Cress. 5.

(6) *Byne v. Moore*, 5 Taunt. 589.

claration alleged that the defendant charged the plaintiff with felony, and, in support of this allegation, the information before the magistrate was produced, which contained in substance an assertion that a felony had been committed, and that the defendant had good cause to suspect and believe that the plaintiff had stolen the property, the Court of King's Bench held, that the information, according to the common understanding of mankind, and as it was understood by the magistrate, amounted to a charge of felony against the plaintiff, and was therefore sufficient to sustain the allegation.(1)

Want of probable cause.

It is necessary for the plaintiff to prove that a legal prosecution was carried on without a probable cause.(2) The question of probable cause, is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law.(3)

The want of probable cause is obviously not to be inferred as a necessary consequence from the most express malice. A man from a malicious motive, may take up a prosecution for real guilt; or from circumstances which he really believes, he may proceed upon apparent guilt; in neither case is he liable to this kind of action. And it seems to be essentially necessary for the plaintiff, in every case, to give some evidence of want of

(1) *Davis v. Noak*, 1 Stark. N. P. C. 377; 6 Maule & Selw. 29. And see *Johuson v. Brown*, 6 Mod. 216.

(It is to be borne in mind that a variance is seldom fatal under the present practice.)

(2) It must be shown that there was a legal prosecution before a competent tribunal—before a court or magistrate having jurisdiction of the cause or offence. *Bixby v. Brundige*, 2 Gray (Mass.) 129.

(3) See the judgment of Lord Mansfield and Lord Loughborough, in *Johnstone v. Sutton*, 1 T. R. 544; 2 T. R. 231; *Incedon v. Berry*, 1 Campb. 203, note; *Turner v. Turner*, 1 Gow, 50; *Arbuckle v. Taylor*, 3 Dow, 160; *Reynolds v. Kennedy*, 1 Wils. 232; Bull. N. P. 14; *Caudell v. London*, 1 T. R. 520, note. It seems that where the judge is of opinion, either on the plaintiff's showing, or on the uncontradicted evidence of the defendant, that there is a probable cause, it is usual to nonsuit the plaintiff. *Davis v. Hardy*, 6 B. & C. 225; *Hill v. Yates*, 2 B. Moore, 80; Bull. N. P. 14; *Fish v. Scott*, Peake's C. 135. Where there is a want of probable cause, it is usual to leave the question to the jury, subject to the judge's observations. *Isaacs v. Brand*, 2 Stark. 176; *Brooks v. Warwick*, 2 Id. 389; *Ravenga v. Mackintosh*, 2 B. & C. 693; *Nicholson v. Coghill*, 4 Id. 21.

(Where the facts are not disputed, the question whether there was or was not probable cause is one of law to be decided by the court; but where the facts are disputed, the question whether they are proved or not belongs to the jury to decide; and when the facts are found or established, the law as pronounced by the court determines whether they constitute probable cause. *Bulkley v. Keteltas*, 2 Selden (N. Y.) R. 384; *Baldwin v. Weed*, 17 Wend. 227. See also *Page v. Cushing*, 38 Maine, 523; *Carpenter v. Sheldon*, 5 Saund. 77. There must be proof of a want of probable cause, and malice; one of these will not be sufficient in the absence of the other. *Hitson v. Forrest*, 12 Texas, 320; *Long v. Rodgers*, 19 Ala. 321; *Cummings v. Parks*, 2 Carter (Ind.) 148; *Ford v. Kelsey*, 4 Rich. 365; *Bulkley v. Smith*, 2 Duer R. 261.)

probable cause, independently of the proof of malice.(1) Where, indeed, there is proof of express malice, and the cause of the former proceedings is peculiarly within the knowledge of the party originating them, slight evidence of the want of probable cause will maintain the action.(2) It will not, however, be sufficient merely to prove that, on the trial of the indictment, the defendant, who was the prosecutor, did not appear, and that the plaintiff was consequently acquitted.(3) Nor is it sufficient to prove, that the defendant, after commencing a prosecution, did not proceed to prefer a bill of indictment;(4) or that the bill of indictment, on being preferred, was returned by the grand jury, not a true bill.(5)

Without cause in part.

Where an action is brought for maliciously preferring an indictment, charging the plaintiff with the crime of perjury in an affidavit, and the whole of the indictment is set out on the record, if it appear that there was no probable cause for assigning perjury on some of the transactions contained in the affidavit, the plaintiff will be entitled to recover, although other parts of the affidavit, respecting transactions within the plaintiff's knowledge, were falsely sworn. The charge, said Gibbs, J., is not that the defendant imputed perjury without probable cause, but that he preferred that indictment without probable cause: there is no probable cause for some of the charges in the indictment, therefore the indictment is preferred without probable cause.(6)

If an action is brought against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing a crime to the plaintiff, but whether there appeared to be any ground upon the hearing before the magistrate; and this can only be shown, by proving what passed upon the hearing, when the conviction took place.(7) If the

(1) See last note.

(2) *Inledon v. Berry*, 1 Campb. 203, n. See *Nicholson v. Coghill*, 4 B. & C. 21. It has been said, that, where the facts are within the knowledge of the defendant, the *onus* is upon him to show a probable cause. Bull. N. P. 14; by *Bailey, J.*, 4 B. & C. 24. But the case of *Parrot v. Fishwick* (9 East, 362), referred to by Buller, does not warrant this position. And see by Lord Kenyon, *Sykes v. Dunbar*, 1 Campb. 202, n.; 9 East, 362; *Purcell v. Macnamara*, 9 East, 361; 1 Campb. N. P. C. 203, n.

(3) *Purcell v. Macnamara*, 1 Campb. N. P. C. 199, so ruled by Lord Ellenborough, and confirmed by the Court of King's Bench, 9 East, 361.

(4) *Wallis v. Alpine*, 1 Campb. N. P. C. 204, n. (See also *Ford v. Kelsey*, *supra*; and *Clark v. Cleveland*, 6 Hill R. 344.)

(5) *Byne v. Moore*, 5 Taunt. 187; *Freeman v. Arkell*, 1 C. & P. 138. See a *dictum* of *Holroyd, J.*, *contra*, 4 Barn. & Cress. 23.

(6) *Reed v. Taylor*, 4 Taunt. 616. (See *Heslop v. Chapman*, 22 Eng. L. & Eq. 296.)

(7) *Bailey v. Bethune*, 5 Taunt. 580. And see *Elsee v. Smith*, 2 Chitty, 304. To render a person liable for an information given before a magistrate, it must be shown to be wilfully false. 6 D. & R. 8. (See *Parker v. Huntington*, 2 Gray, 124.)

depositions of witnesses were taken down in writing at the hearing before the magistrate, they ought to be produced on the part of the plaintiff.

Malice.

Another point to be proved in this action, is the defendant's malice in instituting the proceedings. Malice may be implied from the want of probable cause, where there are no circumstances to rebut the presumption that malice alone could have suggested the prosecution.(1) And malice may be inferred, where the defendant's conduct will admit of no other interpretation, except by presuming gross ignorance.(2) Express malice is shown by proof of expressions of ill will, old grudges, &c. Where the defendant had published an advertisement of the finding of the indictment, together with other scandalous matter, it was held that the plaintiff might give this fact in evidence, to show the defendant's malice.(3) And the evidence of the defendant, on the occasion of the preceding trial, is admissible for the same purpose.(4)

Damage.

The plaintiff is entitled to damages for the peril in which his life or liberty has been placed, for the injury which his reputation has sustained,

(1) Crozer v. Pilling, 4 Barn. & Cress. 26; by Gibbs, Ch. J., 5 Taunt. 583; Turner v. Turner, 1 Gow, 50; Saville v. Roberts, 1 Salk. 14. The fact of malice is a question for the jury. 1 T. R. 540.

(2) Brooks v. Warwick, 2 Stark. N. P. C. 389.

(3) Chambers v. Robinson, 1 Str. 691. And see Knight v. Jermin, Cro. Eliz. 134.

(4) Bull. N. P. 13.

(Express or positive malice must be shown, as well as the absence of probable cause. Long v. Rodgers, 19 Ala. 321; Ewing v. Sandford, Id. 605; Griffin v. Chubb, 7 Texas, 603; Bulkley v. Smith, 2 Duer R. 261. Evidence given before the court or magistrate in the prosecution alleged to be malicious, may be introduced or proved by witnesses to show the existence or the want of probable cause. Goodrich v. Warren, 21 Conn. R. 432; Cooper v. Turrentine, 17 Ala. 13. A conviction or commitment on the evidence in the alleged malicious prosecution is *prima facie* enough to establish a probable cause. Ewing v. Sandford, 19 Ala. 605. See cases cited in Bent v. Place, 4 Wend. 591. But an acquittal, on trial of an indictment, is not *prima facie* proof of the want of probable cause for instituting the criminal proceeding. Scott v. Simpson, 1 Sand. R. 601. The decision of the magistrate convicting or committing the accused, furnishes a reasonable ground, in the first instance, for holding that there was probable cause for the prosecution. Williams v. Woodhouse, 3 Dev. R. 257; Whitney v. Peckham, 15 Mass. 243. But his decision is not conclusive. Burt v. Place, *supra*; and 6 Hill R. 346, note. The motive for the prosecution is usually developed by the evidence showing the existence or the absence of probable cause; and where there is no probable cause for the prosecution shown, there arises a very strong and natural presumption that it was instituted by malice. But if, notwithstanding, it be shown that there was no malice in fact, the action for malicious prosecution cannot be sustained. Long v. Rodgers, *supra*. In the action for malicious prosecution, it may be shown that the circumstances of the transaction were explained to the defendant, the prosecutor, before any proceedings were taken; and his affidavit before the magistrate may be proved. Honeycutt v. Freeman, 13 Ired. 320; Cooper v. Turrentine, 17 Ala. 13.)

and the expense to which he has been put.(1) The plaintiff's right to damages cannot be resisted, on the ground that the proceedings against him were defective; because he is equally subjected to the disgrace of a criminal charge, and put to the same expense in defending himself against it.(2) It has been held, that, in this action, the plaintiff cannot recover damages for the extra costs.(3) Where the action is joint, the jury cannot assess several damages.(4)

The defendant, under the general issue,(5) may justify the proceedings against the plaintiff, and show that he had a probable cause for instituting them. Where the charge against the plaintiff was for felony, the defendant has been allowed, in his defence, after giving some evidence of probable cause, to prove the general bad character of the plaintiff;(6) for in this case, where the point in issue is, whether the defendant acted from malice and without probable cause, it may be thought material to inquire into the situation of the parties, and whether the defendant had any reasonable ground for suspecting the plaintiff. Now, the notoriety of the plaintiff's character for dishonesty is a circumstance of general suspicion, not to be disregarded. In certain cases, especially if the plaintiff's conduct has been suspicious on the particular occasion in question, a man with the fairest and best intentions might be justified in acting upon such grounds, and might have strong reason for proceeding against a person of such notorious character. An inquiry into particular facts, with a view to reflect on the plaintiff's character, is not to be allowed.

The evidence given by the defendant in support of an indictment pre-

(1) *Saville v. Roberts*, Bull. N. P. 13, 14; *Jones v. Gwyn*, 1 Salk. 15. Evidence of the circumstances of the defendant is admissible, in order to increase the damages. Bull. N. P. 13.

(2) *Pipet v. Hearn*, 5 Barn. & Ald. 634; *Chambers v. Robinson*, 1 Str. 691; *Wicks v. Fentham*, 4 T. R. 247. (Damages for loss of credit may be recovered. *Goldsmith v. Picard*, 27 Ala. 142.)

(3) *Sinclair v. Eldred*, 4 Taunt. 7; *Jenkins v. Biddulph*, 4 Bing. 160; *Webber v. Nicholas*, 1 Ry. & Mo. 419. In *Sandback v. Thomas* (1 Stark. N. P. C. 306), the extra costs were held to be recoverable. And see *Nowell v. Roake*, 7 Barn. & Cress. 404.

(4) See Bull. N. P. 15.

(5) NOTE 1112.—GENERAL ISSUE.—In *Drummond v. Pigon* (2 Bing. N. C. 114), held, in an action for maliciously proceeding to outlawry, the general issue, not guilty, only puts in issue the existence of reasonable and probable cause, and not the reversal of the outlawry. Held, also, that the debtor's going abroad after an arrest for debt is reasonable and probable cause for the creditor's proceeding to outlawry, notwithstanding the creditor may know that the debtor has an agent in England.

Whether the suit was brought maliciously, and for the purpose of oppressing defendant, is a conclusion to be drawn by the jury. *Washington, J.*, in *Ray v. Law*, 1 Pet. C. C. R. 207. Probable cause of action is of itself a sufficient answer to this action, although he fail to recover.

* * And see 2 Kent C. (6th ed.) p. 22, n. c, and the cases there cited. * *

(6) *Rodriguez v. Tadmire*, 2 Esp. N. P. C. 720. And see 12 Rep. 92; 2 Inst. 51, 52. In a similar case, Mr. Baron Wood held, that the defendant's counsel could not inquire, whether the plaintiff was a person of suspicious character, and whether his house had been searched on former occasions. *Newsam v. Carr*, 2 Stark. N. P. C. 69.

ferred against the plaintiff for a felony, at the supposed commission of which no third person was present, has been thought admissible in an action for maliciously preferring the indictment; as, also, the evidence of the defendant's wife under the same circumstances.(1) Proof of the jury, on the previous trial, having deliberated and hesitated in giving their verdict, has been allowed to be given by the defendant, for the purpose of showing a probable cause.(2)

2. Actions for malicious arrest.

In an action for a malicious arrest, the plaintiff will have, in the first place, to prove the fact of the arrest. Where the arrest is in consequence of civil process, the return of the sheriff upon the writ is evidence of the truth of the fact stated in the return.(3) If the plaintiff has been held to bail, this will sufficiently appear from the indorsement on the writ.(4) Where the action is for a malicious arrest on criminal process, and the warrant under which the arrest was made is lost, it seems that parol evidence of it will be received, especially if it does not appear that any information has been taken.(5) An actual or constructive arrest must be shown. In a case where a sheriff's officer, to whom a warrant upon a writ against the plaintiff had been delivered, sent a message to the plaintiff, and asked him to fix a time to give bail, in consequence of which a time was fixed, and bail given, it was held, that an action for a malicious arrest could not be sustained against the party suing out the writ, although he had no cause of action, because neither an actual or constructive arrest had been proved.(6) Where the plaintiff averred that the defendant detained him in custody until he found bail, it was held that he was entitled to recover damages, on proving some detention, although no bail was put in.(7)

(1) B. N. P. 14, 15; *Johnson v. Browning*, 6 Mod. 216.

(2) *Smith v. Macdonald*, 3 Esp. C. 7. As to what circumstances are evidence of probable cause, see *Cro. Eliz.* 134, 871; 1 *Sand.* 4, 601.

(3) *Gyfford v. Woodgate*, 11 East, 296. In *Lloyd v. Harris* (Peake's C. 231), it was considered that it was necessary to prove the sheriff's warrant on the writ. See *Jackson v. Burleigh*, 3 Esp. C. 34.

(4) B. N. P. 14; *Rogers v. Ilcombe*, 2 Esp. Dig. N. P. C. 38. It is unnecessary to prove the affidavit to hold to bail, unless it is averred. *Webb v. Hearne*, 1 B. & P. 281. The affidavit, if alleged to have been made generally, may be proved by an office copy. B. N. P. 14; *Casburn v. Reed*, 2 B. Moore, 60. On the evidence of arrest under process of the sheriff's court, see *Arundell v. White*, 14 East, 216.

(5) *Newsam v. Carr*, 2 Stark. C. 69. That the action should be case, see *Else v. Smith*, 2 Chitt. 508; *Ragsdale v. Bowles*, 16 Ala. 62.

None but officers are bound to show return of the writ. *Plummet v. Dennet*, 6 Greenl. 421; *Middleton v. Price*, 2 *Strange*, 1184; 1 *Wils.* 17.

(6) *Supra*, p. 515; *Berry v. Adamson*, 6 B. & C. 529; *Bieten v. Burrigde*, 3 *Campb. N. P. C.* 139. And see *Arrowsmith v. Le Mesurier*, 2 N. R. 211.

(7) *Bristow v. Heyward*, 1 *Stark. N. P. C.* 48.

The proof of the determination of the previous legal proceedings, which are charged as being malicious, is equally necessary in this species of action as in an action for a malicious prosecution. A rule of court, by which the defendant had leave to discontinue on payment of costs, together with proof that the costs were taxed and paid, is good evidence of the determination of the suit.(1) And it seems that, wherever a suit is determined by a rule of court, the rule is proper evidence to show that it is at an end, although it was obtained by means of the plaintiff's own affidavit.(2) But a judge's order to stay proceedings, on payment of costs, does not appear to be sufficient evidence for this purpose.(3)

The same observations with respect to the accuracy required in proving the allegations on the record, occur in this action, as in the preceding.(4) And most of the points relating to the proof of a want of probable cause and of malice, which have been noticed in treating of the former action, are equally applicable in an action for a malicious arrest.(5)

Want of probable cause.

With respect to the proof of a want of probable cause for arresting the plaintiff, and of malice, it is not sufficient to show that the defendant suffered judgment of *non-pros* in his action against the plaintiff;(6) nor that the plaintiff was arrested, after payment to the defendant of debt and

(1) *Bristow v. Heyward*, 1 Stark. C. 48; S. C., 4 Campb. 213. See *Gadd v. Bennett*, 5 Price, 540; *Brandt v. Peacock*, 1 B. & C. 649.

(2) *Brook v. Carpenter*, 3 Bing. 301. See *Austen v. Debnam*, 3 B. & C. 139.

(3) *Kirk v. French*, 1 Esp. N. P. C. 80. And see by Lord Ellenborough, in *Bristow v. Heyward*, 4 Campb. N. P. C. 213. An order of the Lord Chancellor directing a commission of bankrupt to be superseded, is not sufficient proof of its being duly superseded; the writ of *superse-deas* under the great seal ought to be produced. *Poynton v. Foster*, 3 Campb. C. 60; *Barton v. Mills*, Cases t. Hard. 125. As to the determination of a suit in the sheriff's court, see *Arundell v. White*, 14 East, 215.

(4) *Vide supra*, p. 568. The insertion of the words "their pledges to prosecute," in setting forth the record of a judgment, will not create a fatal variance. *Judge v. Morgan*, 13 East, 547. And see *Arundell v. White*, 14 Id. 216, where an allegation of a plaint in the sheriff's court, was supported by proof of proceedings before one of the sheriffs. The assize courts may be stated to have been held before the presiding judge, or both of the judges of assize. *R. v. Alford*, Leach's C. C. 179. That the style of the court need not be exactly copied on the record. See *Bushay v. Watson*, 2 Bl. R. 1050; 2 B. & C. 4.

(5) NOTE 1113.—VARIANCE.—In *Riley v. Gourley* (9 Conn. R. 154), the substance of the charge was that by a malicious accusation of the defendant, the plaintiff had suffered. In proof of the fact, the plaintiff offered the complaint made by the defendant against him by a name slightly differing from his real name, together with the oath of the defendant, that this was the person who committed the felony; held, no variance. *Williams, J.*, says: The libeler might as well screen himself by the letter of the libel, as this defendant by the letter of his declaration or writ.

In an action for a vexatious suit, and holding to bail, in one action only, the records in other suits are not admissible for any purpose. *Ray v. Law*, 1 Pet. C. C. R. 207.

* * See *ante*, note 680, as to variances and amendments. Also, *Conover v. Mut. Ins. Co.*, 3 Denio, 254; *Sloan v. Fairchild*, 7 Hill, 292; *Mann v. Herkimer Mut. Ins. Co.*, 4 Hill, 187. * *
(6) *Sinclair v. Edred*, 4 Taunt. 7.

costs, the writ having issued previous to the payment;(1) unless the defendant has refused to sign an authority to the sheriff to discharge the plaintiff out of custody.(2) Where the defendant has been the actor in putting an end to the former proceedings, as by voluntarily discontinuing them, and there has been a very short interval between the arrest and the abandonment of the action, the absence of probable cause, and malice on the part of the defendant, may properly be left for the consideration of the jury.(3) But the mere circumstance of the discontinuance of a former action does not exclude the existence of a probable cause.(4)

Where there have been mutual dealings between the plaintiff and the defendant, and items are ascertained to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other, is malicious, and without probable cause.(5) And, in answer to an action for maliciously arresting the plaintiff without having a cause of action to a bailable amount, it is not sufficient to show that the defendant had a cause of action to the requisite amount, if it be a different cause from that mentioned in the affidavit to hold to bail.(6) Though, in an action in that particular form, it will be sufficient for the defendant to prove a debt to a bailable amount, notwithstanding it is much less than the sum for which the plaintiff was arrested.(7) It is not sufficient proof of a want of probable cause for holding the plaintiff to bail for a particular sum, to show that a less sum was paid into court, and taken out by the defendant, who, in consequence, relinquished his action against the plaintiff.(8)

Damages.

The questions which occur in this action respecting the damages, and the evidence under the general issue, have been before considered, in treating of the action for a malicious prosecution. It is competent for the defendant to show that he acted, *bona fide*, upon the opinion of a professional adviser, although it may be erroneous, provided it has been given upon a full and correct statement of facts.(9) It has been held in

(1) *Page v. Wyple*, 3 East, 314; *Gibson v. Charters*, 2 Bos. & Pull. 129, where the payment was made before the issuing of the writ, but after the affidavit to hold to bail; *Scheible v. Fairbarn*, 1 Bos. & Pull. 388. Where the defendant sued out the writ, after a release of the debt, it is evidence of malice. *Hob. 267*.

(2) *Crozer v. Pilling*, 4 Barn. & Cress. 26.

(3) *Nicholson v. Coghill*, 4 Barn. & Cress. 21.

(4) *Bristow v. Heyward*, 1 Stark. N. P. C. 50.

(5) *Austin v. Debnam*, 3 Barn. & Cress. 39, overruling *Brown v. Pigeon*, 2 Campb. C. 594. And see *Dronefield v. Archer*, 5 Barn. & Ala. 313.

(6) *Wetherden v. Embden*, 1 Campb. N. P. C. 295.

(7) *Wilkinson v. Mawbey*, cited 1 Campb. N. P. C. 297. See *Saville v. Roberts*, 1 Salk. 14; *Robins v. Robins*, 1 Salk. 15.

(8) *Jackson v. Burleigh*, 3 Esp. N. P. C. 34.

(9) *Ravenga v. Mackintosh*, 2 Barn. & Cress. 697; *Snow v. Allen*, 1 Stark. N. P. C. 502;

one case, that the plaintiff could not call an arbitrator, to whom a cause had been referred, and who had examined the parties to the suit, and inspected their books, to prove that there existed no cause of action.(1)

CHAPTER XVIII.

OF EVIDENCE IN AN ACTION OF EJECTMENT.

THE proceedings in an action of ejectment have been instituted for the purpose of trying this question :—which of the litigating parties is entitled to the possession of an estate, the party claiming possession, or the person who is supposed to withhold possession unlawfully. The lessor of the plaintiff must, therefore, prove the defendant, or if the defendant defend as landlord, must prove his tenant, in possession of the premises which he seeks to recover ; and further, must show in himself a legal title to the possession, at the time when he is supposed to have made the demise stated in the declaration ; and in some cases, must prove an actual ouster by the defendant. A few general observations may be made upon each of these points, before the particular cases of ejectment come to be considered.

Defendant's possession.

Plaintiffs have been of late years, in many instances nonsuited, from failing to prove at the trial, the defendant's possession of the premises mentioned in the ejectment ; but this being inconsistent with the true meaning of the consent rule, by which the defendant is required to insist only upon his title, an order has been lately made by the courts of King's Bench and Common Pleas, by which the defendant is required to specify in the consent rule, for what premises he intends to defend, and to consent to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises ; and if upon the trial the defendant shall not confess such possession as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not

Hewlett v. Krutchley, 5 Taunt. 281 ; Gro. Jac. 320. See also Walter v. Sample, 25 Penn. State R. 275.

(1) Habershon v. Trosby, 3 Esp. N. P. C. 38, by Lord Kenyon. This decision appears to conflict, in principle, with other cases determined by the same judge. See Gregory v. Howard, 3 Esp. N. P. C. 113 ; Slack v. Buchanan, Peake's N. P. C. 5. And see Vol. I.

further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed.(1)

(The forms of proceeding have been of late years very much simplified in England as well as in the several states of the Union; but these changes of form have not essentially modified the rules of evidence applicable to the action. In most cases, the plaintiff asserts title, and in all cases, the right to the immediate possession of the premises which are the subject of the action. And though the plaintiff do not assert title in fee in himself, the title of his grantor is often necessarily brought in question, in the act of showing his right to the possession.(2)

In New York the action of ejectment takes the place of the writ of right, and may be brought as formerly, to recover lands, tenements or hereditaments, by any person claiming an estate therein, in fee or for life, either as heir, devisee, or purchaser; and by any widow to recover dower of such premises. But no person can recover in ejectment, unless he has at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, to be proved and established at the trial.(3)

The action is brought against the occupant of the premises; and the complaint, as prescribed by the Revised Statutes, alleges that on a certain day (which must be after the plaintiff's title accrued), the plaintiff was possessed of the premises in question, particularly describing them, and being so possessed thereof the defendant afterwards entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof.(4) How far the Code of Procedure has modified the precise form of the pleadings in the action, does not seem to be definitely settled?(5) The allegation that the plaintiff was on a day named the owner in fee and possessed of the premises is a sufficient allegation of title;(6) since possession is evidence of title.(7)

An allegation of conveyance by deed to the plaintiff, or proof thereof

(1) 4 Barn. & Ald. 196; 2 Bro. & Bing. 470. As to proof of occupation of premises, see *Doe v. Cartwright*, 1 Ry. & Mo. 62; *Doe v. Anderson*, 1 Stark. C. 262; *Doe v. James*, 2 Barn. & Ald. 371; *Doe v. Alexander*, 3 Stark. N. P. C. 510.

(2) A lessee for the term of one year may maintain the action. *Gardner v. Keteltas*, 3 Hill N. Y. R. 330. But as against his lessor, he may also bring an action for damages, on the landlord's implied agreement to deliver the possession. *Coe v. Clay*, 5 Bingham, 440; *Trull v. Granger*, 4 Selden N. Y. R. 115. See *Whitney v. Allaire*, 1 Comst. 305. As to the present form of the action of ejectment, in England, see 15 & 16 Vict. ch. 76.

(3) 2 R. S. 400 (3d ed.)

(4) *Idem*, 401. If the premises are not actually occupied by any one, the suit is brought against the person claiming title. *Banyer v. Empire*, 5 Hill R. 48.

(5) Code of N. Y., § 455. The general provisions of the Revised Statutes relating to real property are retained.

(6) *The Mayor, &c., of N. Y. v. Campbell*, 18 Barb. 156.

(7) *Hill v. Draper*, 10 Barb. 454; *Barnhart v. Greenshield*, 28 Eng. Law & Eq. 83.

on the trial, is not sufficient evidence of title.(1) 'Plaintiff must show title in himself and a present right of possession;(2) but it has been held that an allegation that the plaintiff is the owner in fee of the premises, and that the defendant in possession unlawfully withholds the possession thereof from the plaintiff, concluding with a demand of judgment for the surrender of the premises, is sufficient, because it implies a present right of possession.(3) The proof of the plaintiff's right of possession will depend upon the circumstances of the case; if the plaintiff claims under the defendant, he cannot attack his title, and must, therefore, show a right to the possession acquired from the defendant.(4) And the defendant may show that the plaintiff is not entitled to the possession, by proving that he, the defendant, is equitably the owner of the premises and entitled to a conveyance thereof.)(5)

Locality of premises.

The locality of the premises must correspond with the description in the declaration. Where the premises were described as situate in two parishes which were united only for the purpose of maintaining their poor, the variance was held fatal.(6) But where the lands were stated to be situate in the parish of A. and B., which were distinct parishes, the demise was considered, upon a motion for a new trial, as of lands situate partly in one, and partly in the other parish.(7) Where the premises were laid to be in the parish of Farnham, and were proved at the trial to be in the parish of Farnham Royal, it was held not to be a fatal variance, unless it could be proved that there were two Farnhams.(8)

(1) *Gardner v. Hart*, 1 Comst. 528. Such proof is consistent with an adverse possession at the time the deed was given.

(2) *Layman v. Whiting*, 20 Barb. 559.

(3) *Walter v. Lockwood*, 23 Id. 228.

(4) *Spencer v. Tobey*, 22 Id. 260.

(5) *Crary v. Goodman*, 2 Kernan N. Y. R. 266. As to the mode of pleading in the action, see *Fosgate v. The Herkimer M. & H. Co.*, Id. 580.

(6) *Goodtitle v. Lammiman*, 2 Campb. N. P. C. 274. A house being watched by parish watchmen, is evidence of parochiality. *Doe v. Welsh*, 4 Campb. N. P. C. 264.

(See *Carroll v. Carroll*, 16 How. U. S. 275. The plaintiff must not only show a right to recover the premises according to their description in his complaint, but must also show a right to recover the interest he claims in them. *Cole v. Irvine*, 6 Hill R. 634; *Rupert v. Mark*, 15 Ill. 540. But if, where several defendants are charged with a joint occupancy, the answer does not deny the allegation, the defendants will not be permitted to interpose the objection on the trial. An objection to the improper joinder of parties must be taken by answer or demurrer. *Fosgate v. The Herkimer Manuf. and Hydraulic Co.*, 2 Kernan R. 580. As a general rule, the plaintiff must recover on the strength of the title which he sets forth, and the precise interest in the premises claimed by him. *Rawling v. Bailey*, 15 Ill. 178. But proof of prior peaceable possession of premises is sufficient to enable the plaintiff to maintain the action against a stranger for ejecting him from the premises. *Tappscott v. Cobbs*, 11 Gratt. 172.)

(7) *Goodtitle v. Walter*, 4 Taunt. 671.

(8) *Doe v. Salter*, 13 East, 9. And see *Rex v. Glossop*, 4 Barn. & Ald. 619, where *St. Mary*

Proof of title as laid.

The title proved must not be inconsistent with the demise laid in the declaration. If the lease is a joint lease from several persons, they must be proved to have had such an interest as would enable them to join in a demise of all the premises in question. The plaintiff cannot declare on the joint demise of tenants in common;(1) though he may declare on the several demises of joint tenants, because the letting severs the joint tenancy.(2) Where the plaintiff declared on a lease made by A. and B., and it appeared at the trial, that A. was tenant for life, and B. had the remainder in fee, so that they could not join in a present demise, the plaintiff failed.(3) In support of the right to make a joint demise, it will be sufficient to prove a payment of one entire rent by the defendant to the common agent of the several lessors of the plaintiff, although it should appear, on the examination of the agent, that he had been appointed by the several parties at different times.(4) It is sufficient, if the plaintiff was entitled to the premises at the time of the demise.(5)

It seems that the demise of the lands of a feme covert may be stated as having been made by the husband and wife jointly.(6) Where the demise is alleged to be by deed under the seal of a corporation, the fact need not be proved,(7) since it is admitted by the consent rule. The extent of the demise, though it be greater than the interest of the lessor of the plaintiff, is immaterial.(8) And the verdict may be for a smaller share of interest than is alleged in the land claimed,(9) or for a less quantity of the

Lambeth was stated, instead of Lambeth. And see *Doe v. Harris*, 5 Maule & Selw. 326; *Kirtland v. Pounsett*, 1 Taunt. 570.

(1) *Co. Litt.* 200 a; *Mantle v. Wollington*, Cro. Jac. 166; *Moore v. Fursden*, 1 Show. 342; *Heatherly v. Weston*, 2 Wils. 232.

(2) *Doe dem. Marsack v. Read*, 12 East, 57; *Doe dem. Whayman v. Chaplin*, 3 Taunt. 130; *Doe dem. Lulham v. Fenn*, 3 Campb. N. P. C. 190.

(3) *Treport's Case*, 6 Rep. 14 b; *Co. Lit.* 45, u.

(4) *Doe dem. Clark v. Grant*, 12 East, 221. A joint condition of re-entry may be construed disjunctively. *Doe v. White*, 4 Bing. 276.

(5) *Doe v. Bluck*, 3 Campb. N. P. C. 447. One of several heirs may maintain the action, notwithstanding the other heirs are not joined with him. *Dawd v. Gilchrist*, 1 Jones Law N. C. 353. If the plaintiff seeks to recover on a joint demise, and on the trial moves to amend by striking out the names of two of the lessors, and the amendment is allowed, no objection can be taken to the ruling of the court; it being a question of practice. *Seabury v. Stewart*, 22 Ala. 207. As to the effect of the Statute of Limitations, which has run against one of the lessors, in the case of separate demises, see *Rawls v. Doe*, 23 Id. 240.

(6) *Cro. Car.* 165. See *Cro. Eliz.* 112, 438; *Cro. Jac.* 617; *Yelv.* 1, 2; *Brownl.* 248; 1 Rep. 61 b.

(7) *Furley v. Wood*, 1 Esp. N. P. C. 197; *Roe v. Clarke*, Peake's N. P. C. 4; *Co. Lit.* 270 b, n. 1. After verdict, the demise will be intended to have been made by deed. *Patrick v. Batts*, Carth. 390.

(8) *Doe v. Porter*, 3 T. R. 13; by Bayley, J., *Doe v. Jackson*, 1 Barn. & Cress. 454.

(9) 1 Sid. 239; 1 Burr. 330. An undivided share may be recovered under a demise of the whole. *Doe v. Wippel*, 1 Esp. N. P. C. 360; *Doe v. Fearne*, 3 Campb. 190; *Roe v. Lonsdale*, 12 East, 39.

land.(1) After the plaintiff has proved his title to a verdict, the court will not try the question as to the extent of his claim, as defined by particular metes and bounds.(2)

The plaintiff must recover on the strength of his own title, and not on the weakness of that of the defendant.(3) But an uninterrupted possession for twenty years, is conclusive of the right, upon a trial of ejectment, either for the plaintiff or the defendant;(4) unless the possession has been by the permission of the other party, or the person under whom he claims; or unless the title of the party out of possession has not accrued till within twenty years, or he has labored under some disability, which has continued till within the period allowed for an entry.

Adverse possession.

The possession of a *cestui que trust* cannot be considered as adverse to the right of his trustees, where it is consistent with the deed of trust.(5) And where interest has been paid on a mortgage, it will prevent the possession of the mortgagor from being considered as adverse to the mortgagee.(6) The possession of the particular tenant will not be adverse to that of the remainderman, or reversioner, although a right of entry may have accrued by reason of a forfeiture.(7) And though a tenant by lease, pays rent to a stranger, or accepts an indenture, reserving rent from him, it will not be evidence of an adverse possession against his landlord.(8) Twenty years possession of a cottage, built on the waste of a manor, without the permission of the lord, is a good title in ejectment; but if it was built at first by the lord's permission, or any acknowledgment has been made, the occupation will be deemed permissive, and not adverse.(9)

It seems, that encroachments of a tenant upon a waste adjoining the land demised shall be intended to be made for the benefit of his landlord after the term expired, especially if his landlord be seized in fee of the

(1) Cro. Eliz. 13; Yelv. 114.

(2) Doe v. Wilson, 2 Stark. N. P. C. 477.

(3) Martin v. Strachan, 4 T. R. 107, n.; Goodtitle v. Baldwin, 11 East, 494.

(4) Bull. N. P. 103 a; Stokes v. Berry, Salk. 421; St. 21, Jac. I, c. 16. The possession may be proved by evidence of any acts of ownership which the case affords, as receipt of rents, or cutting down trees. Stanley v. White, 14 East, 333.

(5) Keene v. Dearden, 8 East, 248; Green v. Rolle, Lord Raym. 716. * * See tit. "*Seizin*," in Hilliard on Property, and in 4 Kent C. And as to adverse possession, see *ante*, note 1095. * * (See also Code of Procedure of N. Y., ch. 2, §§ 75-88.)

(6) Hatcher v. Fineux, 1 Lord Raym. 740; Hall v. Doe, 5 Barn. & Ald. 690.

(7) Doe v. Danvers, 7 East, 299. See Taylor v. Horde, 1 Burr. 60; Doe v. Brightwen, 10 East, 583.

(8) Bull. N. P. 103 a; Ebers v. Archb. York, Hob. 332. It is said that the declarations of the tenant in favor of the stranger may be left to the jury, especially if the stranger has a color of title. Bull. N. P. 104 a.

(9) Bull. N. P. 103 a; Doe v. Wilkinson, 3 B. & C. 413. Wherever the relation of landlord and tenant can be implied, the possession is not adverse. Roe v. Ferrars, 2 Bos. & Pull. 542.

waste.(1) An entry by a younger brother or sister, after the death of the father, is not considered as adverse to the heir, but as made with a view to preserve his possession.(2) Yet if the younger brother or sister has occupied the premises for a long space of time, and the heir has resided near the spot, without offering any interruption, it will be left to the jury to presume, unless the contrary be shown, that the ancestor had only a particular estate, which was settled on the younger branches of his family.(3) The possession of one coparcener, joint tenant, or tenant in common, is not adverse to the title of his co-tenant.(4) A declaration made by a person in possession, of being only entitled for life, is admissible evidence, after his death, to rebut the presumption that his possession was adverse.(5)

And the absence of any adverse possession will frequently afford a sufficient answer to a title founded on the operation of a fine with proclamations. As where the person levying the fine has merely received the rent of the tenant of the land, without ousting him.(6) The plaintiff's right of entry will not be taken away, in consequence of a "descent cast," unless the defendant's ancestor has committed an actual disseizin, and not merely a disseizin in election, such as the wrongful occupation of a tenant by sufferance.(7)

Legal title. Outstanding term.

The plaintiff must prove a legal title to the premises claimed; an equitable title is not sufficient.(8) And an outstanding term may be set up as a bar to the owner of the inheritance, even though he claim only subject to the charge.(9) Although the jury may be allowed, or directed to presume the surrender of a satisfied term, yet if it appear as outstanding upon a special verdict, the plaintiff cannot recover.(10) A surrender of an outstanding term will, in general be presumed, where the trustees ought to

(1) *Bryan v. Winwood*, 1 Taunt. 208. See *Doe v. Davis*, 1 Esp. N. P. C. 461; *Doe v. Mullinar*, Id. 460; *Attorney-General v. Fullerton*, 2 Ves. & Beam. 263.

(2) *Co. Litt.* 242; *Sharrington v. Shotten*, *Plowd.* 298, 306; *Bull. N. P.* 102.

(3) *Jayne v. Price*, 5 Taunt. 326.

(4) *Ford v. Grey*, 6 Mod. 44.

(5) *Doe v. Pettit*, 5 B. & Ald. 223.

(6) *Co. Litt.* 323; *Townshend v. Ash*, 3 Atk. 356; *Smith v. Packhurst*, 3 Atk. 141; *Plowd. Com.* 191; *Ferner's Case*, 3 Co. 77. An entry is not necessary to avoid a fine levied by a mortgagor. *Hall v. Doe*, 5 B. & Ald. 687.

(7) *Doe v. Hull*, 2 Dow. & Ryl. 38. And see respecting the nature of disseizin, *Co. Litt.* 153 b, 240 b; *Blunden v. Baugh*, *Cro. Car.* 303; by Lord Holt, *Salk.* 246; Lord Mansfield's observations in *Taylor v. Horde*, 1 Burr. 60; by Lord Ellenborough, 7 East, 312; *Williams v. Thomas*, 12 East, 141; *Tennett v. Weare*, 3 Price, 575; *St. 32 H. VIII.* c. 33.

(8) *Roe v. Reed*, 8 T. R. 188; *Doe v. Wroot*, 5 East, 138. A mortgage, set up by the defendant, will, under some circumstances, be presumed satisfied. *Bull. N. P.* 110. That a surrender by a copyholder may be presumed, see *Scriven*, 536; 1 H. Bl. 457.

(9) *Doe v. Staple*, 2 T. R. 684.

(10) *Goodtitle v. Jones*, 7 T. R. 47.

convey to the beneficial owner,(1) or where the term is satisfied, and is set up by a mortgagor against a mortgagee.(2) But such a presumption will not be made, where it would have been a breach of trust in the trustees to have surrendered the term;(3) or, in general, where the presumption would be against the interests of the owner of the inheritance, especially if the term has been recognized as subsisting at a late period.(4) The mere fact of a term having been satisfied, does not afford sufficient ground upon which a jury can presume it surrendered.(5)

It has been said, that where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to have been done or omitted, if the term existed in the hands of a trustee, a surrender may be presumed.(6) The application of this rule to the case of terms expressly assigned to attend the inheritance (where the possession of the land by the *cestui que trust* is consistent with the terms of the trust), has given rise to much difference of opinion. It seems to be the present doctrine of the Court of King's Bench, that the presumption of a surrender may be made, where the outstanding terms are not noticed or assigned on the occasion of subsequent marriage settlements or other conveyances of the land.(7) But this doctrine has been much questioned by the authorities in chancery.(8)

Proof of ouster, when.

By the fictitious proceedings in this action, the defendant, the party in possession, is admitted to defend, on condition of his entering into a rule to confess, at the trial of the cause, the lease of the supposed lessor of the plaintiff, the plaintiff's entry and ouster. These are the usual terms on which he is admitted to defend. But if the defendant is tenant in common, or joint tenant, or parcener, with the lessor of the plaintiff (in which cases, since the possession of the defendant is *prima facie* the possession of all the co-tenants, an actual ouster must be proved), the court whence the proceedings issue, will allow him, on proper affidavit, to confess only lease and entry, without also confessing ouster. If this course has been taken,

(1) By Lord Kenyon, *Doe v Staple*, 2 T. R. 696; *Doe v. Sybourn*, 7 T. R. 2.

(2) By Lord Kenyon, *Doe v. Staple*, 2 T. R. 696.

(3) *Keene v. Deardon*, 8 East, 267.

(4) *Doe v. Scott*, 11 East, 478. See *Doe v. Wright*, 2 Barn. & Ald. 720. A conveyance will not, in general, be presumed, where the original enjoyment was consistent with the fact of there having been done. *Doe v. Reed*, 5 Barn. & Ald. 232. Where the plaintiff produced an original lease of the premises for a long term, and proved possession for seventy years, the mesne assignments were presumed. *Earl v. Baxter*, 2 Bl. R. 1228.

(5) By Lord Eldon, *Evans v. Bicknell*, 6 Ves. jun. 184; *Sugden's V. & P.* 424 (7th ed.)

(6) By Lord Tenterden, Ch. J., 2 Barn. & Ald. 792.

(7) *Doe v. Hilder*, 2 Barn. & Ald. 710. See *Bartlett v. Downes*, 3 Barn. & Cress. 616. In *Doe v. Hilder*, the question arose between a judgment creditor and the purchaser of the inheritance.

(8) *Doe v. Putland*, *Sugden's V. & P.* 438; *Aspinall v. Kempson*, *Sugden's V. & P.* 443 (7th ed.)

the consent rule is not evidence of the ouster, as it would be if it were general to confess ouster as well as lease and entry;(1) and, therefore, the ouster must be proved by other means; as, by showing that the defendant held adversely, or that he denied the title of the other co-tenants, or claimed the whole of the premises for himself; or denied possession to the others; or had the sole and undisturbed possession for a long course of years without payment of rent, and without any claim of any part of the profits by the other co-tenants during the whole of the time.(2) But the receipt of the whole rent is equivocal; and a refusal to account is not of itself sufficient evidence of an ouster, without denying the title.(3) In one case it has been held, that the receipt of rent for the period of twenty-six years did not prove an ouster.(4) And where one tenant in common had levied a fine, and took the rents and profits afterwards for nearly five years, it was considered that there was no evidence from which a jury should be directed to find an ouster at the time of the fine levied.(5)

Proof of entry when.

The plaintiff must prove an actual entry on the premises before the commencement of the suit, where his title would otherwise be barred by the Statute of Limitations; or where a fine has been levied; and he must prove that he commenced his action within one year next after such entry.(6) Except in the case of a fine levied, an actual entry is not necessary, where such an entry, if made at the time of the commencement of the suit, would entitle the plaintiff to recover. An actual entry is not necessary to avoid a fine at common law without proclamations;(7) nor is it necessary to avoid a fine levied with proclamations, unless the proclamations have all been made at the time of the commencement of the action;(8) or where the parties to the fine had no freehold interest in the land, or no estate is divested by the fine. An entry is not necessary upon

(1) *Oates v. Brydon*, 3 Burr. 1895; *Doe dem. White v. Cuff*, 1 Campb. N. P. C. 173; *Doe dem. Gigner v. Roe*, 2 Taunt. 397.

(2) *Doe dem. Fisher v. Prosser*, Cowp. 217; *Doe Dem. Hellings v. Bird*, 11 East, 49. In the former case, the exclusive possession was for a period of thirty-six years, and the jury presumed on actual ouster in favor of the *defendant*.

(3) By Lord Mansfield, Cowp. 218.

(4) *Fairclain v. Shackleton*, 5 Burr. 2608. The question in this case was not left to the jury.

(5) *Peaceable v. Read*, 1 East, 568.

(6) St. 4 Ann. c. 16, § 16. The entry must be on the land. Bull. N. P. 103; Skin. 412. And the object of entering should be expressed at the time. Co. Lit. 245 b; Willes, 327, Str. 1086. Entry into part, in the name of the whole, is sufficient. 1 Will. Saund. 319. The confession of an entry in a prior ejectment is not sufficient, *Adams on Eject.* 94. A ratification of an entry by a stranger, in cases where it is necessary, is sufficient, at least if made before the day of the demise. Str. 1128; Bull. N. P. 103 a. In the case of a fine, the assent must be within five years. Moore, 450; 9 Co. 106 a.

(7) *Jenkins v. Pritchard*, 2 Will. 45; *Tapner v. Merlott*, Willes, 177.

(8) *Doe v. Watts*, 9 East, 17.

a clause of re-entry for non-payment of rent;(1) or for the breach of a condition.(2)

1. Action by landlord, on determination of a tenancy.

These general observations being premised, we may proceed to consider the several cases, in which an action of ejectment is usually brought. The most simple case of ejectment, with respect to evidence, is, where the action is brought by a landlord against his tenant, on a determination of the tenancy. The facts which the lessor of the plaintiff will have in this case to prove, are the demise by him to the defendant, and the determination of that demise. A tenancy may be determined by the expiration or running out of the term, or upon some contingency, or by the breach of a condition or covenant; and in the case of a tenancy at will or from year to year, by a notice to quit.

First, of the action of ejectment, by a landlord after the expiration of the term.

1. Ejectment on expiration of term.

The demise to the defendant, if by deed or other writing, may be shown by proof of the counterpart of the lease;(3) or if there is no counterpart, by giving secondary evidence of the contents of the lease, which will be admitted after service of notice to produce the original.(4) Where the demise is by parol, it may be proved by a person present at the time of the letting, or by the receipts for rent, or by an admission of the defendant. The proof of payment of rent by the half year, or by the quarter, is *prima facie* evidence of a tenancy from year to year.(5) The cases in which a tenancy from year to year may be inferred from the payment of rent, or other circumstances, and the distinctions between agreements for a lease and actual demises, have been before considered.(6)

The expiration of the term will be proved by the same evidence which proves the lease; namely, by the counterpart, or by the secondary evidence of the contents of the lease; and if the duration of the term depends on a certain event, that event must be proved to have happened.(7)

(1) *Goodright v. Cator*, 2 Doug. 477; *Doe v. Alexander*, 2 Maule & Selw. 525; 5 Barn. & Ald. 385.

(2) By Lord Mansfield, in *Oates v. Brydon*, 3 Burr. 1897; 1 East, 574; 3 Maule & Sel. 275.

(3) *Roe v. Davis*, 7 East, 363. The writing need not be produced, where it is a mere proposal. *Doe v. Cartwright*, 3 Barn. & Ald. 326.

(4) See Vol. II, Chap. 7.

(5) *Doe v. Samuel*, 5 Esp. N. P. C. 173; *Shirley v. Newman*, 1 Esp. N. P. C. 266. See *Freeman v. Jury*, 1 Mo. & M. 19. This presumption, it seems, does not take place in the case of lodgings where the tenant quits in the course of the current year. *Wilson v. Abbott*, 3 Barn. & Cress. 90.

(6) *Vide supra*, pp. 286, 290, 492.

(7) The decision of several cases has turned on the question, whether, according to the language of the demise, the lease was determined by notice in the first, or only in the subsequent

The lessor of the plaintiff will not be obliged, to prove his title to the demised premises; for the landlord's title is admitted by a tenant who takes a lease from him, and on the faith of the lease, occupies the premises.(1) And a third person cannot defend as landlord, where the tenant came into possession under an agreement with the lessor of the plaintiff, which has expired.(2) The cases in which a tenant will be permitted to show that his landlord's title has expired, have been before considered.(3)

Secondly, of the action of ejectment by a landlord, on the determination of a tenancy by a notice.

On determination of tenancy by notice to quit.

Where the person in the possession of premises is either a tenant at will, or has been let into possession with the privity of the owner, as under an agreement for the purchase of land, or a void or imperfect conveyance, an ejectment cannot be maintained against him without a previous demand of the possession.(4) But such a demand is not necessary where the person in possession is a mere tenant at sufferance.(5)

The most common case of ejectment between landlord and tenant is that on the determination of a tenancy from year to year. This sort of tenancy is determined by a regular notice to quit, and the general rule in common yearly tenancies is, that the notice must be served at least half a year previous to the expiration of the current year of the tenancy.(6) This period may, however, be controlled by the agreement of the parties; though if a less notice than that for six months is agreed upon, it must still determine at the end of the current year, unless it is otherwise provided.(7)

years: *Denn v. Cartwright*, 4 East, 31; *Birch v. Wright*, 1 T. R. 380; *Thompson v. Maberley*, 2 Camp. N. P. C. 573.

(1) *Syllivan v. Stradling*, 2 Wils. 208; *Parker v. Manning*, 7 T. R. 537; *Driver v. Laurence*, 2 Bl. 1259; *Hodson v. Sharpe*, 10 East, 353; *Gravenor v. Woodhouse*, 1 Bing. 43. Where rent has been paid to tenant for life, he cannot dispute the title of the reversioner. *Doe v. Whitroe, Dow. & Ryl.* N. P. C. 1. Nor can the title of the assignee of the landlord be disputed. *Rennie v. Robinson*, 1 Bing. 147.

(2) *Doe v. Smythe*, 4 Maule & Selw. 347.

(3) *Vide supra*, p. 293; *England v. Slade*, 4 T. R. 682; *Doe v. Ramsbottom*, 3 Maule & Selw. 516; *Doe v. Watson*, 2 Stark. N. P. C. 231.

(4) *Right v. Beard*, 13 East, 210; *Goodtitle v. Herbert*, 4 T. R. 680; *Doe v. Fernside*, 1 Wils. 176; *Doe v. Stennet*, 2 Esp. N. P. C. 717; *Denor v. Rawlins*, 10 East, 24; *Doe v. Jackson*, 1 Barn. & Cress. 448. For the rule in New York, see *Mayor of N. Y. v. Campbell*, 18 Barb. 156; *DeLancey v. Ganong*, 5 Seld. 9.

(5) *Doe v. Quigley*, 2 Campb. N. P. C. 305; *Doe v. Lawder*, 1 Stark. N. P. C. 308; *Doe v. Sayer*, 3 Campb. N. P. C. 8. In *Doe v. Stratton* (4 Bing. 446), it was held, that a tenant entering under an agreement for a lease for seven years, which was never executed, was not entitled to a notice to quit at the end of the seven years.

(6) *Right v. Darby*, 1 T. R. 159. Notice may be given on a quarterly feast, to quit at another quarterly feast, though not strictly half a year. See *Doe v. Green*, 4 Esp. N. P. C. 199; *Howard v. Welmsley*, 6 Esp. N. P. C. 53; *Doe v. Kightley*, 7 T. R. 63.

(7) *Doe v. Donovan*, 1 Taunt. 555. See *Roe v. Charnock*, Peake's N. P. C. 6, where the custom of the county to give a less notice than six months was relied on; and see as to the custom of

Where the tenant enters on different parts of the premises at different times, and the precise time from which the lease is to commence is not determined by the agreement of the parties, it will be sufficient to give half a year's notice, with reference to the time of entry on the substantial part of the demise.(1) Where a tenant enters in the middle of a quarter, it is frequently a question for the jury, to be determined by the manner of paying rent, and other circumstances, whether the holding is to be considered as commencing at the time of entry, or at the preceding, or subsequent quarter day.(2) Where there has been a lease which is void by the Statute of Frauds, or in consequence of the death of a tenant for life, or by effluxion of time, a subsequent holding will be considered as commencing at the same period of the year with that expressed in the lease.(3) And although a tenant, after the expiration of his lease, assigns his interest to another person, a notice to quit on a day corresponding with the commencement of the original lease will be good, notwithstanding the assignee came in on a different day.(4)

A holding from Michaelmas *prima facie*, signifies Michaelmas according to the new style.(5) But it may be explained to mean old Michaelmas, by reference to the custom of the country,(6) or by evidence of the intention of the parties.(7) Where, however, the lease is by deed, it appears that such extrinsic evidence is not admissible.(8)

A receipt for rent, in which it is stated to be the year's rent due on a particular day, is *prima facie* evidence of the commencement of the tenancy on that day.(9) And if a notice to quit on a particular day is served personally on the tenant, and, after reading it, he makes no objection to the time mentioned in it, when he has an opportunity of objecting, this, of itself, has been considered as evidence of an acquiescence on his

London for tenements under £10 a year. Co. Lit. 270 b, n. 1. Where the holding is for less than a year, the notice should be of the same duration as the time of holding, and should correspond with it. *Wilson v. Abbott*, 3 Barn. & Cress. 88; *Doe v. Hazel*, 1 Esp. N. P. C. 94; *Kemp v. Derrett*, 2 Campb. N. P. C. 510; *Doe v. Raffan*, 6 Esp. N. P. C. 4.

(1) *Doe v. Howard*, 11 East, 498; *Doe v. Snowden*, 2 Bl. R. 1224; *Doe v. Spence*, 6 East 190; *Doe v. Watkins*, 7 East, 551; *Doe v. Lea*, 11 East, 312; Co. Lit. 68.

(2) *Doe v. Selwyn, Adams' Eject.* 129; *Doe v. Johnson*, 6 Esp. N. P. C. 10; *Kemp v. Derrett*, 3 Campb. N. P. C. 510. No new tenancy is created by a mere agreement for an increase of rent. *Adams' Eject.* 129.

3) *Roe v. Ward*, 1 H. Bl. 97; *Doe v. Bell*, 5 T. R. 472; *Doe v. Weller*, 7 T. R. 478.

(4) *Doe v. Samuel*, 5 Esp. N. P. C. 173. Where a tenant takes a deed from a stranger, and gives him back a mortgage of the premises, he is not entitled to a notice to quit (*Sharpe v. Kelly*, 5 Denio R. 431); claiming to hold adversely, he cannot insist upon a right to notice. *Harrison v. Middleton*, 11 Gratt. 527.

(5) *Doe v. Vince*, 2 Campb. N. P. C. 257, where the holding was from Old Michaelmas, a notice, to quit at Michaelmas was considered sufficient. *Id.*

(6) *Furley v. Wood*, 1 Esp. N. P. C. 198; *Doe v. Benson*, 4 B. & Ald. 588.

(7) *Den v. Hopkinson*, 3 Dow. & Ryl. 507.

(8) *Doe v. Lea*, 11 East, 312; *Doe v. Benson*, 4 B. & Ald. 588.

(9) *Doe v. Samuel*, 5 Esp. 173.

part, and of an admission that the tenancy would expire, as the notice represents.(1) Where the notice is not to quit on a particular day, but in a more general form (as, to quit at the expiration of the term or current year), such notice, however the tenant may assent to it, affords no kind of information: other evidence, therefore, will be requisite as to the regular time of quitting. And this may be supplied, in some cases, by the conduct of the tenant, on being served with the declaration in ejectment. Thus, where a notice has been given to quit at the expiration of the current year, and a declaration in ejectment was served nearly a year afterwards, laying the demise half a year after the notice, and the tenant, on being served with the declaration, made no objection to the notice to quit, nor set up any right to a longer possession of the premises, there the declaration in ejectment had the effect of qualifying the generality of the notice, and was considered as pointing out a specific time when the notice to quit was intended to operate; Lord Ellenborough held, that it was a question for the jury to determine, whether the tenant must not be understood, from the circumstance of not making any objection, as having admitted that the tenancy was determined by the notice.(2) If, on receiving the notice, the tenant were to express displeasure, or complain of being hardly used, his conduct, so far from evincing any degree of assent to the notice, would prove directly the reverse.(3)

A parol notice is as effectual as one in writing, unless there is a stipulation for a written notice.(4) It need not be directed to the tenant;(5) and if directed to him by a wrong name, the mistake will be waived, if he keeps it.(6) A notice to quit part only of premises which were leased together, is bad.(7) A notice should be explicit and positive, not affording an option to the tenant of continuing in possession upon terms. But a notice to quit, or the landlord would insist upon double rent; and a notice to quit on the 25th March or 8th day of April next ensuing, have, under the circumstances of the cases, not been considered as offering to the tenant any permission of continuing in possession of the premises

(1) See Vol I.; Thomas v. Thomas, 2 Campb. N. P. C. 648; Doe v. Foster, 13 East, 405. But the tenant may rebut this evidence by proof of the actual commencement of the tenancy. Oakapple v. Copous, 4 T. R. 361. Notice is not *prima facie* evidence, unless served personally. Doe v. Calvert, 2 Campb. N. P. C. 388.

(2) Doe dem. Baker v. Woombwell, 2 Campb. N. P. C. 559; Steward v. Harding, 2 Gray, 335, 224. The length of notice is generally prescribed by statute. Young v. Young, 36 Maine, 133; Larkin v. Avery, 23 Conn. 304; 2 R. S. of New York, 597 (3d ed.)

(3) Oakapple dem. Green v. Copous, 4 T. R. 361. Whether the defendant assented or not, is a question for the jury. Id. If a tenant, upon application of his landlord, states his tenancy to have commenced on a particular day, he shall be bound by such information. Doe v. Lambley 2 Esp. N. P. C. 635.

(4) Doe v. Crick, 5 Esp. N. P. C. 196. And see Legg v. Benyon, Willes, 43.

(5) Doe v. Wrightman, 4 Esp. N. P. C. 5.

(6) Doe v. Speller, 6 Esp. N. P. C. 70.

(7) Doe v. Archer, 14 East, 245.

beyond the earliest period at which the notice could be enforced.(1) A misdescription of the premises, or a misstatement of dates, which cannot mislead, will not vitiate the notice.(2)

Service of notice.

A personal service of the notice upon the tenant, is the best of all modes, if practicable; but the service also may be on the tenant's wife, who lives with him, or on the tenant's servant at his house, though the house may not be situated on the demised premises.(3) Lord Kenyon said, in the case last referred to, that leaving a notice at the dwelling-house of the party had always been deemed sufficient;(4) and added, that the distinction was between process to bring the party into contempt, and a notice like that which the court were then considering, the former of which only need be personally served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of service of the notice upon him has been held to be a sufficient ground for the jury to presume that the notice, so served upon the premises, had reached the other, who resided in another place.(5) And if the tenant has under-let to another, between whom and the landlord there is no privity, the notice is to be served upon the tenant, not on the under-tenant.(6) If the premises are held by a corporation, the notice to quit should be directed to the corporation, and served upon its officers.(7)

A notice to quit, given by one of several joint tenants, will enable him to recover his share;(8) and a receiver appointed by the Court of Chancery, with an authority to let lands, has incidentally a power of giving notice to quit.(9) When the notice is given by an agent, some proof of the agent's authority will be requisite. This may be proved by the agent who delivered the notice; and the mere bringing of the ejectment in the name of the landlord, where the tenant holds under a single person, seems to be a sufficient recognition of the act done by the agent, on the principle

(1) *Doe v. Jackson*, Doug. 165; *Doe v. Wrightman*, 4 Esp. N. P. C. 3.

(2) *Doe d. Cox*, 4 Esp. 185, where the notice described the premises as the *Waterman's Arms*, instead of the *Bricklayers' Arms*; *Doe v. Kightley*, 7 T. R. 63, where the notice was dated of the preceding year. And see *Doe v. Culliford*, 4 Dow. & Ry. 248.

(3) *Jones d. Griffiths v. Marsh*, 4 T. R. 464; *Doe v. Dunbar*, 1 Mo. & M. 10, where Lord Tenterden, Ch. J., observed that he had no doubt of the *absolute* sufficiency of a notice delivered to a servant at the tenant's dwelling-house. It seems not sufficient to leave the notice at the dwelling-house, without delivering it to some person there. *Doe v. Lucas*, 5 Esp. N. P. C. 153.

(4) See *Doe dem. Buross v. Lucas*, 5 Esp. N. P. C. 153.

(5) *Doe dem. Lord Bradford v. Watkins*, 7 East, 553; *Doe dem. Lord Macartney v. Crick*, 5 Esp. 196; Co. Litt. 496. See *Porter v. Bleiler*, 17 Barb. 149.

(6) *Roe v. Wiggs*, 2 New Rep. 330; *Pleasant v. Benson*, 14 E. 234; *Doe v. Levi, Adams' Eject.* 115.

(7) *Doe v. Woodman*, 8 East, 228.

(8) *Doe v. Chaplin*, 3 Taunt. 120; by Lord Ellenborough, *Doe v. Read*, 12 East, 57.

(9) *Doe v. Read*, 12 East, 57.

that *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*.(1) A steward of a corporation is competent to give notice, without a power under the corporation seal; the bringing of the ejectment is a sufficient recognition of his act by the corporation.(2)

A notice to quit must be such as a tenant may act upon at the time; and, therefore, in a case where the notice was required to be given under the respective hands of certain executors, a notice signed by two of the executors, and which purported to be given on behalf of themselves and the third executor, was held not to be made good by a subsequent ratification on the part of the executor who did not sign.(3) But where a notice was delivered by an agent, which purported to be given on the part of certain joint tenants, the notice was held sufficient, though several of them did not recognize the agent's authority till after the service of the notice; for the notice was such as the tenant could act upon with certainty at the time it was given.(4)

Proof of service.

A written notice to quit may be proved by a duplicate original, or an examined copy, without proof of notice to produce the one delivered.(5) But the notice delivered must be proved to have been properly signed, and, if it was attested, the attesting witness ought to be called to prove the signature.(6)

Notice when dispensed with.

When the tenant has attorned to a stranger, or done some other act disclaiming to hold as tenant to the landlord, a notice to quit is not necessary.(7) And it seems that such a notice is only requisite where a tenancy is admitted on both sides.(8) A notice to quit will be waived by a subsequent notice;(9) or by a receipt of rent, or distress for rent, accruing subsequently to the expiration of the notice;(10) or by a recovery

(1) See 5 East, 497, 499.

(2) *Roe v. Pierce*, 2 Campb. N. P. C. 96.

(3) *Right v. Cuthell*, 5 East, 690.

(4) *Goodtitle dem. King v. Woodward*, 3 Barn. & Ald. 689.

(5) Vol. II. It seems that where a copy has not been taken, the contents of the notice may be proved at once by parol evidence, without any previous demand of the original. See *Ekens v. Hanley*, 2 F. & S. Ir. p. 4.

(6) Vol. II, Chap. 7.

(7) *Bull. N. P.* 96 a; *Harrison v. Middleton*, 11 Gratt. 527; *Sharpe v. Kelley*, 5 Denio R. 431.

(8) 4 Bing. 560, and the case of *Doe v. Pasquili*, Peake's N. P. C. 259, was doubted, where a notice was held necessary when a tenant refused to pay rent to a devisee under a contested will.

(9) *Doe v. Palmer*, 16 East, 53. But not if the second notice, in fair construction, amounts only to a demand of possession, or claim for double value. *Doe v. Inglis*, 3 Taunt. 54; *Doe v. Steel*, 3 Campb. N. P. C. 151; *Massinger v. Armstrong*, 1 T. R. 53. And see *Whiteacre v. Symonds*, 10 East, 13; *Doe v. Humphreys*, 2 East, 236. *Vide infra*, 594.

(10) *Doe v. Willingale*, 1 H. Bl. 311; *Doe v. Batten*, Cowp. 234; *Goodright v. Cordwent*, 6 T. R. 219. Otherwise, if the distress is for rent due before the expiration of the notice, and is

in an action for use and occupation for a subsequent period.(1) In the mere acceptance of rent, however, the intention of the parties is a question for the jury; and, therefore, in a case where a receipt, as for rent, was given in order to deceive the landlord, and, in another case, where rent was usually payable at a banker's, and the banker had received a quarter's rent, without any special authority from the landlord, it was held, in each of these cases, that a previous notice to quit was not waived.(2)

Secondly, of the action of ejectment by a landlord on a forfeiture of the term.

2. For a forfeiture.

An ejectment is frequently brought on a clause of re-entry reserved in a lease, to recover the premises, as having been forfeited by the breach of some covenant. In this case, as the declaration supplies no information respecting the alleged causes of forfeiture, the defendant may compel the lessor to give him a particular of the breaches of covenants, and the lessor at the trial will be confined to this particular.(3)

Forfeiture by non-payment of rent.

The most common cause of forfeiture is for non-payment of rent. And in an ejectment brought for this cause, if the landlord proceed as for a forfeiture at common law, great nicety and strictness are requisite in all the preliminary steps. In the first place, the tenancy is to be proved in the regular manner; and for this purpose, the counterpart of the lease is evidence not only against the original tenant, but also against his assignee, who has held under the same lease.(4) Or the tenancy may be proved by secondary evidence of the lease, after due notice to the defendant to produce the original.(5) And the power of re-entry will be shown by the counterpart, or other evidence of the lease.

Demand of rent.

A demand of the reserved rent is also necessary, in order to take ad-

made within six months after the determination of the lease. 1 H. Bl. 312. *Brewer v. Eaton*, 6 T. R. 220.

(1) *Birch v. Wright*, 1 T. R. 387.

(2) *Doe v. Batten*, as cited by *Wilson, J.*, 1 H. Bl. 312; *Doe v. Calvert*, 2 Campb. N. P. C. 387; 1 H. Bl. 312. And see *Goodright v. Cordwent*, 6 T. R. 219. *Goodright v. Davis*, Cowp. 803; *Sykes v. —*, cited, 1 T. R. 161, n. The rent must be received as between landlord and tenant. *Right v. Bowden*, 3 East, 260.

(3) *Doe dem. Birch v. Philips*, 6 T. R. 597. Where the ground of forfeiture is a breach of covenant, the lessor of the plaintiff must, in general, give some evidence of the non-performance of the covenant. *Doe v. Robson*, 2 C. & P. 245.

(Under present practice the complaint must unquestionably show a right of re-entry; at all events it must be strictly proved on the trial. *Van Rensselaer v. Jewett*, 2 Cómst. N. Y. R. 141.)

(4) *Roe dem. West v. Davis*, 7 East, 363. See *Nash v. Turner*, 1 Esp. 217.

(5) See Vol. II, Chap. 7.

vantage of the condition,(1) unless it has been dispensed with by the express agreement of the parties.(2) A demand of the precise sum due for rent must be proved to have been made precisely upon the day, when it became payable, at the place appointed for the payment, or, if no place is appointed, on the most notorious part of the demised premises, and at a convenient time before sunset.(3) The demand may be made by an agent in the name of the lessor, under a power of attorney; in that case the authority must be proved, and the agent ought to notify it to the tenant at the time of the demand; though it will not be necessary to produce it, if the tenant is satisfied without the production.(4) These several requisites being strictly performed (for the common law requires the utmost strictness, where the condition tends to the defeasance of an estate), the lessor will be entitled to re-enter. However, an actual entry will not be necessary, whether the lease is for years or for life; but the confession of entry by the defendant will be sufficient for this purpose.(5)

Demand of rent, when dispensed with.

The great niceties in making a demand for rent, formerly necessary to be observed, in order to take advantage of a power of re-entry for non-payment, have been removed, in certain cases, by a modern statute, St. 4 G. II, c. 28, which was intended to obviate the inconvenience resulting from the strictness of the common law. That statute dispenses with the necessity of a previous formal demand, by substituting the service of the declaration of ejectment for the demand of rent. The statute, however, does not require the day of the demise in the ejectment to be the same as that upon which the declaration is served; but the title of the lessor of the

(1) Co. Litt. 202 a; Borough's Case, 4 Rep. 73; Willes' Rep. 506. See 1 Wms. Saund. 287, n.

(2) Goodright dem. Hare v. Cator, 2 Doug. 477, 485.

(3) Co. Litt. 202 a. The cases which require the observance of these several particulars are collected in 1 Saund. 287, n. 16, Duppa v. Mayo. A demand upon an under-tenant on the premises is sufficient. Doe v. Brydges, 2 D. & R. 29.

(At common law great strictness and technical nicety were required to entitle the reversioner to re-enter for non-payment of rent. There must be a demand of rent—and the precise rent due—upon the precise day when it is due—at a convenient time before sunset—at the place appointed for the payment of the rent. The action brought to enforce a penalty, the rule is not relaxed. Van Rensselaer v. Jewett, 5 Denio R. 121; S. C., 2 Comst. 141.)

(4) Roe dem. West v. Davis, 7 East, 363.

The same strictness of proof, as to the previous demand, is requisite, as where the lessor is seeking to recover what is called a *nomide pœne*, that is; where there is a proviso, that if the rent is in arrear for such a time after the days of payment, the lessee shall forfeit a sum of money as a penalty.(a)

(5) The rule was so settled in the time of Lord Holt, and has been since observed. Little v. Heaton, 2 Lord Raym. 750; 3 Burr. 1897; Goodright dem. Hare v. Cator, 2 Doug. 477, 485.

(a) 1 Roll. Ab. 459,(s.) pl. 8; Maund's Case, 7 Rep. 28 b; Willes' Rep. 506, 507.

plaintiff is still considered as accruing at the same time as that at which it would have accrued at common law.(1)

That statute 4 G. II, c. 28, provides, that where half a year's rent is in arrear, the landlord or lessor, to whom the rent is due, instead of making a demand and re-entry, may serve a declaration in ejectment for the recovery of the demised premises; or, in case it cannot be legally served, or if no tenant be in actual possession of the premises, then he may affix it upon the door of any demised messuage, or, in case the ejectment is not for the recovery of any messuage, upon some notorious place of the premises; and, at the trial of the action, when the defendant appears, the lessor will have to prove the service of the declaration in ejectment in the usual manner,(2) or, under the circumstances above specified, may prove the affixing of the declaration, this service of affixing being substituted in the place of a demand and re-entry; and further, he must prove that half a year's rent was due before the service of the declaration. He will have also to prove, that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that he had power to re-enter.

As to the proof of the time of searching for a distress, and of finding it insufficient, the search must of course be proved to have been after the rent had become due, and after the expiration of the time of payment; and it must be shown to have been before the day of the demise in the declaration, or at least there must be *prima facie* evidence, that, at the time when the demise is laid, there was not a sufficient distress. In the case of Doe on the demise of Smelt v. Fuchan,(3) the proviso was for re-entry in case the rent was unpaid for the space of fourteen days after either day of payment; the demise was laid on the 2d of May, 1811; half a year's rent was due on the Lady-day preceding; and it appeared that the broker went upon the premises for a distress on some day in May, but found nothing to distrain upon; the counsel on the part of the defendant contended, that it ought to have been shown, that there was no sufficient distress on the premises for fourteen days after the rent was due, and that there was none at the time of the service of the declaration. But the court held, that there was at least sufficient *prima facie* evidence to call upon the defendant to show, that a sufficient distress had been on the premises within the proviso; and the jury might presume, from the fact of there being no sufficient distress some time in May, that there was none in May before the 2d, when the demise was laid, nor at the time when the declaration was served, if that were material. It will be necessary to

(1) Doe v Shawcross, 3 Barn. & Cress. 756. See 2 R. S. of N. Y. 597 (3d ed.)

(2) The cases as to the service of the declaration are collected in Adams' Treatise on Ejectments, pp. 207, 210.

(3) 15 East, 286.

prove that every part of the premises has been searched.(1) But where the doors of the tenant's house were locked up, and the landlord could not get at the premises to distrain, it was held that there was no available distress within the meaning of the statute.(2)

Although a demand of rent is expressly required by the lease, previous to the entry (as where the condition is, that if the rent should be unpaid for so many days next after any of the days of payment, being lawfully demanded, the lessor should have a right to re-enter), yet this has been considered a case within the provisions of the statute; and, if more than half a year's rent is in arrear, and there is not a sufficient distress upon the premises, a demand has been held to be unnecessary.(3) And although the amount of rent proved to be due, be different from that stated in the particulars, the variance will not be material.(4)

Defence. Tender.

The defendant, in answer, may show any ground to save himself from the forfeiture; as that he offered the rent to the lessor some time before the last day of payment, though he did not offer it on the most notorious part of the premises, nor until the last instant.(5) And where the landlord avails himself of the provisions of the statute, the tenant does not incur a forfeiture till the declaration in ejectment is served upon him, and if at that time he is ready to pay the rent, it gives him the same benefit as if he had tendered it when it was due.(6)

Waiver of forfeiture.

The defendant may show that the right of entry and forfeiture have been waived by the landlord, where the lease is for life, which is only avoidable by entry;(7) or where the lease, though for years, is by its terms made voidable and not void; as, where the language of the condition is, that the lessor may re-enter.(8) Acceptance of rent, or a distress for rent, or the bringing an action of covenant for rent, which has accrued since the forfeiture, is a waiver of it.(9) But to constitute a waiver of a

(1) *Rees v. King*, cited 2 Bro. & Bing. 514; *Forrest*, 19. See *Van Rensselaer v. Jewett*, 5 Denio R. 121.

(2) *Doe v. Dyson*, 1 Mo. & M. 78.

(3) *Doe dem. v. Scholefield v. Alexander*, 2 Maule & Selw. 525. In this case Lord Ellenborough differed from the other judges. See *Doe dem. Wandlass v. Foster*, 7 T. R. 117, and *Smith v. Spooner*, 3 Taunt. 232.

(4) *Tenny v. Moody*, 3 Bing. 3.

(5) Co. Lit. 202 a.

(6) By *Holroyd, J.*, in *Doe v. Shawcross*, 3 B. & C. 756.

(A surrender by the tenant may be shown by the acceptance of another tenant. *Clemen v. Bloomfield*, 19 Mis. (4 Bennett) 118, 132; *Barber v. Pratt*, 15 Ill. 568; 18 Barb. 484.)

(7) *Pennant's Case*, 3 Rep. 64 b; *Manning's Case*, 8 Id. 95 b; Co. Litt. 215 a.

(8) *Pennant's Case*, 3 Rep. 64 b; *Jones v. Verney, Willes*, 176; *Goodright v. Davids*, Cowp. 804. See *Doe v. Banks*, 4 B. & Ald. 401; *Reed v. Farr*, 6 Maule & Sel. 121.

(9) *Roe v. Minshull*, Bull. N. P. 96. *Vide supra*, p. 590. And see, with respect to the effect

forfeiture by the acceptance of rent, the landlord must be proved to have had notice of the forfeiture at the time he accepted the rent.(1)

Where the ground of forfeiture is a breach of some other covenant than that to pay rent, as a covenant not to carry on a particular trade, a waiver can only be by some act done by the landlord affirming the tenancy, such as the acceptance of rent, or the like; a mere knowledge and acquiescence in those acts of the tenant which constitute the forfeiture, will not amount to a waiver; though, if the plaintiff lay by, and saw that money was laid out by the defendant in repairing the premises, having notice, at the time, of a forfeiture, a waiver of it may be presumed.(2) A landlord who waives his right of re-entry upon a breach of covenant, as for underletting, or not repairing premises, does not thereby waive his right of re-entry for a subsequent breach of the same covenant.(3) An assignment of the reversion by the landlord, subsequent to the commission of a forfeiture, where the lease is not absolutely void, will prevent any advantage being taken of the forfeiture.(4)

II. Ejectment by heir at law.

II. The cases which have been hitherto considered are those in which the relation of landlord and tenant has subsisted, and in which the title of the lessor has, in general, been admitted. We proceed now to cases of another kind, where the lessor of the plaintiff will be obliged to prove a strict legal title. And, first, as to the case in which the lessor of the plaintiff claims by descent, as heir at law of the person last seized of the property.

Proof of seizin.

The seizin of the deceased is proved by showing his actual possession of the premises, or by proving his receipt of rent from the person in possession;(5) this is presumptive evidence of a seizin in fee, and sufficient till the contrary appear. An entry into any part of the lands in a county, or by any part of the person, is, in general, sufficient to constitute a seizin.(6)

of a distress for rent, *Brewer v. Eaton*, cited 6 T. R. 220, case of insufficient distress. *Doe v. Johnson*, 1 Stark. N. P. C. 411.

(1) *Goodright v. Davids*, Cowp. 804; *Rowe v. Harrison*, 2 T. R. 430; *Pennant's Case*, 3 Rep. 64; Co. Litt. 211 b.

(2) *Doe v. Allen*, 3 Taunt. 78. In *Hume v. Kent*, 1 Ball. & Beat. 554. And see *Doe v. Elkins*, 1 Ry. & Mo. 29. Respecting the waiver of a forfeiture for a breach of covenant to repair depending on the terms of the notice to repair, see *Roe v. Payne*, 2 Campb. N. P. C. 520; *Roe v. Meux*, 4 B. & C. 606; *Doe v. Miller*, 2 C. & P. 348. For the breach of covenant to insure, *Doe v. Rowe*, 1 Ry. & Mo. 343.

(3) *Doe v. Bliss*, 4 Taunt., 735; *Fryett v. Jeffreys*, 1 Esp. N. P. C. 393.

(4) *Fenn v. Smart*, 12 East, 445.

(5) *Jayne v. Price*, 4 Taunt. 326; Co. Litt. 15 a; Bull. N. P. 103; *Tappscott v. Cobbs*, 11 Gratt. 172.

(6) *Bro. Seis.* 20, 23; *Entre Cong.* 57, 61. It seems otherwise where the lands are in the

But when the lands have been abated into by a stranger, it is necessary that the entry, to gain a seizin, should have been notorious, and made expressly for that purpose.(1) The declarations of a deceased occupier of the land in question, that he held as tenant under a particular person, have been admitted as evidence of the seizin of that person.(2)

It is not necessary that the possession should be gained by the actual entry of the very person in whom the seizin is alleged. It may be gained by the entry or possession of the guardian,(3) or by the possession of his ancestor's lessee for years, or tenant by elegit.(4) And it seems that an heir may gain a seizin by making a lease at will or for years, before his own entry.(5) A seizin may be gained by the entry of a co-parcener, joint tenant, or tenant in common;(6) or of a younger brother or sister;(7) or of a person entering in the name of him who is entitled to the lands, though without a precedent command or subsequent assent.(8)

Actual seizin may be gained by the possession of a tenant by copy of court roll, before admittance; and it is a rule, that the entry, and not the admittance, makes a *possessio fratris* in the case of copyholds.(9)

There is no mesne seizin of a remainder or reversion, expectant on an estate of freehold, while such a remainder or reversion continues in a regular course of descent. But as it may be sold, devised, or charged by the person entitled to it, the descent of it may be changed by the execution of certain acts of ownership, as, by granting it over for a term of life, or in trial; the execution of such acts of ownership being equivalent to actual seizin of an estate which is capable of being reduced into possession by

hands of several abators, or the entry is not made on the part of the land into which a stranger, has abated. See *Plowd. Queries*, 142; *Co. Litt. tit. Entry*, and *Continual Claim*.

(1) *Plowd. Comm.* 92; *Co. Litt.* 245 b, 368 a; *Ford v. Gray*, 6 *Mod.* 44.

(2) *Peaceable v. Watson*, 4 *Taunt.* 16.

* * On the subject of *lis mota*, &c., see *ante* of the text and notes; also *In the Matter of Taylor*, 9 *Paige*, 611; 1 *Gr. Ev.* §§ 131-134, and notes; *Taylor on Ev.* pp. 407-413. * *

(3) See *Watkins on Descents*, 64. The guardian need not have been formally assigned. *Newman v. Newman*, 3 *Wils.* 528. If a stranger enter into the lands of an infant, he shall be considered as entering as guardian, *F. N. B.* 18; *Co. Litt.* 89; *Morgan v. Morgan*, 1 *Atk.* 489; *Dormer v. Fortescue*, 3 *Atk.* 130. And the entry of such person will make a *possessio fratris*, *Doe v. Keene*, 7 *T. R.* 386, and 3 *Wils.* 528; *Whitcombe v. Whitcombe*, *Prec. Ch.* 280.

(4) *Watkins on Descents*, 65; *Bushby v. Dixon*, 3 *Barn. & Cress.* 298; *Co. Litt.* 15 a, 143 a. And this, though the heir dies before the day of payment of rent. *Moore*, 126; *Co. Lit.* 15 a.

(5) *Watkins*, 67. The heir is seized by right of inheritance. *Brandt v. Livermore*, 10 *John. R.* 358; 11 *Gratt.* 172.

(6) And such an entry will make a *possessio fratris*. *Smales v. Dale*, *Hob.* 120; *Moore*, 546, 868; *Dyer*, 128.

(7) *Co. Lit.* 242 a; *Plowd.* 306 a. See *Jayne v. Price*, 4 *Taunt.* 326. Such an entry will make a *possessio fratris*, to the exclusion of the person who enters. *Plow.* 306; *Jenk. Cont.* 242; *Doe v. Keene*, 7 *T. R.* 386.

(8) *Perk.* 5, 48; *Bro. Seis.* 50; *Co. Litt.* 245 a, 258, a.

(9) 1 *Freem.* 45. See *Kitch.* 60 b, 3 *Leon.* 38. The possession of a lessee, by license of the lord, does not give a *possessio fratris*. *Id.*

entry. With respect therefore to the proof of a title by descent to a remainder or reversion expectant on an estate of freehold, the claimant must prove himself heir to the person originally seized of the entire fee simple, and who created the particular estate of freehold; or to the person in whom the remainder or reversion first vested by purchase; or (in case acts of ownership have been exercised of the nature before alluded to), to the person by whom, or in whose favor, acts of ownership over the remainder or reversion in question have been last exerted.(1)

After proof of the seizin of the party from whom the plaintiff claims, it must, in the next place, be shown either that the plaintiff is lineally descended from him, or if he claims collaterally that they are both of them sprung from the same common ancestor;(2) and further, that all the branches interposed between the claimant and the ancestor, which if in existence, would have a preferable title, are extinct.(3)

In tracing a pedigree, the several facts of births, marriages or deaths, may be proved by examined copies of entries in parish registers, together with evidence of the identity of the parties. The parish registers are evidence of what they purport to record; namely, that certain persons there described were baptized, married, or buried at a particular time or place; but they are not evidence of any other facts inserted in them, as of the time or place of birth of an infant.(4)

The declarations of deceased members of the family, whether relations or connections by marriage, are admissible evidence to prove relationship, deaths or marriages; but the declarations of servants or intimate acquaintances are not received for this purpose.(5) Declarations upon matters of pedigree are admitted though made by persons in *pari jure* with the party using them; but they may be objected to, if they were not made *ante litem motam*. Of the same nature with declarations are descriptions in wills, recitals in deeds, entries in family books, or on monuments.(6)

The ancient books of the Herald's Office, and the visitation books of counties, are evidence on a question of pedigree.(7) But a pedigree drawn out by a herald at arms, unaccompanied by any regular proof from the office, is clearly inadmissible.(8) And a recital in an act of Parliament,

(1) Watkins on Descents, 137, 151.

(2) Doe dem. Thorne v. Lord, 2 Bl. R. 1099. At least, it must be shown that the claimant and the deceased were descended from brothers or sisters. *Id.*

(3) Richards v. Richards, 15 East, 294 a. See Doe v. Griffin, 15 East, 293, stated in Vol. I.

(4) See former volume.

(5) Johnson v. Lawson, 2 Bing. 90.

(6) See *ante*. See the observations of Le Blanc, J., in Higham v. Ridgway, in 10 East, 120, and of Lord Eldon in Whitlocke v. Baker, 13 Ves. 514.

(7) See Vol. II.

(8) Plumptre v. Robinson, 2 Roll. Ab. Trial, 1, pl. 2, p. 636.

stating J. S. to be the heir of a particular person, has been held not to be evidence.(1)

Reputation has been held good evidence of a marriage, in an ejectment brought by the heir, through his parents (whose marriage was the subject of dispute were both living.)(2) The presumption of continuance of human life ends, in general, at the expiration of seven years from the time when the person was last known to be living;(3) but the death of a party may be presumed in a shorter time under the particular circumstances of the case.(4) The reputation in the family may afford presumptive evidence of a death of a person without issue.(5)

Defence—Illegitimacy.

The question of legitimacy, or illegitimacy, frequently arises, on the part of the defendant, as a defence to the ejectment, when the action is brought by one claiming as heir at law. If the lessor of the plaintiff claim by heirship, immediately as the son of the person last seized, the defendant may show that he is not the legitimate son; or if he claim as heir, through other persons interposed between himself and the person last seized, the defendant in that case may show, either that the lessor himself, or that some one of those through whom he claims by descent, is not legitimate. The illegitimacy of any one in the line of ancestors will make a complete chasm or breach in the pedigree; an illegitimate person not having an ancestor, from whom any heritable blood can be derived. The illegitimacy of a person may arise, either from being born out of lawful wedlock, or, if born in wedlock, from not being the true child of the married parties.(6)

Want of legal marriage.

First, as to the question, whether the individual whose legitimacy is disputed, was born in lawful wedlock; or, in other words, whether the mother of such individual was at the time of his birth, lawfully married to his supposed father. It is a well known principle of our law, that a marriage, although voidable for some *canonical* disabilities (such as consanguinity, affinity, &c.), is not void until sentence of nullity has been declared, and is considered valid and operative for all civil purposes,

(1) Anon., 12 Mod. 384. And see May v. May, Bull. N. P. 112.

(2) Doe v. Fleming, 4 Bing. 266; Bull. N. P. 114; Reed v. Prosser, Peake's N. P. C. 233. On the proof of marriage, *vide supra*, 522.

(3) Doe v. Jesson, 6 East, 80; Doe v. Deakin, 4 Barn. & Ald. 433; Hopewell v. De Pinna, 2 Campb. N. P. C. 113; Wilson v. Hodges, 2 East, 312. And see R. v. Twynning, 2 Barn. & Ald. 386.

(4) Watson v. King, 1 Stark. N. P. C. 121.

(5) See Vol. I; Doe v. Griffin, 15 East, 293.

(6) (The evidence on the question of legitimacy was much discussed in the House of Lords, on the claim of Lieutenant-Colonel Knollys to the earldom of Banbury. See Vol. 6 of Campbell's Lives of the Lord Chancellors, page 480; and Morris v. Davis, 5 Clarke & Finelly's R. 163, where the authorities are collected.)

unless such sentence is actually declared during the lifetime of the parties; but *civil* disabilities, such as a prior marriage, want of age, want of reason, and the non-observance of certain solemnities required by the Marriage Act, render the contract of marriage not merely voidable, but absolutely void *ab initio*.⁽¹⁾

Proof of marriage.

It will not be absolutely necessary for the party who claims as heir, and has to maintain the lawfulness of a marriage, to prove, in the first instance, the regular publication of the banns, or the obtaining the license, under which the marriage was solemnized; the usual presumptive proofs, arising from the cohabitation of the parties as man and wife, have not been taken away by the Marriage Act; (2) they are still admissible, as before the passing of that act; and it must often happen, especially in the case of old marriages, where the parties have been long dead, and the place of marriage is unknown, that such proof is all that can be supplied. On the other hand, it is open to the adverse party to disprove the existence of the license, or the regular publication of the banns; and if this is effectually done, the marriage will be absolutely void. But even in this case, there may be sufficient ground for presuming a *subsequent* legal marriage, from the cohabitation of the parties as man and wife, and from the manner in which they were always received by their relations. Whether such a presumption is reasonable, the jury are to determine, upon all the various circumstances of the particular case. In the case of Wilkinson agt. Payne, (3) where a question arose respecting the marriage of the plaintiff, it clearly appeared that the marriage, when it first took place, was not legal; because the plaintiff was at the time a minor, and married after the death of his parents, without the consent of a legally appointed guardian; yet, as the plaintiff and his wife had been always received and treated by the wife's father (the defendant) and by all his family, down to the time of her death, as man and wife, the judge who tried the cause, left it as a question for the jury, whether they would not presume a subsequent legal marriage; the jury presumed such marriage, and found a verdict for the plaintiff. In this case, there was a strong

(1) See 6 G. IV, ch. 92, § 22. With respect to the requisites of foreign marriages, and marriages of particular sects, *vide supra*, p. 524. With respect to the effect and the proof of sentences in the Ecclesiastical Court, see Vol. I. That a marriage will be avoided by proof of lunacy, though no commission has issued, see *Turner v. Meyers*, 1 Haggard's Const. C. 416. A marriage solemnized in England cannot be dissolved by a foreign sentence of divorce. *Russell*, 287. See *Tovey v. Lindsay*, 1 Dow, 117. See *Bennett v. Smith*, 21 Barb. 439; and *Cropsey v. Ogden*, 1 Kernan N. Y. 228.

(2) *St. Devereux v. Much Dew. Church*, 1 Black. R. 367; *Reed v. Prosser*, Peake's N. P. C. 232; *Doe v. Fleming*, *supra*, p. 598.

(3) 4 T. R. 468, an action on a promissory note given to a plaintiff, in consideration of his marrying the defendant's daughter. The defence was, that there had not been a legal marriage.

circumstance to encounter such a presumption; for it was proved, that when the plaintiff came of age, his wife lay on her death-bed, and died three weeks afterwards. However, the Court of King's Bench were unanimous in refusing to grant a new trial. "Though the first marriage," said Lord Kenyon, "was defective, a subsequent one might have taken place; the parties cohabited together for a length of time, and were treated by the defendant himself as man and wife; these circumstances afforded a ground on which the jury presumed a subsequent marriage."

Either of the married parties, provided they are not interested in the suit, will be competent to prove the marriage; either of them will also be competent to disprove the supposed marriage; and they may give evidence as to the fact whether their child was born before or after marriage.(1)

The declarations of a deceased person, as to the fact of his marriage, or as to the time of the marriage, or to prove that a child was born before or after marriage, are admissible in evidence, on a question of pedigree;(2) and the declarations of deceased members of the family are evidence upon the same point.(3) But the declarations of a deceased person, who attended at the marriage as parish clerk, that the banns had not been duly published,—or the declarations of the deceased clergyman, that the banns had been forbidden, and were, therefore, not published,—are clearly not admissible.(4)

If the individual whose legitimacy is disputed was born during a lawful marriage, another question may still arise, namely, whether that individual was the true and legitimate child of the married parties. The maxim of the civil law, "*Pater est quem nuptiæ demonstrant*,"(5) has given rise to great difference of opinion among the writers on civil law, as to the force of the presumption which existed in favor of legitimacy; and whether it might not be rebutted, as well by the existence of moral reasons as by the proof of some physical cause. Our ancient law writers, Bracton, Fleta and Brittan, seem to have considered that circumstantial evidence was admissible to controvert the presumption of legitimacy. But it appears from the Year Books that rules of pleading were laid down by our courts at an early period, the effect of which was to treat the presumption in favor of legitimacy as conclusive, unless it could be opposed by evidence of the husband's impotency, or of his being beyond the four seas during

(1) *R. v. St. Peter's*, 1 Bott. 454; *S. C.*, B. N. P. 112; *Cowp.* 593; *Henley v. Chesham*, 2 Bott. 79; *Standen v. Standen*, Peake's N. P. C. 32; *R. v. Bromley*, 6 T. R. 330.

(2) See Vol. I; *May v. May*, Bull. N. P. 112; *Goodright v. Moss*, *Cowp.* 591.

(3) See Vol. I.

(4) See Vol. I.

(5) Dig. L, 2, T, 4, § 5.

the whole period of the wife's gestation. And the law is stated in conformity with these rules by Lord Coke, in his first Institute.(1)

It seems, however, to be now clearly settled, as the modern doctrine upon this subject, that although the birth of a child during wedlock raises a presumption that such child is legitimate, yet that this presumption may be rebutted both by direct and presumptive evidence. And, in arriving at a conclusion upon this subject, the jury may not only take into their consideration proofs tending to show the physical impossibility of the child born in wedlock being legitimate, but they may decide the question of paternity, by attending to the relative situation of the parties, their habits of life, the evidence of conduct, and of declarations connected with conduct, and to every induction which reason suggests for determining upon the probabilities of the case. Where the husband and wife have had the opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is the fruit; but it is only a very strong presumption, and no more. This presumption may be rebutted by evidence, and it is the duty of a jury to weigh the evidence against the presumption, and to decide as, in the exercise of their judgment, either may appear to preponderate.(2)

Period of gestation.

In arriving at a conclusion respecting the question of legitimacy, it is sometimes important to make inquiries respecting the period of gestation. Lord Coke lays it down that this is fixed, by the law of England, to forty weeks.(3) It appears, however, from several authorities, that there is no absolute rule upon this subject, though it has been the practice of our courts to consider forty weeks as the usual period of gestation; but, at the same time, to exercise a discretion in allowing a longer space, where the opinion of physicians or the circumstances of the case have required.(4) In investigations of this nature, an appeal is frequently made to the authority of foreign institutions. It seems that, by the civil law, a child born in the eleventh month after her husband's decease was illegitimate;(5)

(1) Co. Litt. 244. The reader is referred to the report of the proceedings of the House of Lords on the claims to the barony of Gardiner, by D. Le Marchant, Esq. Attached to the report will be found a valuable collection of ancient and modern opinions and decisions respecting adulterine bastardy. See *Morris v. Davis*, 5 Clarke & Finelly's R. 163.

(2) By Lord Eldon, Lord Redesdale, and Lord Ellenborough, in the case of the Banbury Peerage. The answers of the judges in the case of the Banbury Peerage. Lord Eldon in the case of the Gardiner Peerage, Hargr. Co. Litt. 123 b; *Pendrel v. Pendrel*, 2 Str. 924; *R. v. Luffe*, 8 East, 206; *Goodright v. Saul*, 4 T. R. 356; Vol. I. Children born during a separation *mensa et thoro* are *prima facie* presumed to be bastards. 1 Salk. 123; Vol. I.

(3) Co. Litt. 123 b.

(4) Hargr. Co. Litt. 123 b, n. 1. A great deal of medical evidence upon this subject is collected in the report of the case of the Gardiner Peerage; and see the opinion of Dr. Hunter, Hargr. Co. Litt. 123 b, n. 1.

(5) Rep. on Gardiner Peerage, 329, Pref. 16.

and the same appears to be the rule of the Scotch law.(1) The Code Napoleon withholds the presumption in favor of legitimacy where the child is born three hundred days after the dissolution of the marriage.(2)

Evidence of parents.

The mother of the child whose legitimacy is questioned, is not allowed to prove the non-access of her husband during his lifetime or after his death.(3) But she is competent to prove the fact of her criminal intercourse with that person whom she charges to be the real father of the child; and it seems that it will be competent for her to prove that the adulterer alone had that sort of intercourse with her by which a child might be produced within the limits of time which nature allows for parturition.(4) The declarations of a deceased mother are not admissible as to the fact of non-access, which she would not be allowed to prove in person.(5)

Heir of copyhold.

In the case of copyholds, the legal estate descends upon the heir at common law immediately upon the death of the tenant, if no custom intervene.(6) And, if the ancestor has been admitted, the heir may maintain ejectment before admittance.(7) If the ancestor has not been admitted, then, in case the lands have been surrendered to the ancestor, the heir should be admitted previous to the trial.(8) The admittance may be proved by the original entry made on the court rolls of the manor, or by copies of the court rolls properly stamped;(9) and some evidence must be given of the identity of the party admitted.(10)

(1) *Stewart v. M'Keand*; Report on Gard. Peerage, App. (A.)

(2) T. vii. a. 315, Code Civil; Observations du Code Civil, 273; Case of Catherine Berard, App. to Report on Gard. Peerage, (D). The Frederican Code attaches such conditions to the proof of the legitimacy of children born in the eleventh month, as to render it almost impracticable to be established. Pref. to Report on Gard. Peerage, lxi.

(3) *R. v. Luffe*, 8 East, 193; *R. v. Kea*, 11 East, 132; Cowp. 594; Vol. I.

(4) *R. v. Reading*, Rep. temp. Hard. 82; 8 East, 203; Vol. I.

(5) 8 East, 193; Cowp. 592; Vol. I.

(6) *Doe v. Mason*, 3 Wils. 63; *Denn v. Spray*, 1 T. R. 466.

(7) *Doe v. Brightwen*, 10 East, 583; *Roe v. Hicks*, 2 Wils. 15. It is not necessary that he should be presented heir. *Rumney v. Eades*, 1 Lev. 100; 1 T. R. 601.

(8) See *Scriven*, 351; *Doe v. Hall*, 16 East, 208. The admittance of copyholds, when made, relates back to the surrender. *Holdfast v. Clapham*, 1 T. R. 600; *Roe v. Hicks*, 2 Wils. 15; *Doe v. Hall*, 16 East, 208. The admittance of a particular tenant, is the admittance of the persons in remainder. Cro. Jac. 31; 5 Mod. 307; Co. Litt. 266 b, n. 1. And a person taking a reversion or remainder by grant from the lord of a manor, has a perfect title without admittance. *Roe v. Loveless*, 2 Barn. & Ald. 453. Surrenders and admittances will sometimes be presumed at law. *Roe v. Lowe*, 1 H. Bl. 457.

(9) *Doe v. Hall*, 16 East, 208. A mistake in the entry may be shown by evidence, or the entry may be supplied, if lost. *Doe v. Calloway*, 6 Barn. & Cress. 484. The foul draft of the steward is good evidence of an admittance. Anon. *Ld. Raym.* 735. See 2 Walk. 39, n.

(10) *Doe v. Smith*, 1 Campb. N. P. C. 197.

If the plaintiff claims as heir by custom, contrary to the course of the common law, the most usual proof of the custom is by the entries in the court rolls. These entries are evidence of the customary mode of descent, although no instances can be proved of persons having succeeded to lands according to the alleged custom.(1) The nature of the evidence by which the customs of a manor may be proved, has been particularly considered in the first volume.(2)

Where the title of the lessor of the plaintiff, as heir at law, is admitted, the defendant, claiming under a will, is entitled to begin, and to have the general reply. And even if the lessor of the plaintiff, in the first instance, proves his pedigree, and the defendant set up a new case, which the plaintiff answers by evidence, it has been held that the defendant has a right to the general reply.(3)

III. Having considered the title by descent, we proceed now to the title by devise. And, first, of an ejectment by the devisee of a freehold interest.

III. Ejectment by devisee.

A devisee, who claims immediately upon the testator's death, must show the seizin of the deceased, and that his will has been duly executed. A freehold interest, in real property, though not vested in possession or interest, may yet be devised, under the Statute of Wills; as, a reversion, or remainder in fee,(4) or an interest by virtue of an executory devise.(5) A party, therefore, claiming such an estate or interest, when the right to possession becomes vested, will have to prove the seizin of the testator, the regular execution of his will, and the determination of all the precedent estates, upon which determination the interest, limited to him, is made to vest in possession. Something has been already said respecting the proof of seizin;(6) and the regular mode of proving the execution of wills has also been so much considered as to make it unnecessary to add anything in this place.(7)

(1) *Roe v. Parker*, 5 T. R. 26; *Doe v. Askew*, 10 East, 520. See Vol. I.

(2) See Vol. I.

(3) *Jackson v. Hesketh*, 2 Stark. N. P. C. 518; *Goodtitle v. Braham*, 4 T. R. 497; 2 Tidd, 1238 (9th ed.) This is analogous to the rule in trespass and replevin, in which actions the defendant begins, where the proof of none of the issues lies on the plaintiff, notwithstanding the question of damages is to be determined. 2 Stark. N. P. C. 520.

(4) St. 34 H. VIII, c. 5.

(5) *Jones v. Roe*, lessee of *Perry*, 3 T. R. 88.

(6) *Vide supra*, respecting the proof of seizin and adverse seizin.

(7) See Vol. I. See also the recent case of *Todd v. Ld. Winchelsea*, 1 Mo. & M. 13, where Lord Tenterden, Ch. J. states the rule as to attestation of a will in the presence of the testator, in ordinary cases, to be, "Was the will attested in such a situation as that the testator might have seen it?" As to the point of the necessity of the testator acknowledging the will or handwriting to the witnesses, see *Peate v. Oughley*, Com. 197. *Trimmer v. Jackson*, 4 Burn. Eccl.

Defence by heir at law.

The heir at law, in answer to this title by devise, may show, if he can, that the will is a mere fabrication and forgery, or that the deceased was incompetent to make a will; as, by being a married woman,(1) or within the age of twenty-one years,(2) or by reason of mental incapacity, whether proceeding from idiocy or non-sane memory;(2) or that the will was extorted by duress, or obtained by fraud, as where one paper was obtruded on the testator for another which he intended to execute;(3) or that the testator had not a devisable estate, as, if he were tenant in tail.(4)

Incapacity of testator.

The mental incapacity of the testator, at the time of making the will, is a good ground of defence; for, unless the testator was in a state of mind competent to do such an act, the supposed will is absolutely void. The rule of law upon this subject is laid down thus by Lord Coke:(5) It is not enough, he says, that the testator, when he makes his will, should have sufficient memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his lands with understanding and reason; this, he adds, is such a memory as the law calls sure and perfect.

Partial insanity.

Apparent sanity, on some subjects, is not conclusive proof that delusion on particular subjects, and showing itself on particular occasions, does not exist. And it seems that, in civil cases, this partial insanity, if existing at the time of an act done, invalidates that act, though it be not directly connected with it. It has been said, that, where there is delusion of mind, there is insanity; as, where persons believe things to exist, which exist only, or, at least, in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, and which no rational person could have believed. This delusion may sometimes exist on one or two particular subjects, though, generally, there are other concomitant circumstances; such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks

L. 127; Wallis v. Wallis, Id.; Ross v. Ewer, 3 Atk. 161; Stoneham v. Evelyn, 3 P. Wms. 253; Powell's L. D. 80.

(1) St. 34, 35 H. VIII, c. 5, § 14.

(2) St. 34, 35 H. VIII, c. 5, § 14.

(3) Doe dem. Small v. Allen, 8 T. R. 147.

(4) An estate *pur autre vie* is devisable by Stat. of Frauds; and the same forms are requisite as on the devise of an estate in fee simple.

(5) Marquis of Winchester's Case, 6 Rep. 23 a. The testator ought to have judgment to discern. Swinb. 72, 77. See also 2 Co. 6, 23. The expression of "*unsound mind*," is not altogether of synonymous import with an incompetency to manage a person's own affairs. See *Ex parte Barnsley*, 2 Atk. 167; *Ridgway v. Darwin*, 8 Ves. jun. 67. (See *Stewart v. Lisenard*, 26 Wend. 255; 9 Paige 618.)

and symptoms which may tend to confirm the existence of delusion, and to establish its insane character.(1)

Lucid interval.

If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, from whatever cause it may proceed, whether from a natural decay of intellect, from derangement, or partial insanity, it will be incumbent on him to establish such incapacity by the clearest and most satisfactory evidence.(2) The burden of proof rests upon the party attempting to invalidate what, on its face, purports to be a legal act. If he succeed in proving that the testator had been affected by habitual derangement, then it is for the other party, who claims under the will, to adduce satisfactory proof, that, at the time of making the will, the testator had a lucid interval, and was restored to the use of his reason.(3)

Lord Thurlow has observed, in the case of *The Attorney-General agt. Parnter*,(4) that the evidence in support of the allegation of a lucid interval, after the proof of the derangement at any particular period, should be as strong, and as demonstrative of such facts, as where the object of the proof is to establish derangement. Perhaps it would be more just to observe, that, if on the one side derangement has been clearly proved, a lucid interval must also be clearly and satisfactorily proved on the other side. But there appears to be no reason for requiring, in the proof of each of these several facts, precisely the same measure of evidence, or the same degree of demonstration. It is possible, that both facts may be most satisfactorily established, though the proof in the one case may perhaps not be so strong or so demonstrative as in the other. Insanity, from its peculiar nature, admits of more easy and obvious proof, than the existence of a lucid interval. The wildness and unnatural appearance of insanity can never be misunderstood; but whether light and reason have been restored, is often a question of the greatest difficulty. It may happen, therefore, that insanity at a particular period is established by such a body of cogent evidence, as to dissipate every possible shade of doubt, and to convince the mind of the truth of the fact, as strongly as of its own existence. But to insist on the same weight of evidence, and the same degree of demonstration in the proof of a lucid interval, is requiring more than almost any case can be expected to supply, and perhaps more than the nature of the question will generally admit. "It is scarcely pos-

(1) See the judgment of Sir J. Nicholl in the case of *Dew v. Clark*, East. T. 1826, edited by Dr. Haggard.

(2) *White v. Wilson*, 13 Ves. jun. 89; Swinb. 72.

(3) 3 Brown Ch. C. 440; Dr. Phillimore's Rep. Vol. 1, p. 100. *Semel furibundus, semper furibundus, præsumitur*, see Lord Holt's MSS.; Hargr. Co. Litt. n. 185; Swinb. 78. See *Stewart v. Redditt*, 3 Md. 67; also *Levy v. Buffington*, 11 Geo. 337; *Fitzhugh v. Wilcox*, 12 Barb. 235.

(4) 3 Brown's Ch. C. 443.

sible, indeed, to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognizes acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact.”(1)

Imperfect restoration.

Nor can it be necessary to prove, that the patient had been restored to as perfect a state of mind as that which he had before his derangement, in order to be competent to make his will, or to do any other legal act. “The strongest mind,” as Lord Eldon has observed,(2) “may be reduced, by the delirium of a fever, or some other cause, to a very inferior degree of capacity; but the conclusion is not just, that, because the person is not what he had been, he should not, therefore, be allowed to make a will.” A great intellect may lose half its powers, and still retain more reason than falls to the lot of the common order of minds. All that the law requires is that the person should be restored to a “disposing mind,” capable of doing an act of thought and judgment; not that he should regain all the powers of intellect, which distinguished him before the malady.

Some important observations on the subject of lucid intervals have been made by Sir W. Wynne, in a case lately reported, in the Court of Pre-rogative.(3) After observing that a person is not incapacitated, even after the general habitual insanity, provided there is an intermission of the disorder at the time of the act, and that where an habitual insanity is established, there the party who would take advantage of the fact of an interval of reason, must prove such fact, Sir W. Wynne proceeds thus: “Now, I think the strongest and best proof, that can arise, as to the lucid interval, is that which arises from the act itself; that I look upon as the thing to be first examined; and, if it can be proved and established that it is a rational act, rationally done, the whole case is proved. In my apprehension, where you are able completely to establish that, the law does not require you to go further; and the citation from Swinburne states it to be so. The manner in which he has laid it down, is, ‘If a lunatic person, or one that is beside himself at times, but not continually, makes his testament, and it is not known whether the same were made while he was of a sound mind and memory, or not, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed, that the same was made during the time of his calm

(1) See Sir John Nicholl's judgment in *White v. Driver*, Dr. Phillimore's Rep. Vol. 1, 88.

(2) *Ex parte Holyland*, 11 Ves. 11.

(3) *Cartwright v. Cartwright*, Dr. Phillimore's R. Vol. 1, pp. 90, 101.

(There is an interesting discussion on the subject of legal capacity, in *Stewart's Ex'r v. Lispenard*, 26 Wend. 255.)

and clear intermission, and so the testament shall be adjudged good ; yea, although it cannot be proved, that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably," continues Sir W. Wynne, "there must be a complete and absolute proof, that the party who had so framed it, did it without any assistance. If the fact be so, that he has done without assistance, as rational an act as can be, what there is more to be proved I do not know, unless it can be shown, by any authority or law, what the length of the lucid interval is to be, whether an hour, a day or a month. I know no such law as that. All is wanting, is that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact, that the act done is perfectly proper, and that the party who is alleged to have done it, was free from the disorder at the time, that is completely sufficient."(1)

Revocation of will.

The heir at law may set aside the will, by proof of an actual revocation. The form of revoking a will is described in the 6th section of the Statute of Frauds, which enacts, "that no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself, or in the presence, or by his directions and consent ; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt or canceled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered to some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same."

Alteration.

As to the first mentioned mode of revoking a will, namely, that of altering it by some other will or codicil in writing, it seems to be clearly settled, that the second will or codicil cannot have the effect of revoking a former one, notwithstanding that it contain a general clause of revocation, unless it be proved to have been duly and formerly executed, accord-

(1) But the will itself may have every appearance of being the act of a sane person, and yet, when connected with the previous history of the individual, may show a delusion existing at the time. By Sir J. Nichol, in *Dew v. Clark*, *ub. supra*. In the selections from D'Aguesseau, in the Appendix to Evans' Pothier, it is said, that there is a great distinction between a reasonable act, and an interval, which is a *state*, the duration of which must be sufficiently long to admit a judgment of its reality ; and that an act of reason may subsist with a habit of madness. And see Hargr. Co. Litt. ii. 185, where it is said, that the act must be *sapientis*, and not merely *sapienti conveniens*.

ing to the requisitions of the fifth section ; (1) for, being intended to be a will and to revoke as such, it must have all the solemnities and forms of a will, or it cannot operate as a revocation. And further, if the second will does not expressly revoke, it revokes only so far as it appears to be clearly inconsistent with the former devise as to the particular subject matter of that devise ; (2) for the words of the statute are express, that all devises shall remain in force unless altered by some other will.

Express revocation.

The next mentioned mode of revoking is by some other writing of the devisor, declaring an intention to revoke. This must be signed in the presence of three or four witnesses ; but the statute has not required the witnesses to subscribe or attest in the presence of the devisor, nor indeed, to subscribe at all ; nor does this appear by any means necessary. (3)

Another mode of revocation is by burning, or canceling, tearing, or obliterating, by the testator himself, or in his presence, and by his directions and consent. These acts are in their nature equivocal, and their effect as a revocation, must entirely depend upon the intention with which they are accompanied. A will may be canceled by mistake or by accident ; but such a canceling is not a revocation. On the other hand, the burning or tearing may be partial and incomplete ; yet, if this was done with the design of revoking the will, it will be as complete a revocation as if the entire will had been destroyed. (4) The act, therefore, must be proved to have been done with the intention of revoking. And on a question of intention, as this is, evidence of the declarations of the testator at the time of doing the act, or of his subsequent declarations respecting the act, is clearly admissible, and has been admitted in a great variety of cases. (5)

Implied revocation.

The several modes of revoking a will, hitherto mentioned, are those prescribed by the Statute of Frauds ; and the language of that statute is so strong and clear, that it should seem absolutely to exclude every other species of revocation ; for the legislature has declared, that no devise of

(1) *Ecclestone v. Speake*, 1 Show. 89, better reported in *Carth.* 80 ; *Onions v. Tyrer*, 1 P. Will. 342 ; *Limberg v. Mason*, Com. 454.

(2) *Harwood v. Goodright*, lessee of Rolfe, Cowp. 87.

(3) *Townsend v. Pearce*, Vin. Ab. title Devise, R, 4, pl. 3, p. 142 ; 1 P. Will. 343 ; 7 Ves. 376 ; *Hilton v. King*, 3 Lev. 86.

(4) *Bibb dem. Mole v. Thomas*, 2 Black. R. 1043 ; *Burtenshaw v. Gilbert*, Cowp. 49 ; 1 P. Will. 345 ; *Doe dem. Perkes v. Perkes*, 3 Barn. & Ald. 489 ; *Winsor v. Pratt*, 2 Brod. & Bing. 650 ; 1 Wms. Saund. 379, note c.

(5) See particularly *Burtenshaw v. Gilbert*, Cowp. 53 ; *Bibb dem. Mole v. Thomas*, 2 Black R. 1043 ; *Campbell v. French*, 3 Ves. 321 ; 2 East's R. 534 b. (As to the manner in which wills of real and personal property may be revoked or canceled, see New York Revised Statutes, Vol. 2, page 124. See *Pryor v. Coggin*, 17 Geo. 444.)

lands shall be revocable otherwise than by the particular modes there specified, and that all devises shall continue in force until they are so revoked, notwithstanding any former usage to the contrary. However, strong as the words of the statute are, the doctrine of implied revocations of wills is established.(1) Among these, one kind of implied revocation is, that resulting from the marriage of the testator and the birth of a child, without provision made for the objects of these relations; and this, as Lord Ellenborough said, in the case referred to, must now be considered as a general proposition of law.(2) The doctrine of this implied or constructive revocation is founded, in the opinion of Lord Kenyon,(3) on a tacit condition annexed to the will then made that it should not take effect, if there should be a total change in the situation of the testator's family. Other judges have been of opinion, that the doctrine is founded on a supposed intention in the testator;(4) and it has been said to be only a presumption grounded on the supposition, that so complete a change in the family of the deceased raises the implication, that he did not intend his will to take effect.(5)

Declarations to rebut.

On the subject of the admissibility of parol evidence to rebut such an implied revocation, there has been considerable difference of opinion. Lord Mansfield and Mr. Justice Buller(6) were of opinion, that evidence of the testator's declarations, and other parol evidence, may be properly admitted; and such evidence is always admitted in ecclesiastical courts.(7) On the other hand, strong opinions have been expressed against the admission of the testator's declarations;(8) and in the last reported case,

(1) The origin and progress of this doctrine, and the various opinions of judges upon the subject, are very ably and fully considered in two late judgments, the one by Lord Ellenborough, in *Kennebel v. Scrafton* (2 East, 540); the other by Sir J. Nichols, in *Johnston v. Johnston* (Dr. Phillimore's R. Vol. 1, p. 468). And see Roberts' Treatise on the Law of Wills, ch. 2, § 17. (See *White v. Costen*, 1 Jones' Law N. C. 321. See also 1 Vict. c. 26; *Lees*, in re, 22 Eng. L. & Eq. 636.)

(2) The rule applies only where the wife and children are wholly unprovided for. 1 Wms. Saund. 278 d. Marriage alone or the birth of children alone, is not sufficient, unless in certain cases, when combined with other circumstances. 1 Phill. 44; *Johnston v. Johnston*, Doe v. Bradford, 4 Maule & Selw. 10; 1 Wms. Saund. 278 c. Where there is a family by a former wife, there will be a revocation of a will of personalty only. *Skeath v. York*, 1 Ves. & Beam. 390.

(3) *Doe dem. Lancashire v. Lancashire*, 5 T. R. 58. See also, 2 East, 541; 4 Maule & Selw. 13.

(4) Lord Mansfield, in *Brady dem. Norris v. Cubitt*, 1 Doug. 39; Sir W. Wynne, in *Emmermerson v. Boville*, Dr. Phillimore's R. Vol. 1, p. 342; *Holloway v. Clarke*, Id. 339; *Johnston v. Johnston*, Id. 468.

(5) For other cases of implied revocation, see the notes to *Duppa v. Mayo*, 1 Wms. Saund. 278.

(6) 2 H. Bl. 524.

(7) Dr. Phillimore's R. Vol. 1, pp. 341, 344, 460, 469.

(8) By Lord Alvanley, *Gibbons v. Caunt*, 4 Ves. 848.

where the point arose,(1) the Court of King's Bench cautiously abstained from expressing any opinion upon the subject. The admissibility of the testator's declarations may, perhaps, be found to depend principally upon this consideration : whether the rule of law which admits of such an implied revocation, is founded, as some have said, on a supposed intention in the mind of the testator ; or whether, according to the opinion of others, the revocation is a tacit condition annexed to the will itself when first made. In the former way of considering the rule, there seems to be more reason for admitting such evidence than in the latter view of the question ; for, if there is a tacit condition annexed to the will at the time of the execution, then the revocation takes effect by operation of law, of which the law only can judge, and which must be collected from the circumstances that give birth to the presumption.(2)

Republication. Codicil.

A will may be republished either by re-execution of it, or by a codicil. Much difference of opinion formerly prevailed respecting the effect of a codicil, as to an implied republication of a will. It seems now to be settled, that a codicil, attested by three witnesses, is considered as a republication of the will, and as bringing it down to the date of the codicil, independent of any intention expressed, and making the will speak as of that date, unless, indeed, a contrary intention be shown ; and it is not necessary that a codicil to have this effect, should be annexed to the will.(3)

An executor, who takes a pecuniary interest under a will, is competent to support it, by proving the sanity of the testator, where the verdict in the case would only have the effect of establishing the will as to real property.(4) The competency of witnesses to prove the execution of a will, is fully considered in former part of the volume.(5)

Where the lessor of the plaintiff claims under a will, and the defendant under a codicil, the validity of which is the question between them, the defendant, on admitting the title of the lessor of the plaintiff, has a right to begin, and to have the general reply.(6)

Devisee of leasehold.

Secondly, of an action of ejectment by the devisee of a leasehold interest.

(1) *Kennebel v. Scrafton*, 2 East, 543 ; S. C., 5 Ves. 663. And see *Doe v. Lancashire*, 5 T. R. 60.

(2) See the judgment of Eyre, C. J., in *Goodtitle v. Ottway*, 2 H. Bl. 524. In all other instances of implied revocation, it seems settled that no parol declarations in favor of the will can be admitted. 1 Wms. Saund. 278, note f.

(3) 1 Wms. Saund. 277 f; by Lord Ellenborough, *Goodtitle v. Meredith*, 2 Maule & Selw. 6. See *Hulme v. Heygate*, 1 Mer. 285 ; *Rowley v. Eyton*, 3 Mer. 128.

(4) *Doe v. Teague*, 5 Barn. & Cress. 335.

(5) See 25 George II, chapter 6, which avoids a devise or bequest given to an attesting witness, and makes him competent.

(6) *Doe v. Corbett*, 3 Campb. C. 368.

The claimant in this case will have to prove the execution of the lease by the lessor,(1) under which lease the interest vested in the testator, the lessee; and if the testator was an assignee of the original lessee, the assignment to him, as well as the original lease, must be proved.

The lease is the best evidence of the property being leasehold. But this may be dispensed with by proof of an admission to that effect by the defendant; as in the case of Doe on the demise of Digby v. Steel,(2) where it was proved, that the defendant had admitted, in his answer to a bill in equity, that the testator, under whom the lessor of the plaintiff claimed, was possessed of the leasehold premises there mentioned.

Since a lease for years is a chattel interest, and vests in the personal representative of the lessee, the claimant must produce the probate of the will, or give other legal evidence of the will having been proved in the Ecclesiastical Court, to which court alone the jurisdiction belongs; for a court of common law will not take notice of a will, as a title to personal property, till it is proved in the Ecclesiastical Court.(3)

The title of the testator, and the bequest to the claimant being thus proved, all that remains to complete the claimant's title, is the executor's assent to the bequest. This previous assent is made necessary for the security of the executor, upon whom all personal property devolves, in trust to apply it, in the first instance, to the payment of debts; and until his assent is given, the legatee has only an inchoate property, and cannot enter upon the premises without being guilty of a trespass. But as this assent to a legacy is only requisite for the security of the executor, and to complete the title of the legatee, there is no specific form prescribed for declaring the assent. In general, any expression or act done by the executor, which shows his concurrence or agreement to the bequest, will be sufficient;(4) and "a very small matter shall amount to an assent to a legacy, an assent being but a rightful act."(5) This assent, when once given, whether before probate or after, is evidence of assets, and an admission by the executor, that the fund is adequate to the discharge of debts; it vests the interest at law absolutely and irrevocably in the legatee, from the death of the testator;(6) though he may still be liable to refund in a court of equity on the deficiency of other assets.

(1) On the construction of wills, and the doctrine of latent and patent *ambiguities*, see Vol. II. An *inaccuracy*, whether latent, or patent, may be explained by parol, subject to several restrictive rules.

(2) 3 Camp. C. 115.

(3) *Stone v. Forsyth*, 2 Doug. 707.

(4) 3 Bac. Abr. 84; 4 Bac. Abr. 444; *Toller's Law of Executor*, 308; by *Lawrence, J.*, 3 East, 124; *Duppa v. Mayo*, 1 Saund. 278 f.

(5) By the Lord Chancellor, in *Noel v. Robinson*, 1 Vern. 94.

(6) *Doe dem. Lord Say and Sele v. Guy*, 3 East, 120, 123; *Saunders's Case*, 5 Rep. 12 b.

Devisee of copyhold.

Thirdly, of an action of ejectment by a devisee of copyhold property.

The claimant, in the first place, has to prove the will. And it is now a clear proposition of law, whatever may be thought of the earliest decisions on the subject, that a devisee of copyhold land, or of a customary estate, passing by surrender, need not be signed by the testator as a devisee of lands in fee simple, unless such signature be required by the terms of the surrender to the use of the will; nor is the same form of revocation necessary.(1) The draft of a will, which the testator was prevented by sudden death from signing and publishing, has been held sufficient to direct the uses of a surrender;(2) so also have instructions for a will, taken down in writing, from words dictated by the testator.(3) The recital of a devise in the admittance to a copyhold, is good evidence, as between the lord and the devisee; but not as between the heir and the devisee.(4)

The claimant has also to prove the admittance of the testator to the copyhold tenement in question, and his own admittance;(5) and before the late statute, 55 G. III. c. 192, which makes every disposition of a copyhold by will as effectual without a surrender as with one, he must also have shown a surrender to the use of the will. A will and a surrender to the use of the will, without an admittance, are not sufficient; until the admittance is made, the legal estate continues in the surrenderor, and descends to his heir.(5) And though a party, who claims a copyhold as heir at law, may maintain an ejectment before admittance, against all persons except the lord (for then he claims by the course and operation of law), yet the rule is different in the case of one claiming under a surrender and a devise, who is a purchaser, and has nothing before admittance. The proof of an admittance, therefore, is indispensably necessary, in this case, to establish the testator's title, as well as that of the devisee; the nature of this proof has been before considered.(6) The effect of an admittance is to clothe the lessor of the plaintiff with the legal possession, if he had before a title to the estate; it enables him to bring an action, but does not in any case confer a title.(7)

(1) Doe dem. Cook v. Danvers, 7 East, 322; Wagstaffe v. Wagstaffe, 2 P. Wms. 258.

NOTE 1114.—* * The section relating to the proof of wills, contained in Vol. II of the 7th edition of Phillpotts on Evidence, is omitted from the present edition. It is inserted entire in an appendix to these notes, with the original notes of Cowen & Hill. And on the general subject, see also title *Wills*, in 2 Gr. Ev. §§ 666–694; the same title in Taylor on Ev., and Till. Adams on Eject., p. 288, *et seq.* And see Doe v. Roe, 2 Barb. S. C. R. 205; Ramsen v. Brinkerhoof, 26 Wend. 332; Hoyer v. Burger, 1 Hoff. Ch. R. 20; Rutherford v. Rutherford, 1 Denio, 33, * *

(2) Cary v. Askew, 2 Brown Ch. C. 319, and other cases cited in 7 East, 315.

(3) Doe dem. Cook v. Danvers, 7 East, 299, 324.

(4) Anon., Ld. Raym. 735. And see Jenkins v. Barker, Bac. Ab. Ev. 632.

(5) Roe dem. Jefferys v. Hicks, 2 Wils. 15; Roe dem. Shawen v. Wroot, 5 East, 137; Wilson v. Weddell, Yelv. 144.

(6) *Vide supra*, p. 602.

(7) Doe dem. Vernon v. Vernon, 7 East, 22.

IV. Ejectment by guardian.

Fourthly, the next case to be considered is, the case of an action of ejectment by a guardian.

Guardians in common soccage, and guardians appointed by deed or will, may maintain an action of ejectment to recover the property of their wards. A guardian in soccage (that is the next friend of the heir at law of one who had died seized of lands in common soccage, to which next friend the inheritance cannot descend), has the wardship of the land and of the heir, until his age of fourteen years.(1) A party, therefore, who claims as guardian in soccage, will have to prove the seizin of the deceased, the fact of his leaving issue, his heir at law, under the age of fourteen years, and that among those relations to whom the inheritance cannot descend, he himself is the next of blood to such issue. It seems necessary also to prove, that the ward was under the age of fourteen at the time of the demise stated in the declaration ;(2) for Littleton expressly says, that the guardian shall have wardship of the land until the age of fourteen years, and when the heir comes to the age of fourteen years complete, he may enter and oust the guardian, and occupy the land himself; however, in the opinion of others, this guardianship ends on the completion of the age of fourteen years, only where another guardian, either by the election of the infant or otherwise, is ready to succeed, and, in the meantime, the guardianship in soccage will continue.(3)

With respect to another description of guardian, a statute in the reign of Charles II,(4) gives a power to fathers to appoint guardians for their unmarried children under age, "either by deed executed in their lifetime, or by last will and testament in writing, in the presence of two or more credible witnesses;" and enacts, that such appointment shall be effectual against every claim of guardianship in soccage, and that the guardian so appointed may take into his custody the profits of all the lands and hereditaments of the children till their respective ages of one and twenty years. To support an ejectment, therefore, brought by such guardian, the title of the deceased father must be proved, the minority of the ward at the time of the demise in the declaration, and the due execution of the will or deed which appoints him guardian. The natural father of an illegitimate child cannot appoint a guardian ;(5) consequently, the title of the

(1) Lit. § 123.

(2) In the case of Doe dem. Rigge v. Bell (5 T. R. 471), where it was proved at the trial that two daughters, to whom the plaintiff claimed as guardian in soccage, were above fourteen, an objection was taken on this ground against the plaintiff's recovering. Another objection was also taken, on the ground of the insufficiency of a notice to quit. The plaintiff was nonsuited. On cause being shown against the nonsuit, the Court of King's Bench discharged the rule, on the ground that the notice was insufficient; and there was no argument on the other point.

(3) Andr. 313. See Hargr. Co. Litt. 88 b, an elaborate note on the subject of guardians.

(4) St. 12 C. II, ch. 24, §§ 8, 9.

(5) Horner v. Liddiard, by Sir W. Scott; Printed Report, p. 179.

lessor of the plaintiff would be disproved, by proof of the illegitimacy of the child.

V. Ejectment by execution creditor.

Fifthly, of the action of ejectment by a person claiming land under an execution. And, first, of an ejectment by the tenant under a writ of *elegit*.

The writ of *elegit*, as is well known, is founded on the statute of Westminster the second⁽¹⁾ (the first statute that subjected land to the execution of a judgment or recognizance), which gives to the creditor, who has sued for the debt or damages and recovered a judgment, his election, either to have a writ to the sheriff for levying the debt of the land and chattels, or that the sheriff deliver to him the chattels of the debtor and a moiety of his land. The sheriff, upon receiving this writ, is to impanel a jury, who are to inquire of the debtor's goods and chattels, and also of his lands and tenements. Formerly it was usual for the sheriff, after inquisition made by the jury, to deliver actual possession of a moiety of the lands; but, by the modern practice, he delivers only legal possession, and the creditor, as some have said, in order to obtain actual possession, must proceed by ejectment.⁽²⁾

In this action of ejectment, it will be necessary for the lessor of the plaintiff to prove the judgment recovered by him, the *elegit* taken out upon it, the inquisition, and the sheriff's return, by which the land in question is assigned to him.⁽³⁾ For this purpose, an examined copy of the judgment roll, containing the award of the *elegit*, and the return of

(1) St. 13 Ed. I, ch. 18.

(2) 2 Tidd Pr. 1075; 3 T. R. 295; 2 Eq. Ca. Ab. 381. (Where the plaintiff in ejectment claims under a purchaser on a foreclosure sale, he must show title at the commencement of the action. *Layman v. Whiting*, 20 Barb. 559. See also *Dean v. Pyncheon*, 3 Chand. 9; *Sheik v. McElroy*, 20 Penn. (8 Harris) 25.)

In the case of *Rogers v. Pitcher* (6 Taunt. 207), the Lord Chief Justice Gibbs, alluding to this opinion, expressed himself thus: "I am aware, it has in several places been said, that the tenant in *elegit* cannot obtain possession without an ejectment, but I have always been of a different opinion. There is no case, in which a party may maintain ejectment, in which he cannot enter. The ejectment supposes that he has entered; at least, that he has leased to another, and that the other entered and that the lessor may do it by another, and not enter himself, is not very intelligible. I would not, however, consider the present case as deciding these points, which I only throw out in answer to the argument that has been used." In another part of his judgment, the chief justice says: "I have no doubt that the sheriff may deliver the moiety, and enter upon it, except that where the land is under a previous demise, as in this case it is to the plaintiff, whatever term the sheriff finds, he cannot disturb the previous title of the tenant in possession; all he can do is to put the avowant into the state of landlord: if the land had been in the possession of the former owner, the sheriff might have delivered actual possession; where it is in the possession of a tenant, the sheriff sets it out by metes and bounds, and the tenant is bound thenceforward to pay rent for his moiety to the tenant by *elegit*."

(3) Bull. N. P. 104. The plaintiff must prove all the facts necessary to work a transfer of the title (*Jackson v. Davis*, 18 John. R. 7; *Kellogg v. Kellogg*, 6 Barb. 116); so as to tax sales. See *Tallman v. White*, 2 Comst. 66; *Beekman v. Bigham*, 1 Seld. 366.

the inquisition, is sufficient proof, and a copy of the elegit itself, or of the inquisition, will not be wanted;(1) for, as Lord Ellenborough said in the case referred to, the judgment roll imports incontrovertible verity as to all the proceedings which it sets forth. This evidence is sufficient in an action against the debtor, who is in possession of the lands. If a third person, and not the debtor, is in possession, it will be incumbent on the lessor of the plaintiff not only to prove his own title under the judgment, but also the title of the debtor, under whom he claims. The sheriff must state in his return that he has set out a moiety by metes and bounds, otherwise the return will be void;(2) and the objection may be taken on the trial of the ejectment.(3) The inquisition ought also to set forth the lands with convenient certainty.(4)

The lessor of the plaintiff may claim title, under an elegit, to lands held in fee simple, in trust for the person against whom the elegit issued.(5) But his title under the elegit only attaches upon lands held in trust at the time of the execution sued; and, therefore, if the trustee has conveyed the lands by the direction of the *cestui que trust* before execution, though he was seized in trust at the time of the judgment, the lands cannot be taken in execution.(6) An equity of redemption cannot be taken under an elegit.(7) And lands held in trust cannot be seized, unless the trust is simply and solely for the defendant.(8) It seems that a term for years, held in trust, cannot be taken in execution under an elegit.(9)

Where a tenant comes into possession by lease, after the judgment, though before the issuing of the writ of elegit, notice to quit is unnecessary, as the land is bound, from the time of the judgment, against every person acquiring a subsequent interest.(10)

In action of ejectment to recover lands taken in execution under a writ of *fiery facias*, on a judgment obtained against a termor, the judgment

(1) *Ramsbottom v. Buckhurst*, 2 Maule & Selw. 565.

(2) *Pullen v. Birkbeck*, 1 Ld. Raym. 718; Carth. 453; *Fenny dem. Masters v. Durrant*, 1 Barn. & Ald. 40. See *Taylor v. Lord Abingdon*, 2 Doug. 473. If the parcels amount to more than a moiety, the inquisition is bad for the whole. 1 Sid. 91; 2 Salk. 563. See 1 Wms. Saund. 69 b.

(3) 2 Dough. 475; 1 Lord Raym. 718; 1 Sid. p. 91; 1 Barn. & Ald. 40.

(4) *Moor*, 8 pl. 28. If a *tenement* generally is found without showing house or pasture, it will be bad. Id. An inquisition should find the certainty of estate. *Dyer*, 299 a.

(5) 2 Wms. Saund. 11; 29 Car. II, c. 3.

(6) *Hunt v. Coles*, Com. R. 226; Com. Dig. Execution, ch. 14.

(7) *Scott v. Scholey*, 8 East, 467; *Plunket v. Penson*, 2 Atk. 290; *Lyster v. Dolland*, 1 Ves. jun. 431.

(8) *Doe v. Greenhill*, 4 Barn. & Ald. 684; *Harris v. Booker*, 4 Bing. 96; *Harris v. Pugh*, 4 Bing. 345.

(9) 1 Wms. Saund. 11 a; *King v. Ballet*, 2 Vern. 248; by Lord Ellenborough, *Scott v. Scholey*, 8 East, 467, and see *Doe v. Greenhill*, 4 Barn. & Ald. 684. This point, which does not appear to be perfectly settled, is of great importance with reference to terms attendant on the inheritance. See *Doe v. Hilder*, 2 Barn. & Ald. 782; *Sugden's V. & P.* 426 (7th ed.)

(10) *Doe v. Hilder*, 2 Barn. & Ald. 785.

must be proved, where the lessor of the plaintiff is the party in the original action in which the execution issues.(1) But the writ alone is a sufficient title to the vendee of the sheriff.(2) Where an assignment of a lease by deed, taken in execution, was made by the under sheriff in the name, and under the seal of office of the sheriff, it was held unnecessary to prove his authority.(3)

Of a nature similar to the case last mentioned, is an ejectment by the conusee of a statute merchant,(4) statute staple,(5) or recognizance in the nature of a statute article;(6) all of which are obligations acknowledged before certain persons appointed for the purpose, and enrolled in courts of record.(7) The process on a statute merchant, after it has been forfeited and certified into chancery, is a writ of *capias si laicus*; and if the sheriff return upon the writ, that the party is dead, or not found in his bailiwick, a writ of extent issues to extend the lands to the conusee on a reasonable extent, without the delay or charge of a writ of *liberate*.(8) The writ of extent recites the writ of *capias si laicus*, and the sheriff's return, and then proceeds to command the sheriff to cause to be delivered to the conusee the goods and chattels of the debtor, and all his lands and tenements, "of which he was seized on the day of acknowledging the debt or ever afterwards, unless they have descended to any one within age by hereditary descent."(9) In an action of ejectment, therefore, by the conusee of a statute merchant against the conusor, the proper evidence will be, first, the obligation of the conusor, or, in case the obligation has been lost or dam-

(1) Doe dem. Bland v. Smith, Holt's N. P. C. 589; S. C., 2 Stark. N. P. C. 199; Burton v. Cole, Carth. 443.

(2) Doe dem. Batten v. Murless, 6 Maule & Selw. 113. See Glazier v. Eve, 1 Bing. 209. That the sale of the term is valid, notwithstanding the execution is set aside for irregularity. Doe v. Thorn, 1 Maule & Selw. 425; Dyer, 263; 5 Co. 90; 8 Co. 96. See Ray. 73; Cro. Eliz. 278.

NOTE 1115.—* As to title by execution, see 4 Kent. C. (6th ed.) pp. 428–437, and notes. The purchaser on a sheriff's sale must show a judgment and execution. Id. 434. Mere irregularities do not vitiate the sale. Id. 431. And the sale is valid and effectual, though the judgment be reversed, unless the judgment was void for want of jurisdiction. And see Wood v. Colvin, 2 Hill, 566. But see Dater v. Troy Turnp. Co., 2 Hill, 62, which seems *contra*, except where the purchaser is a stranger, acquiring the title *bona fide*. See Delaplaine v. Hitchcock, 6 Hill, 14. In McDonald v. Burns (3 Denio, 45) a judgment entered in vacation was held to be absolutely void. Id. 436, note. A formal levy on real estate is not required, to enable the sheriff to sell. Per Bronson, J., in Wood v. Colvin, 5 Hill, 230. And see the cases collected in Green v. Burke, 23 Wend. 498, S. P. But, such levy seems to be necessary where the judgment is not docketed; and *quere* as to the validity of a sale, where there is no docket. Ex parte Becker, 4 Hill, 614. See 2 Gr. Ev. § 316 and notes. * *

(3) Doe dem. James v. Brown, 5 Barn. & Ald. 243.

(4) By st. 11 Ed. I, enforced and amended by st. 13 Ed. I, c. 3.

(5) By st. 27 Ed. III, c. 9.

(6) By st. 23 H. VIII, c. 6.

(7) On the subject of these securities, see Bac. Ab. tit. Execution; and 2 Saunders, 69 c, in note, and Tidd Pr. 1101.

(8) 2 Tidd Pr. 1083.

(9) Tidd Appendix, ch. 39, § 105.

aged, a true copy from the roll in the custody of the clerk of recognizances or of his deputy, made and signed by the clerk or his deputy, and duly proved;(1) and, in the next place, the writ of extent must be proved. An examined copy of the writ of *capias si laicus* appears not to be necessary, since it is recited in the writ of extent. If the ejectment is not against the debtor, but against a third person, who is in possession of the lands, and who was in possession before the conusor's acknowledgment of the debt, the lessor of the plaintiff, in addition to the proofs before mentioned, must be prepared with proof of the conusor's title; or, if the defendant claim under the conusor, as lessee or otherwise, that his interest and right of possession have been regularly determined.

The process on a statute staple, or on a recognizance in the nature of a statute staple, is a writ in the nature of an extent,(2) commanding the sheriff to take the body, lands and goods of the debtor, and, after causing the lands and goods to be extended and appraised, to take them into the king's hands. The conusee, then, in order to get possession of the lands, must sue out a *liberate*,(3) which recites the last writ, and the sheriff's return, and commands the sheriff to deliver to the conusee the lands, tenements and chattels, so taken into the king's hands by the extent and appraisal, to hold them till he is satisfied of his debt. Upon this writ, the sheriff cannot turn the tenant out of possession, as upon an *habere facias possessionem*, but is only to deliver the legal possession, as upon an *elegit*, and, in order to obtain the actual possession, the conusee must proceed by ejectment.(4) In such an action against the debtor, the plaintiff's evidence will consist, in the first place, of the bond of the conusor, to be

(1) St. 8 G. I. c. 25, § 2.

By st. 27 Eliz. ch. 4, § 7, the whole tenor and contents of all statute merchants and of statutes of the staple are to be entered, within six months after the acknowledgment, in the office of the clerk of recognizances taken according to the st. 23 H. VIII, c. 6, and shown to the clerk, who is to enter the statutes in a book provided for the purpose. And by the 8th section of the same act, if the statute merchant or statute staple is not delivered to the clerk or his deputy, within four months after the acknowledgment, that a true copy may be taken by the clerk, in such case every statute, not so entered, will be void against any person who purchases the lands and tenements, or any profit out of them, after the time of the acknowledgment. The 9th section requires the clerk, under a penalty for disobedience, to enter the recognizance within six months after the acknowledgment, and to indorse the day and year as the entry upon the statute, with his name.

By the Statute of Frauds (st. 29 C. II, c. 3, § 18), the day and year of the enrollment of recognizances are required to be set down on the margin of the roll, and no recognizance will bind lands, &c., in the hands of a purchaser *bona fide* and for valuable consideration, but from the time of such enrollment.

The statute of 27 Eliz. c. 4, §§ 7, 8, does not extend to recognizances under st. 23 H. VIII, c. 6 (called recognizances in the nature of the statute staple), and the st. 8 G. I. ch. 15, § 1, was passed to regulate the mode of enrolling and preserving them.

(2) See Tidd App. ch. 39, § 107; Tidd Pr. 1084.

(3) Tidd App. ch. 39, § 108.

(4) 1 Vent. 41; Tidd Pr. 1084.

proved in the regular manner; or, in case of its loss or damage, a true copy from the roll in the custody of the clerk of recognizances or his deputy, made and signed by the clerk or his deputy, and duly proved, will have precisely the same effect, as if the original recognizance were produced.(1) After proof of the recognizance, the writ of *liberate* is to be proved; but the proof of the writ of *extent* seems not to be necessary, as this writ is recited in the *liberate*. If the action is against a third person in possession of the lands, not against the debtor himself, other evidence will also be required, as in the case of an ejectment against a third person by the conusee of a statute merchant.(2)

VI. Ejectment by mortgagee.

Sixthly, of an ejectment by a mortgagee.(3)

Where lands are granted by way of mortgage, with condition to be void on repayment of the mortgage money at a time appointed, the mortgagee has an immediate vested interest, and may immediately enter on the lands, liable only to be dispossessed on the performance of the condition of repayment. In such a case, the demise in the declaration will be properly laid at any time subsequent to the commencement of the term. But if a clause is inserted in the mortgage deed, as is now most usual, that the mortgagor shall continue in possession, until default is made in payment of the mortgage money,(4) then the demise ought to be laid subsequent to the time appointed for the payment. In either case, it will not be incumbent on the plaintiff to prove the defendant's default by non-performance of the condition; but the defendant, if he can, is to prove performance.

If the lessor of the plaintiff claim the premises as mortgagee, against the mortgagor, the plaintiff will have to prove the execution of the mortgage deed,(5) and the defendant's possession of the mortgaged premises.

(1) St. 8 G. I, c. 25, § 2.

(2) *Vide supra*, p. 617.

(3) NOTE 1116.— * * For the prevailing doctrines in the United States in respect of the mutual rights of mortgagors and mortgagees, at law and in equity, see tit. *Mortgage*, 4 Kent C. (6th ed.) and notes; 1 Hilliard's Abr. 457. As to the action of ejectment by mortgage, see Steph. N. P. 1338, 1339; Id. 1400-1402; 1 Hilliard's Ab. 457; Till. Adams on Eject. pp. 60, 108, 306, *et seq.* In New York, the action of ejectment by the mortgagee, or his assigns, or representatives, is abolished. 2 Rev. Stat. § 312, p. 57. One who is in possession by virtue of a mortgage foreclosure against the defendant cannot be ousted by a writ issued in his favor, under the N. Y. R. S. 310, § 41. A tender, whether before or after the day of payment, if before foreclosure, discharges the lien of the mortgage; and if the mortgagee be in possession, he may be ousted after such tender. Edwards v. The Farmers' F. Ins. & Loan Co., 21 Wend. 467; S. C., 26 Wend. 541, in error. This case was very ably argued at the bar, in the Supreme Court and the Court of Errors; and the opinions of the learned members of the two courts deserve to be carefully studied. * *

(4) See Hall v. Doe, 5 Barn. & Ald. 687.

(5) See *ante*, as to the execution of deeds. It is not incumbent on the plaintiff to prove the

It seems that it is not necessary to demand possession of the mortgagor before bringing the ejectment.(1) When the ejectment is brought against a third person, who is in possession, the plaintiff must prove a legal title, to divest the defendant of his possession; as, in case the defendant claims under the mortgagor by a lease or other title *prior* to the mortgage, by showing the expiration or legal determination of the defendant's estate, which is prior to his own; or, if the defendant was let into possession under a lease granted by the mortgagor *after* the mortgage, by showing that the defendant's interest was created subsequent to his own under the mortgage deed, in which case the defendant will not be entitled to a notice to quit, unless the mortgagee has done some act to recognize the defendant as his tenant.(2)

VII. Ejectment by parson.

Seventhly, of the action of ejectment by a parson, for recovering possession of the parsonage-house or glebe.

When the lessor of the plaintiff grounds his right to recover on being parson, he ought to prove himself in full and complete possession of the rights of the church; and this is done, in ordinary cases, by proof of presentation, institution and induction; or, when the ordinary is also the patron (in which case the presentation and institution are one and the same act), by proof of collation and induction; and it is not necessary to prove the title of the patron.(3)

Presentation, which is the act of the patron offering his clerk to the bishop of the diocese for institution, may be by parol, or by writing in the nature of a letter to the bishop.(4) And, as a presentation may be by parol, it may be proved by parol by a witness who was present and heard

memorial of an annuity deed. *Doe v. Bingham*, 4 Barn. & Ald. 677; *Doe v. Mason*, 3 Campb. N. P. C. 7. The mortgagor will not be permitted to set up a prior mortgage. *Bull. N. P.* 110 a.

(1) *Birch v. Wright*, 1 T. R. 383; *Keech v. Hall*, Doug. 21; *Thunder v. Belcher*, 3 East, 449. *Vide supra*, p. 586. In a late case, the mortgagor was considered as strictly a tenant to the mortgagee. *Partridge v. Beer*, 5 Barn. & Ald. 604. And see *Hall v. Doe*, 5 Barn. & Ald., 687.

(2) *Thunder dem. Weaver v. Belcher*, 3 East, 449; *Birch v. Wright*, 1 T. R. 383; *Keech v. Hall*, Doug. 21. See *Clayton v. Blakey*, 8 T. R. 3. *Vide supra*, p. 618. A counterpart of a lease by a mortgagee is not sufficient, some proof of the original having been executed should be given. *Doe v. Trapond*, 1 Stark. N. P. C. 282.

(3) *Bull. N. P.* 105.

(4) *Co. Litt.* 120 a. That it may be by parol, see also *Bull. N. P.* 105, 295, and 3 T. R. 723.

Dr. Burn has laid down, in his work on Ecclesiastical Law (title *Benefice*, under the head of *Presentation*, art. 19, p. 149), that by the Statute of Frauds, all presentations must be in writing; and that the necessity of a written presentation is implied by the stamp acts. But what clause there is in the Statute of Frauds, on the subject of presentations, Dr. Burn has not pointed out, and the utmost that can be inferred from the stamp acts is, that, if the presentation is in writing, it requires a stamp, and a written presentation unstamped, is inadmissible. Lord Kenyon and Mr. Justice Buller have expressly held, in the passage above cited, that a presentation may be by parol.

it.(1) If the presentation is by a corporation aggregate, it must be in writing under their common seal.(2) A recital of the presentation in the letters of institution, does not seem to be sufficient evidence of it, especially if induction or possession have not followed.(3) But a recital in the letters of institution, followed by induction, has been held good evidence of the cession of the predecessor.(4) The presentation cannot be proved by the person making it, though he were only a grantee of the avoidance.(5)

Institution is described by Sir William Blackstone(6) to be the investiture of the spiritual part of the diocese. It is the act of the bishop, appointing the presentee to be the rector of the church, *cum cura animarum*. By institution, therefore, the church is full against a common person. This ceremony of institution may be proved by the letters testimonial of institution; or by the official entry in the public register of the diocese, which ought regularly to record the time of the institution, and on whose presentation it was given.(7) This entry, therefore, if regularly made, is proof of the presentation, as well as of the institution.

Although the clerk may, upon institution, enter on the parsonage-house and glebe, yet he cannot maintain an action for them until he is inducted. By induction, the clerk becomes seized of the temporalities of the church, and is in complete possession.(8) It is an act purely of a temporal nature; performed under a mandate, directed by the ordinary to the archdeacon; or, if the church is exempt from the archdeacon's jurisdiction, directed to the chancellor or commissary; or, if the church is a peculiar, exempt from episcopal jurisdiction, then to the dean or judge within the peculiar.(9) After induction, according to the tenor of the language of the mandate, the inductor ought to certify the giving of the induction, either by a distinct instrument, in the form of a return made to the mandate, or by indorsement on the mandate. The fact of induction may, therefore, be proved, either by some person present at the ceremony, or by the indorsement on the mandate, or by the return to the mandate, if any return has been made.(10)

Before institution, certain oaths are required to be taken by the person presented, such as the oath of supremacy and allegiance; and, within a certain time after institution or collation, he is required to declare his

(1) See the case of *The King v. Eriswell*, 3 T. R. 723, and Vol. I. Hearsay evidence of a presentation seems not admissible. Vol. I.

(2) *Gibs. Cod. tit. 34, ch. 8, p. 794.*

(3) *Bull. N. P. 105.*

(4) *Doe v. Carter*, 1 Ry. & Mo. 237.

(5) *Bull. N. P. 105.*

(6) 1 Com. 391.

(7) *Gibs. Cod. tit. 34, ch. 8, p. 813.*

(8) *Id. p. 814.*

(9) *Id. p. 815.*

(10) *Chapman v. Beard*, 3 Anst. 942.

assent to the use of all things contained in the Book of Common Prayer, in the manner prescribed by the Act of Uniformity (st. 13, 14 C. II, § 6); and this he is required to do, under the penalty of being *ipso facto* deprived of his benefice in case of neglect or refusal. But it has been determined, upon the soundest principles of law, that he is not obliged to prove, in support of his title, on the trial of the cause, his conformity with these requisites; his conformity will be presumed.(1) And though the statute of Charles enacts that the minister who so refuses or neglects shall be *ipso facto* deprived, and that the patron may present to the benefice, as if such minister were dead; yet no case appears to have determined this point, that the proof of the negative on the opposite side will be a good defence to the action; in other words, that the mere proof of the defendant's neglect to declare his assent shall be of itself a bar, in the action of ejectment, to one who, by institution, was invested with the *spiritual* rights, and by induction was actually seized of all the *temporal* rights of the church.(2)

In addition to the proof of title, grounded on presentation, institution and induction, some evidence will be requisite to show that the house or land, for the recovery of which the action is brought, is the property of the church. This may be shown, by proof of the receipt of rent from some former occupier, or by proof of the occupation of the premises by some former incumbent, or by the production of ancient leases, and in various other modes.

The incumbent of a living may sustain ejectment against parties in possession of glebe lands, though the current year of a tenancy from year to year, created by his predecessor, is unexpired.(3) Where persons have occupied the glebe lands as tenants under a preceding rector, it will be presumed, after a lapse of time, that the successor has assented to the continuance of their tenancies, upon the same terms as before, and consequently, they cannot be dispossessed without a notice to quit.(4)

Before closing the subject of ejectment, it may be convenient to men-

(1) Case of Dr. Sherard, afterward Lord Harborough, before Wilmot, C. J., cited by De Grey, C. J., 3 Wilson, 366; 2 Black. R. 853; Powell v. Millbank, 3 Wilson, 355, S. P.; S. C., 2 Black. R. 851, and other cases cited in Vol. I.

(2) In Mr. Justice Blackstone's report of the case of Powell v. Millbank, Lord Chief Justice De Grey is reported to have said, "If evidence had been given, that a person had regularly attended the church, and heard nothing of this matter (that is, the declaration of assent); or, if a search had been made in the bishop's register, and nothing had been found therein, this would have destroyed the presumption, and put the plaintiff on proof of his having performed those requisites." But this opinion is not so strongly expressed in Wilson's Report, which is fuller and better than the other report.

(3) Doe v. Carter, 1 Ry. & Mo. 237.

(4) Doe v. Sommerville, 6 Barn. & Cress. 132. And see *Ibid.* respecting ejectment by the mortgagees of glebe lands. Adverse possession of glebe lands for twenty years, is not evidence, except against the rector permitting the possession. Runcorn v. Doe, 5 Barn. & Cress. 701; Flowl. 538.

tion, in this place, a few cases respecting the competency of witnesses, which do not belong in particular, to any of the actions above considered. And first, a witness, to whom the lessor of the plaintiff has agreed to grant a lease of the lands in question, in case he recover them in an action of ejectment, is incompetent to give evidence against the defendant.(1) And where a witness stated, that the lessor of the plaintiff had formerly assigned to him the premises in question for a particular purpose, but that he had given up the deed, and did not believe that he had any beneficial interest in the premises, he was considered incompetent.(2) The tenant in possession is an incompetent witness in support of the title of the defendant under whom he holds.(3) Where a *prima facie* case has been made out against the defendant, as tenant in possession, a witness is incompetent to prove himself the real tenant, and that the defendant was only his bailiff.(4) Where two persons are contending for the possession, who are to pay rent in different rights, the landlord cannot be admitted a witness in the ejectment; but if the terms had been granted without receiving rent, the landlord would then have had no interest in preferring one tenant to the other.(5) Where both of the contending parties claim under the same person, the landlord who has become bankrupt, may, after releasing his allowance and surplus, prove that the premises in dispute were not included in the first lease.(6) An heir apparent is a competent witness in ejectment for the land; but a remainderman, who has a present interest, and not a mere expectancy, is incompetent.(7) It has been held, that a joint defendant, who suffered judgment by default, was a good witness to prove the other defendant in possession.(8) Where the ejectment is brought on several demises, and the evidence shows that the title is exclusively in one of the plaintiffs, the other cannot be compelled to be examined as a witness for the defendant, as all the plaintiffs are jointly liable for costs.(9)

VIII. Trespass for mesne profits.

Eightly, and lastly, of the action of trespass for mesne profits.(10)

(1) Vol. I.

(2) Doe v. Bragg, 1 Ry. & Mo. 87.

(3) Vol. I; Doe v. Williams, Cowp. 621; Doe v. Pye, 1 Esp. N. P. C. 364.

(4) Doe v. Wilde, 5 Taunt. 183; Doe v. Bingham, 4 Barn. & Ald. 677; Vol. I.

(5) Buller, J., in Bell v. Harwood, 5 T. R. 310; Fox v. Swann, Styles, 482. It is said, that where a grantee is a mere trustee, he is competent to prove the execution of the deed to himself. Goss v. Tracey, 1 P. Wms. 287; Goodtitle v. Welford, Doug. 140.

(6) Longchamps v. Fawcett, Peake's N. P. C. 101.

(7) Smith v. Blackham, 1 Salk. 283.

(8) Doe v. Green, 4 Esp. N. P. C. 198.

(9) Fenn v. Granger, 3 Campb. N. P. C. 178.

(10) The stat. 1 Geo. IV, c. 87, § 2, enacts, that whenever it shall appear on the trial of an ejectment, at the suit of a landlord against a tenant, that the tenant or his attorney has been served with due notice of the trial, the plaintiff shall not be nonsuited for default of the defend-

As the principal question in the action of ejectment relates to the title, and the damages recovered are merely nominal, an action of trespass is often brought after a recovery in ejectment, in order to recover the mesne profits, which the tenant in possession has wrongfully received. And this action may be brought against the tenant in possession, either in the name of the nominal plaintiff in ejectment, or in the name of the lessor ; (1) in either case, it is in reality the action of the lessor of the plaintiff. The plaintiff, in this case, will have to prove his possession of the premises, the defendant's wrongful entry, the time of the defendant's occupation, and the value of the mesne profits, to be estimated by the amount of the crops taken, or by the fair annual value of the premises. He may recover also, in this action, the costs of executing the writ of possession, and the costs also of the ejectment, if not already recovered.

The proceedings in ejectment, when they are admissible in evidence, are of the greatest use, not only as proving the plaintiff's possession and the defendant's wrongful entry, but also because they estop the parties from controverting the plaintiff's title. It will be necessary, therefore, to consider shortly the effect of a judgment in ejectment. (2)

The judgment in an action of ejectment between the nominal plaintiff and the tenant in possession, or between the lessor of the nominal plaintiff and the tenant in possession, is conclusive, in the action of trespass between these parties, on the right of possession at the time of the demise laid in the declaration. (3) And a judgment by default against the casual ejector is as conclusive, in an action of trespass brought by the nominal

ant's appearance, or of confession of lease, entry, and ouster; but the production of the consent rule, and undertaking of the defendant, shall in all such cases, be sufficient evidence of lease, entry and ouster; and the judge, before whom the cause is tried, shall permit the plaintiff (whether the defendant shall appear upon such trial or not), after proof of his right to recover possession of the whole, or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits from the day of the expiration or determination of the tenant's interest, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein and the jury on the trial finding for the plaintiff, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be found for the mesne profits; provided, that this shall not be construed to bar any landlord from bringing an action of trespass for the mesne profits; which shall accrue from the verdict, or the day therein specified, down to the day of the delivery of possession of the premises recovered in the ejectment.

NOTE 1117.—* * See 2 Burrill's (N. Y.) Pr. 328; Till. Adams on Eject. 380, *et seq.*; Steph. N. P. 1490, 1491; 2 Gr. Ev. § 132. A plaintiff in ejectment is entitled to recover *mesne profits* only for the period of six years, even though the Statute of Limitations be not pleaded. Jackson d. Genet v. Wood, 24 Wend. 443. In ascertaining the *mesne profits*, or the rents of premises in the city of New York, interest may be computed upon rents from the expiration of the quarter days, instead of the expiration of the year. *Id.* * *

(1) If the action is brought in the name of the nominal plaintiff, damages are not to be recovered for any possession anterior to the day of demise in the ejectment; the nominal plaintiff not having a title before that time.

(2) * * See Till. Adams on Ejectment, 328, *et seq.*; 2 Gr. Ev. § 333. * *

(3) Aslin v. Parkin, 2 Burr. 668; Bull. N. P. 87.

plaintiff or his lessor, against the tenant in possession; for there is no solid distinction between a judgment in ejectment upon a verdict, and a judgment by default: in the first case, the right is tried and determined, in the latter, it is confessed; in both cases, the lessor of the plaintiff and the tenant in possession are judicially considered the only parties to the suit.(1) The judgment in ejectment is to be proved in the regular manner, by an examined copy.

The judgment in an action of ejectment on the several demises of two or more persons, is evidence for them in an action of trespass brought by them jointly;(2) for the judgment is consistent with their being tenants in common, and, in respect of such tenancy, they may jointly maintain trespass. A judgment in ejectment is not evidence against a precedent occupier;(3) nor is a judgment, in an action of ejectment against a woman, evidence in an action for mesne profits against her and her husband;(4) for the parties are not the same, and the recovery in ejectment operates as an estoppel only between the same parties. So, if the action for mesne profits is brought against the landlord of the premises, a judgment in ejectment against the casual ejector is not evidence of title, unless the landlord had notice of the ejectment. Thus, in the case of *Hunter v. Britts*,(5) where the defendant, who was the landlord of the premises, was proved to have been in the receipt of the rents and profits from the time of the demise till the execution of the writ of possession; but the ejectment had been served upon the tenant, and the defendant did not appear to have had notice of this until after the judgment. Lord Ellenborough held that the judgment was not evidence against the defendant, without notice of the ejectment; but the defendant in this case having promised, subsequently to the judgment, to pay the rent and costs to the plaintiff, Lord Ellenborough was of opinion, that this subsequent promise amounted to an admission, that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser.

This judgment, like all others, is conclusive only as to the subject matter. It is conclusive, on the question of title, only from the day of the demise laid in the declaration in ejectment. It is not evidence of title before that time; and if the plaintiff seeks to recover damages for a wrongful possession antecedent to the day of demise, he must prove his earlier title, which the defendant will be at liberty to controvert.(6)

Possession of plaintiff.

The action of trespass is a possessory action, founded on an injury to

(1) *Aslin v. Parkin*, 2 Burr. 668; Bull. N. P. 87.

(2) *Chamier & Plestow v. Clingo & Willet*, 5 Maule & Selw. 64.

(3) Bull. N. P. 87.

(4) *Denn v. White and Wife*, 7 T. R. 112.

(5) 3 Campb. 455.

(6) Bull. N. P. 87; 1 Sid. 239; 2 Rol. Ab. tit. *Trespass by Relation*.

the possession; and proof of an actual possession by the plaintiff will therefore be necessary, to support the action for mesne profits. To prove this, an examined copy of the writ of possession, and of the sheriff's return, are usually given in evidence; and an entry under the writ of possession will be referred to the time when the title accrues. This evidence is necessary where the judgment in ejectment has been by default against the casual ejector.

But where the judgment is after verdict, and the ejectment was against the tenant in possession, who appeared and confessed lease, entry, and ouster, the plaintiff's possession seems to be sufficiently shown by proof of the common consent rule, without proving the execution of the writ of possession; because, by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee; so that either may maintain trespass without proving an actual entry; but where the judgment was against the casual ejector, and no rule entered into, the lessor, says Mr. Justice Buller, shall not maintain trespass without an actual entry, and therefore, ought to prove the writ of possession executed.(1) If the plaintiff has been let into possession with the consent of the defendant, this is sufficient to entitle him to maintain the action for mesne profits, though no writ of possession has been executed.(2)

The costs of the ejectment, where the defendant suffers judgment by default, may be recovered in this action, under that part of the declaration, in which the plaintiff complains of having been obliged to expend money in recovering possession of the premises.(3) Where the ejectment is defended, and the plaintiff has recovered and taxed his costs, it has been held that he cannot recover, in this action, more than the taxed costs.(4) Yet the plaintiff has been allowed the expenses incurred in a court of error as between attorney and client.(5) The defendant, under the general issue, will not be allowed to prove an agreement on the part of the plaintiff to waive the costs, in consideration of the defendant paying the rent of the premises for the time in dispute.(6)

(1) Bull. N. P. 87, citing *Thorp v. Fry*. And see cases cited in 2 Solw. N. P. 693, S. P.

(2) *Calvert v. Horsfall*, 4 Esp. N. P. C. 167.

(3) Bull. N. P. 89; *Gulliver v. Drinkwater*, 2 T. R. 261; *Brooke v. Bridges*, 7 B. Moore, 471. And the plaintiff may recover for his trouble. *Goodtitle v. Tombs*, 3 Wils. 121.

(4) *Doe v. Davis*, 1 Esp. N. P. C. 357; *Brooke v. Bridges*, 7 B. Moore, 471. *Vide supra*, p. 573, n.

(5) *Nowel v. Roake*, 7 Barn. & Cress. 404.

(6) *Doe dem. Hill v. Lee*, 4 Taunt. 459. In New York, an action to recover real property may be united with a count for the rents and profits of the same (*Livingston v. Tanner*, 12 Barb. 481); though the plaintiff is not obliged to unite them, and may recover the mesne profits in a distinct action. *Holmes v. Davis*, 21 Id. 265. To authorize a recovery of the mesne profits, the plaintiff must establish his right to the premises and the possession thereof, and show that the defendant occupied for the time for which he claims. *Id.*; and *Hancock v. Aiken*, 4 Zabr. 544. Having recovered in an action of ejectment, the plaintiff must acquire the possession in order to

support trespass for the mesne profits. *Caldwell v. Walters*, 22 Penn. (10 Harris) 378; *Carson v. Smith*, 1 Jones Law N. C. 106. The damages in the action of ejectment at common law are only nominal (*Davis v. Delpit*, 25 Miss. 445); and the action of ejectment must precede the action for mesne profits. *Mitchell v. Mitchell*, 1 Md. 55; *Ainslee v. Mayor, &c.*, of N. Y., 1 Barb. 168. As to the defence to the latter action, see *Davis v. Doe*, 2 Carter, 599. If plaintiff acquires possession without suit, he may recover for mesne profits (*Leland v. Tousey*, 6 Hill R. 328); so he may though his term has expired. *Jackson v. Davenport*, 18 John. R. 295.

PART II.

OF EVIDENCE IN ACTIONS, CONSIDERED WITH REFERENCE TO THE OFFICE AND CHARACTER OF THE PARTIES.

IN the former part of this Volume, the several actions of which it was proposed to treat, have been considered with reference to the nature of the injury complained of; it now remains to inquire into the requisite evidence in certain actions, with reference to the particular relation or character of the parties to the suit.

CHAPTER I.

OF EVIDENCE IN ACTIONS BROUGHT BY OR AGAINST THE ASSIGNEES OF A BANKRUPT.

(THE contents of this chapter are not in themselves very important to the American lawyer; but as the principles of evidence here stated, apply equally to a large class of actions brought by receivers of corporations appointed under a proceeding authorized by law, and by assignees of insolvent debtors, the chapter is retained in the present edition. The statutes on the subject have been consolidated into one general act; and provision has been made for the proof of many important facts by the production of the fiat, petition, assignment, certificate, deposition, or other proceeding, *sealed with the seal of the court*, or by the production of a sealed copy.(1) But it is scarcely necessary to say that these modifications of the Bankrupt Law have not essentially modified the rules of evidence applicable to the action by an assignee.)(2)

(1) 12 & 13 Vict. c. 106, § 236 of the Bankrupt Law Consolidation Act. See also, 15 & 16 Vict. c. 77; and 17 & 18 Vict. c. 119, §§ 16, 17, 19.

(2) NOTE 1118.—* * 1. The English Bankrupt Law is well epitomised, and the decisions under it stated, in Smith's Merc. Law (English ed.) See also, 1 Stephens' N. P. pp. 522-708, where the subject is very fully and ably treated. To these sources, and to Chitty on Contr. and

Addison on Contr., tit. *Bankruptcy*, the learned reader is referred for information on all the subjects treated in the text.

2. The Bankrupt Act of the United States (passed April 4th, 1800, and repealed December 19th, 1803), consolidated the provisions of the prior English statutes of bankruptcy, and the English decisions were applicable to its construction. *Roosevelt v. Mark*, 6 Johns. Ch. R. 266; *Lummas v. Fairfield*, 5 Mass. 249; *Livermore v. Bayley*, 3 Id. 511. For decisions upon various provisions of that act, see 1 U. S. Dig. (by Metc. & Perkins), tit. *Bankrupt*.

3. In respect of the extra-territorial operation of foreign bankrupt laws, see Story on Conf. Laws (2d ed.), tit. *Foreign Bankrupt Laws*. See also, U. S. Dig. cited *supra*, and the *Supplement* thereto.

4. For a history of the passage, and of the repeal, of the U. S. Bankrupt Law, Aug. 19th, 1841, see 2 Kent C. (6th ed.) 391, *u. c.* The law was repealed March 3d, 1843. The constitutionality of the voluntary branch of that law was upheld in most of the state courts, and the District and Circuit Courts of the United States, where it was questioned. For a very elaborate discussion of the point, see *Kunzler v. Kohans*, and *Sackett v. Andross*, 5 Hill, 317-327. Mr. Justice Bronson delivered a very able dissenting opinion, *Id.*; and as to the voluntary branch of the law, was supported by Wells, Dist. Judge of Missouri, in the case of *Klein*, 2 N. Y. Leg. Obs. 184. For other cases upholding the constitutionality of the law, see U. S. Dig. cited *supra*. And see *Lalor v. Wattles*, 3 Gillman, 225; *Loud v. Pierce*, 12 Shep. (25 Maine), 233.

5. The question has arisen, in several cases, whether the Bankrupt Act of 1841 invalidated, by relation, certain acts done by the bankrupt intermediate the date of its passage (August 19th, 1841), and the time when, by its terms, it took effect (1st February, 1842). As this point is yet of great practical importance, especially with reference to the effect of such intermediate acts of the bankrupt, as giving preferences to creditors, &c., in avoiding his discharge, a reference to the decisions will be useful. In his treatise on Mercantile Law, Mr. Smith (p. 521, English ed.) with comprehensive brevity, states that "the policy of the Bankrupt Law comprehends two grand objects; first, the distribution of the debtor's effects in the most expeditious, equal, and economical mode: secondly, the liberation of his person (and his subsequent acquisitions might have been added), from the demands of his creditors, after he has made a full surrender of his property." The debates in Congress show, that a principal object in the passage of the law, was to prevent the gross injustice frequently done to creditors by the unequal distribution made of the property of their debtors, by means of assignments giving preferences. See 3 Webster's Speeches, pp. 444, 462, 467. The policy of the law was to prevent that injustice by securing an equal distribution of the debtor's property among his creditors; and the object of the law was to be obtained by declaring all such assignments to be void and a fraud upon the act. With this object in view, it would have been most extraordinary, if Congress had intended to leave debtors free, during the six months which intervened between the time when the act was passed and when it went into operation, to dispose of their property among favored creditors, and to defeat the just claims and expectations of others, and then to obtain a discharge from all their liabilities. That would have been, in the most absolute and effectual manner, to defeat the just policy of the law, and to give the debtor power to secure to himself future advantages with the favored creditors, at the expense of the disappointed creditors; whereas, the law designed to defeat all such arrangements, as being founded in injustice, and essentially injurious to trade and commerce. A construction which upholds such intermediate preferences is therefore deemed radically unsound, as tending to subvert one of the principal purposes for which the act was passed. The second section of the act declares, that all preferences given after the 1st of January, 1841, in contemplation of the passage of that act, should deprive the bankrupt of a discharge, unless a majority of the creditors not preferred should assent to his receiving it. It also declares, that all "future payments, securities, conveyances, or transfers of property," in contemplation of bankruptcy and giving preferences, should be void. Is the word "future" to be taken with reference to the date of the passage of the act, or the time when it took effect?

In the matter of *Chadwick v. Leavitt* (5 Law Rep.), Judge Irwin, of the United States District Court for the Western District of Pennsylvania, held, that the word future had reference to the date when the act took effect, and not to the date of its passage. In the Matter of *Ely Horton* (5 Law Rep. 462), in the United States District Court for Connecticut, Mr. Justice Judson adopted the same construction; and Mr. Justice Thompson is said to have concurred. The case is very

Title when to be proved.

Where assignees of a bankrupt are parties to a suit, it is in the first place necessary to ascertain in what cases their title to that character must be proved. If the plaintiffs have no ground for recovering, except as assignees, they must prove that they were duly appointed under a valid commission of bankruptcy, as well where the cause of action has arisen subsequent to the bankruptcy, as where it was prior; and this, although they do not state themselves to be assignees in the pleadings.(1) But where the defendant has himself contracted with the plaintiffs, their title is founded immediately upon the contract, and they may recover without proving themselves to be assignees;(2) even when they sue in that character, the proof appears to be superfluous and unnecessary, provided they establish a title to recover, independent of such averment. The same principle must equally apply to the case where the contract which is the cause of action, was originally made between the defendant and the bankrupt (who was not competent to make such contract, from not having obtained his certificate), and which has been since affirmed, and made the subject matter of another contract between the defendant and the plaintiff. Thus, in the case of *Eyans agt. Mann*, above cited,(3) an action for goods sold and delivered, where an uncertificated bankrupt sold goods to the defendant, who paid part of the price, and afterwards it was agreed between the defendant and the plaintiffs, that he should retain the goods, and pay what remained after the part payment; here there was an actual contract between the plaintiffs and the defendant, relative to the subject matter in dispute, and not merely a promise by implication of law; the

shortly reported, and no reasons are assigned in support of the decision. *Cornwell's Appeal* (7 Watts & Ser. 305) adopted the opposite construction, and supported it by a well reasoned opinion. Mr. Justice Baldwin, of the United States Circuit for Pennsylvania, in *Anon.* (1 Penn. L. Journal, 326-328); Mr. Justice Story, in *Hutchins v. Taylor* (5 Law Rep. 289); and Judge Betts, of the United States District Court for the Southern District of New York, in *Ex parte the creditors of Quackenboss* (1 Legal Observer 146); all held the word future to apply to the date of the passage of the act. And in *M'Lean, Assignee v. The Lafayette Bk.* (3 M'Lean R. 185), Mr. Justice M'Lean held, that a mortgage executed on the 7th December, 1841, in contemplation of a state of insolvency, was void under the Bankrupt Law. *Weiner v. Farnum* (2 Barr, 146) overrules *Cornwell's Appeal* (*supra*).

A majority of the decisions hold all assignments, &c., after the passage of the act, in contemplation of bankruptcy, and giving preferences, to be void. And it is conceived, that those decisions are better supported in principle, and much more ably reasoned, than those which adopt a contrary construction. The reasoning of Mr. Justice Story's opinion, especially, 5 Law R. 289, seems unanswerable, and, certainly, has not been satisfactorily answered in any reported case.

6. In *Reigart v. Small* (2 Barr, 487), a judgment confessed in contemplation of the passage of the Bankruptcy Act, was held to be valid as to creditors, though it would prevent the party from availing himself of the benefit of the act. The case of *Creditors of Quackenboss* (cited *supra*), holds that such a preference bars the right to a discharge. * *

(1) See *Evans v. Mann*, Cowp. 570; *Thomas v. Ridring*, Wightw. 65.

(2) Cowp. 569.

(3) Cowper, 569.

action, therefore, was founded on an actual contract between the parties to the suit, and the plaintiffs were entitled to recover *suo jure*.

Proof of title dispensed with.

Proof of the title of the assignees will be dispensed with, if the defendant has, by his admissions or by his conduct, precluded himself from disputing it. If the defendant is the petitioning creditor, who sued out the commission, under which the plaintiffs, as assignees, derive their title, he is estopped from setting up the defence, that the debt due to him as petitioning creditor was less than a hundred pounds; it is not competent to him to controvert the affidavit of debt made by himself under the requisites of the statute.(1) A plea of payment to an action of debt on a bond, brought by the assignees, dispenses with the proof of their title.(2) In the case of Maltby, assignee of Durouveyray agt. Christie,(3) (an action to recover the price of some goods, which the defendant had received from the trader, before his bankruptcy, to sell by auction, and which he had sold after the bankruptcy), Lord Kenyon ruled, that the defendant, having described the goods, in his catalogue of sale, as "the property of Durouveyray, a bankrupt," had precluded himself from disputing the bankruptcy, and that the admission dispensed with the necessity of going through the different steps, as in ordinary cases. This, as Lord Ellenborough has since observed, in commenting upon the case,(4) was an express declaration by the defendant, that Durouveyray was a bankrupt, and imported, that the defendant was acting under his assignees, inasmuch as the bankruptcy would have countermanded any authority, which the bankrupt himself might have given for the sale. So, in the case of Dickenson, assignee of Booth agt. Coward,(5) where it appeared, that the defendant, having purchased goods of the person who was afterwards a bankrupt, attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, claiming certain deductions, and that he afterwards made a part payment to the plaintiff; the Court of King's Bench were of opinion, that the defendant must be understood to have treated with the plaintiff as assignee, and that this was *prima facie* evidence of his being assignee, without the production of the proceedings. Such evidence is not conclusive; and the defendant in answer may show, that he bore some other character; but any recognition of a person standing in a given relation to others, is *prima facie* evidence against the person who makes such recognition, that the relation exists.(6) The mere

(1) Harmar v. Davis, 7 Taunton, 577. And see Watson v. Wace, 5 Barn. & Cress. 153.

(2) Corsbie v. Oliver, 1 Starkie N. P. C. 62.

(3) 1 Esp. N. P. C. 340, cited and commented on, 16 East, 193.

(4) 16 East, 193.

(5) 1 Barn. & Ald. 677. No notice to dispute the proceeding had been given.

(6) By Lord Ellenborough, C. J.

circumstance, however, of a creditor having proved a debt under the commission, is not sufficient to preclude him from disputing its validity.(1)

. What proof required.

In cases where the assignees have no ground of action or defence, except in their representative character, and their title is not admitted, they must prove the commission and the assignment; and (provided proof is required by notice) the trading also, the bankruptcy, and the petitioning creditor's debt.

Commission. Assignment of personalty.

The commission, and assignment of personal estate, when entered of record, pursuant to the ninety-sixth section of the new act, prove themselves.(2) That section provides, as to all commissions issuing after the first of September, 1826, that no commission of bankruptcy, or assignment of the personal estate of the bankrupt, shall be received as evidence in any court of law, unless the same shall have been first entered of record in the manner directed by the ninety-fifth section of the act: and that on the production of the instrument so required to be entered on record, having a certificate thereon, purporting to be signed by the person appointed in the act to enter the same, or by his deputy, the same shall be received as evidence of such instrument having been so entered of record. And it is further provided by the ninety-seventh section of the act, that "office copies of any original instrument or writing filed in the office, or officially in the possession of the Lord Chancellor's secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively."

Assignment of real estate.

The assignment of the bankrupt's real estate must be by deed indented and enrolled.(3) And the deed must be enrolled within six months after its date, according to the express provision of the act of Parliament, relating to the enrollment of deeds of bargain and sale.(4) The execution

(1) *Rankin v. Horner*, 16 East, 191. And see *Pope v. Monk*, 2 C. & P. 112; Vol. I, title *Bankrupt*.

NOTE 1119.—* * Under the last Bankrupt Act of the United States, debts owing in a fiduciary character could not be discharged. But it was held, that if the creditor waived his privilege by proving the debt in bankruptcy, it was embraced in the discharge. *Fisher v. Currier*, 7 Metcalf, 424; *Chapman v. Forsyth*, 2 Howard U. S. R. 202. And see S. P., *Morse v. City of Lowell*, 7 Metcalf, 152. * *

2) Stat. 6 George IV, c. 16, and see section 63, respecting the assignment of personalty. *Tucker v. Barrow*, 1 Mo. & M. 137; by Lord Tenterden, Ch. J., 1 Mo. & M. 26.

(3) Section 64; *Perry v. Bowers*, Sir T. Jones, 196; *Bennet v. Grandy*, Carth. 178; *Elliott v. Danby*, 12 Mod. 3. (See *Lyall v. Miller*, 6 McLean, 482; *Warren v. Miller* 38 Maine, 108, as to what passes by the assignment.)

(4) The statute 27 Henry VIII, ch. 16, "enacts, that no manure, lands, &c., shall pass, alter,

of the deed of bargain and sale is to be proved in the regular manner.(1) A bargain and sale of freehold lands may also be proved by an examined copy of the enrollment, signed by the proper officer.(2) A certificate on the bargain and sale, signed by the officer, whose duty it is to enroll such deeds, will be evidence of its enrollment, and of the time when it was enrolled.(3) The time of enrollment may be proved by an examined copy of the officer's indorsement on the enrolled deed; and since the enrolled deed is a record, and the indorsement of the time, as well as of the fact of the enrollment is part of the record, the indorsement will be conclusive as to the time.(4)

Assignment, relation of.

When an assignment is once made, it vests the personal property in the assignees from the time of the bankruptcy.(5) But this doctrine of relation has been considered as applicable only to the assignment of the per-

or change from one to another, whereby any estate of inheritance or freehold shall take effect, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and enrolled in one of the king's courts of record, or else within the county or counties where the said lands, &c., lie, before the *custos rotulorum* and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same enrollment to be had and made within six months next after the date of the same writings indented. The 6 George IV, chap. 16, section 64, does not specify any particular time for enrollment."

(1) See Vol. I, titles *Deed, Enrollment*; and Vol. II, title *Bankrupt*.

(2) See Vol. I, titles *Deed, Enrollment*; and Vol. II, title *Bankrupt*.

(3) *Kinnersley v. Orpe*, 1 Doug. 56, 58; *The King in aid of Reed v. Hopper*, 3 Price, 494; and see Vol. I, titles *Deed, Enrollment*; and Vol. II, title *Bankrupt*.

(4) *The King in aid of Reed v. Hopper*, 3 Price, 595.

(5) 2 Rep. 26 a. See *Drayton v. Dale*, 2 Barn. & Cress. 293, as to the distinction between the property vesting in the assignees, and their right to claim it.

NOTE 1120.— * * S. P., *Ex parte Newhall*, 2 Story R. 360; *Mitchell v. Winslow*, Id. 630; *Storm v. Waddell*, and *De Kay v. Waddell*, 2 Sandford Ch. R. 494. The assignee takes the bankrupt's property, acquired intermediate the filing of the petition and a decree of bankruptcy. Id. But he takes subject to attachments, liens, &c.; and, in the absence of fraud, only such property, interests, and rights, as the bankrupt himself had. *M'Lean v. Rockey*, 3 M'Lean, 235. The assignee in bankruptcy may take advantage, in behalf of creditors, of a preference or fraud, which the bankrupt himself could not do. And see *Winsor v. Kendall*, 3 Story R. 587, and *M'Lean v. Lafayette Bank*, 3 M'Lean, 587; *Ex parte Foster*, 2 Story R. 132; *Fiske v. Hunt*, Id. 582; *West v. His Creditors*, 4 Robinson's R. 88. And see the notes to *Cooper v. Chitty*, 1 Smith's Lead. Cases, 231-347. * *

(The assignment of a bankrupt carries a note given to his wife before marriage, though the husband has not previously reduced it into possession (*Smith v. Chandler*, 3 Gray (Mass.) 392); and the assignee entitled to the note may bring trover for its conversion. *Chickering v. Raymond*, 15 Ill. 362. In reference to the rights of the assignee in bankruptcy, as against fraudulent purchasers, see *The Chemung Bank v. Judson*, 4 Selden, 254, and *Clark v. Clark*, 17 Howard U. S. 315. It is to be borne in mind that the decree in bankruptcy relates back to the presentation of the petition (*Smith v. Brinkerhoff*, 2 Selden, 305); and consequently, the assignment takes effect from as early a day. *Camack v. Bisquay*, 18 Ala. 286. But see *Butterton v. Betts*, 4 Hill New York R. 577.)

sonal property, and not to extend to the conveyance of the freehold property of the bankrupt. In an action of ejectment, therefore, where the demise was laid after the date of the commission, but before the general assignment, and also before the bargain and sale of the lands in question to the assignees (the lessors of the plaintiff), the Court of King's Bench held, that the plaintiff was not entitled to recover.(1)

Where proof is required, by notice, of the other particulars which are necessary to complete the title of the assignees, the first point to be established, in proof of the plaintiff's claim, is the trading. The clause on the new act, upon this subject, is as follows:(2) "All bankers,(3) brokers,(4) and persons using the trade or profession of a scrivener,(5) receiving other men's moneys or estates into their trust or custody, and persons insuring ships or their freight, or other matters against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail; and all persons, who either or by themselves, or as agents or factors for others,(6) seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders, liable to become bankrupt; provided, that no farmer,(2) grazier,(7) common laborer, or workman for hire, receiver-general of taxes,(8) or member of, or subscriber to, any incorporated commercial or trading companies established by charter or act of Parliament, shall be deemed, as such, a trader, liable, by virtue of this act, to become bankrupt."

The most numerous class of persons liable to the Bankrupt Law, is composed of those who, by themselves, or as agents or factors for others, "*seek their living by buying and selling.*" If a man merely buy for his own use, or for the use of his family, and sell the surplus, that is not a buying

(1) Doe dem. Esdaile v. Mitchell, 2 Maule & Selwyn, 446; Perry v. Bowers, T. Jones, 196. Real property, acquired subsequently to the deed, passes under the provisions of the 64th section.

(2) 6 George IV, c. 16, § 2. This act was passed on the 2d May, 1825, but did not take effect till 1st September, 1825. The statute 5 George IV, ch. 98, was passed on 1st May, 1825, and by statute 6 George IV, repealed from 2d May.

(3) 5 George II, c. 30, § 39.

(4) Id.

(5) 21 James I, c. 19, § 2.

(6) 5 George II, c. 30.

(7) Id.

(8) 5 George II, c. 30, § 40.

and selling within the meaning of the statute.(1) But if he buy and sell with a view to profit, and as a means of living, he may be a bankrupt.(2)

It is the *intent*, therefore, with which he bought and sold, that is to be considered; and the question of trading will often depend more upon the *nature* and *kind*, than on the *quantity*, of buying and selling.(3) The proof of a very few instances may, in some cases, prove the intention conclusively; it is possible that even a single instance may be decisive. And though the acts of buying and selling may not be proved to have been recently before the act of bankruptcy, still, if there was an apparent intention of continuing the trade, the party will be as much liable, as if he had been in the constant habit of transacting business.(4) On the point of *intention*, a statement of the party, as to the mode in which the goods were to be disposed of, made at the time of the purchase, and forming a part of the transaction of buying, has been thought to be admissible in evidence.(5)

If the bankrupt is described in the commission, as a dealer in a particular species of articles, and also, in general terms, as a person seeking his living by buying and selling, evidence may be admitted to show that he was a general merchant, or carried on any other particular species of trade.(6)

Where a person belongs to a class which is excluded by the bankrupt laws, as, if he is a farmer (who yet may be a bankrupt, although not such in the capacity or character of a farmer), the question for the jury will be, whether the acts of buying and selling were done collaterally to the occupation of the farm, with a view to profit, or were incident to that occupation;(7) and, upon this subject, the important consideration will be, as to the nature of the acts themselves, and the use to which the bought articles were applied. The acts of buying and selling may be so frequent, so general, and so extensive, as evidently to have no reference to the business of farming; they may be transacted so publicly, so regularly, and with such a manner and semblance of trafficking, as to show a manifest intention in the party to hold himself forth as a general dealer in such articles.

(1) *Newland v. Bell*, Holt N. P. C. 222; *Summersett v. Jarvis*, 3 Brod. & Bing. 2.

(2) See *Gale v. Halfknight*, 3 Stark. N. P. C. 56.

(3) 1 Holt N. P. C. 222; 1 T. R. 575; 2 Taunt. 178; *Eden B. L.* 3; *Esp. B. L.* 9.

(4) *Wharam v. Routledge*, 5 Esp. N. P. C. 235; *Heanny v. Birch*, 3 Camp. N. P. C. 233; 1 Rose B. C. 356, 402.

(5) *Gale v. Halfknight*, 3 Stark. N. P. C. 56; *Milliken v. Brandon*, 1 Car. & P. 380. Evidence of an actual purchase, or sale, does not seem indispensable. *Id.*; and *Parker v. Barker*, 1 Bro. & Bing. 9.

(6) *Hale v. Small*, 2 Brod. & Bing. 25, 29. An illegal trading will support a commission. *Cobb v. Symonds*, 5 Barn. & Ald. 516. See *Millikin v. Brandon*, 1 Car. & P. 381. A person may be subject to the English bankrupt laws, though he does not sell goods in England, and does not reside there. *Allen v. Cannon*, 4 Barn. & Ald. 418.

(7) *Stewart v. Ball*, 2 New Rep. 79.

On the other hand, they may be only occasional acts, or incidental to the occupation of the farm and connected with the business; such, in short, as negative the supposition of his being a general dealer, or of seeking his livelihood by buying and selling. Buying for the purpose of selling again is not decisive of the question; even to buy solely and entirely for that purpose appears to be rather equivocal, although in one case great stress was laid upon such evidence;(1) for still it may be incidental to the occupation of the farm, and to the farming business. The true question is, whether the farmer bought with a view to the making of a profit as a trader, independently of the occupation of his farm?(2) And, in like manner, with respect to other classes of persons excluded by the bankrupt laws, the question to be determined will be, Whether the buying and selling has been carried on substantially and independently as a trade, or has been merely ancillary to a business which is not in itself a trading?(3)

It seems that the declarations of the bankrupt, made before the bankruptcy, are evidence of the trading. Such evidence was received in a case where the bankrupt had acknowledged that he was in partnership with a trader;(4) though, in a late case at Nisi Prius, the propriety of admitting the declarations of the bankrupt, as evidence of the trading, was questioned.(5) It has been before mentioned, that such declarations have been admitted in several cases, where they have been cotemporaneous with the acts of buying or selling, and constituted part of the *res gesta*.(6)

The next fact to be proved is, that the trader has committed an act of bankruptcy. The several acts of bankruptcy, some one of which it will be necessary to prove, are thus described in the new act: If any such trader shall depart this realm, or being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money or chattels to be attached, sequestered, or taken in execution, or make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any

(1) *Bartholomew v. Sherwood*, 1 T. R. 573, in note. But see *Stewart v. Ball*, 2 New Rep. 81, where *Chambre, J.*, said that the finding of the jury in the former case was a very strong one.

(2) *Patten v. Browne*, 7 Taunt. 409; *Wright v. Bird*, 1 Price, 20.

(3) See *Summersett v. Jarvis*, 3 Bro. & Bing. 2; *Martin v. Nightingale*, 3 Bing. 421; *Carter v. Dean*, 1 Swanst. 64; *Ex parte Gallimore*, 2 Rose, 424. A devisee for life, who converted his land into bricks, has been held under the new act, not to be a trader. *Ex parte Burgess*, 2 Gl. J. 183.

(4) The United States Bankrupt Law of 1841 was not confined to traders, in terms, nor in its operation. For an interesting discussion of its constitutionality, see *Kunzler v. Kohans*, 5 Hill, N. Y. Rep. 317, and *Sackett v. Andross*, Id. 327.)

(5) *Parker v. Barker*, 1 Bro. & Bing. 9. In this case no act of buying and selling, during the partnership, was proved.

(6) *Bromley v. King*, 1 Ry. & Mo. 228.

(6) *Vide supra*, p. 634.

of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."

The fourth section of the same act enacts, "that where any such trader shall, after this act shall have come into effect, execute any conveyance or assignment, by deed, to a trustee or trustees, of all his estate or effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader; provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader, and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor."(1)

The 5th section enacts, "that if any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy, from time of such arrest, commitment or detention: provided, that if any such trader shall be in prison at the time of the commencement of this act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months."

(1) * * As to what are acts of bankruptcy, see the authorities cited *ante*, note 1118; and see the American Index to the Eng. Com. Law Rep., Vol. 47, tit. *Bankruptcy*. See 1 Steph. N. P. 531-576. * * (See *Fisher v. Boncher*, 10 B. & C. 710; *Perkins v. Vaughan*, 4 M. & G. 988.)

. The 6th section enacts, "that if any such trader shall file in the office of the Lord Chancellor's secretary of bankrupts, a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent, or unable to meet his engagements, the said secretary of bankrupts, or his deputy, shall sign a memorandum that such declaration has been filed, which memorandum shall be authority for the printer of the London Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time when such declaration was filed; but no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed; and no docket shall be struck upon such act of bankruptcy before the expiration of four days next after insertion of such advertisement, in case such commission is to be executed in the country; and the Gazette, containing such advertisement, shall be evidence to be received of such declaration having been filed." And the 7th section enacts, "that no commission, under which the adjudication shall be grounded on the act of bankruptcy, being the filing of such declaration, shall be deemed invalid by reason of such declaration having been concerted or agreed upon between the bankrupt and any creditor or other person."

The 8th section enacts, "that if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debt than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt."(1)

(1) The ninth and two following sections relate to proceedings in bankruptcy against traders, who have privilege of Parliament.

The departing from the realm, or departing from the dwelling-house, or a person absenting *with intent* to delay creditors, is an act of bankruptcy although no creditor may have been, in fact, thereby delayed.(1) And where the delay of creditors has not been the immediate or principal object of the party, yet, where that has been the necessary consequence of such proceeding, it has been considered evidence of his intent to delay or defeat his creditors;(2) as he must be supposed to foresee and intend whatever is the necessary consequence of his own acts.(3)

The intention of the party will be more or less apparent, according to the varying circumstances of such particular case. In general, his conduct previous to his departure, and the state of his affairs, afford the strongest indications of his motives. The declarations of a trader, made at the time of departure from his dwelling-house or the realm, or of his absenting himself, are properly received in evidence, as showing his intention.(4) The time when the declarations were made is most material; and if the particular time is not clearly proved, or the declarations appear to have been made subsequent to the act of bankruptcy, they cannot, in general, be admitted.(5) It has, however, been considered, under the circumstances of particular cases, that declarations of the bankrupt may be received in evidence, which were not precisely cotemporaneous with the act of bankruptcy, if they were connected with the state of the party's mind at the time, and might be considered as the result and consequence of the co-existing motives.(6)

(1) *Robertson v. Liddell*, 9 East, 487; *Chenoweth v. Hay*, 1 Maule & Selw. 676; *Williams v. Nunn*, 1 Taunt. 270; *Wilson v. Norman*, 1 Esp. N. P. C. 334; *Hammond v. Hicks*, 5 Esp. N. P. C. 139; *Holroyd v. Whitehead*, 3 Campb. N. P. C. 530; *Ex parte Wydown*, 14 Ves. 84; *Ex parte Bainford*, 15 Ves. 449.

(2) *Lawrence, J.*, in *Fowler v. Padget*, 1 T. R. 516; and *Lord Ellenborough*, in *Ramsbottom v. Lewis*, 1 Campb. N. P. C. 279; and *Gibbs, Ch. J.*, in *Holroyd v. Whitehead*, 3 Campb. N. P. C. 530. And see *Bull. N. P. 39*; *Raikes v. Poreau*, Co. B. L. 111; *Verum v. Hankey*, Id.; *Warner v. Barber*, Holt's N. P. C. 175; *Windham v. Paterson*, 1 Stark. N. P. C. 145. Much difficulty upon this subject is now removed by the clause in the new act, which makes it an act of bankruptcy to remain abroad with intent to delay creditors.

(3) * * Where the acts of the bankrupt have not a specific legal character, irrespective of the actual intent with which they were done; that is, where they are not, *per se*, acts of bankruptcy, or fraudulent; the question of intention should be submitted to the jury. Numerous authorities to this point may be found stated in 1 Steph. N. P. title *Bankruptcy*. * *

(4) See *Deffle v. Desanges*, 8 Taunt. 673; *Rawson v. Haigh*, 2 Bing. 99; *Ambrose v. Clendon*, Cas. temp. Hard. 267. A letter written by the bankrupt, is not evidence to prove the fact of his absence. *Rawson v. Haigh*, 2 C. & P. 77.

(5) *Marsh & Meager*, 1 Stark. N. P. C. 353; *Schooling v. Lee*, 3 Stark. N. P. C. 151; *Robson v. Kemp*, 4 Esp. N. P. C. 233.

(6) *Bateman v. Bailey*, 5 T. R. 512; *Rawson v. Haigh*, 2 Bing. 104.

NOTE 1121.—* * As to admissions and declarations, see those titles in the indexes to Vols. I and II. They are always competent, when part of the *res gesta*. See *Res Gestæ* in indices to the text and notes. *Barley v. Wakeman*, 2 Denio's Reports, 220; S. C., 2 Hill's Reports, 279; 1 Greenleaf's Evidence, §§ 108, 109, 111, 114; *Taylor on Evidence*, pages 375-380. * *

It will be an *absenting* within the meaning of the statute, if the party quit any place with the intention of delaying his creditors, though it may not be his dwelling-house or ordinary place of business; or a place where he has made an appointment with a particular creditor.(1) A mere breach of appointment is not *prima facie* evidence of an act of bankruptcy.(2)

With respect to an act of bankruptcy by beginning to keep house, the length of time in keeping house is not material. In the very first moment that the act is done with such a specific intention, the trader has become a bankrupt.(3) The usual evidence of this act of bankruptcy is a denial of a trader to a creditor, who calls to see the trader, and demand payment of his debt, such denial being authorized by the trader, and the trader being then at home. The denial ought to appear to have been made to a creditor, or to some one calling on his behalf.(4) The act of bankruptcy does not depend upon the intention with which the creditor comes, but upon the intention of the debtor.(5)

But though an authorized denial to a creditor, on his requiring to see his debtor, is the most usual and familiar evidence of *beginning to keep house* within the meaning of the statute, it is not the only evidence by which this may be proved.(6) If a trader has no servant, the act cannot be evinced through such a medium. In that case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so. And, generally, if a trader secludes himself in his house, to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the meaning of the legislature, and commits an act of bankruptcy.(7)

The denial to a creditor is evidence of the intent to delay, if unexplained; but it may admit of explanation, like any other equivalent act. Sickness, or the unseasonableness of the hour, or a particular engagement, or other circumstances, to which the denial may be naturally attributed, may satisfactorily explain the act, and repel the presumption of its having

(1) *Curteis v. Willis*, 1 Ry. & Mo. 58; *Park v. Prosser*, 1 C. & P. 176; *Bayley v. Schofield*, 1 Maule & Selw. 338; *Chenoweth v. Hay*, 1 Maule & Selw. 676; *Gimingham v. Laing*, 6 Taunt. 532.

(2) *Tucker v. Jones*, 2 Bing. 2; *Schooling v. Lee*, 3 Stark. N. P. C. 149. And see *Mills v. Elton*, 3 Price, 142.

(3) See *Mucklow v. May*, 1 Taunt. 479; *Holroyd v. Gwynn*, 2 Taunt. 176; *Spencer v. Billing*, 3 Campb. N. P. C. 312.

(4) *Ex parte Hague*, 1 Rose Bank. Cas. 150; *Schooling v. Lee*, 3 Stark. N. P. C. 151.

(5) *Ex parte White*, 3 Ves. & Beam. 328; *Ex parte Harris*, 2 Rose Bank Cas. 67; *Lloyd v. Heathcote*, 2 Brod. & Bing. 388.

(6) By Lord Ellenborough, *Dudley v. Vaughan*, 1 Campb. C. 271.

(7) *Dudley v. Vaughan*, 1 Campb. 271; *Lloyd v. Heathcote*, 2 Brod. & Bing. 388; *Harvey v. Ramsbottom*, 1 Barn. & Cress. 55.

been done with the supposed intent to delay creditors.(1) A denial by the trader's clerk may be considered as authorized by the trader; unless it is shown to have been made without his authority.(2)

The denial to a creditor, at the time of keeping house, is only a medium of proof, but not necessary or indispensable proof; in other words, it is evidence of the rule, but not the rule itself. If a trader, therefore, in insolvent circumstances, or pressed with debts, were to seclude and conceal himself in his house, giving orders to his clerk to deny him generally to every person, this would be justly considered as strong evidence of "a keeping house with intent to delay creditors," although in fact it should not appear that the clerk had actually denied him to a creditor.(3) It is evidence for the consideration of the jury, who have to determine, under all the circumstances of the case, whether the party did the act with the intent imputed to him, of delaying his creditors.(4) The case of *Robertson v. Liddell*,(5) having so fully established, that the intent, and not the actual delay, is what the statute meant, it must be immaterial, whether in fact there was any delay, or even whether there was any possibility of delay. The act of bankruptcy, as Mr. Justice Bailey said, in the case of *Chenoweth v. Hay*,(6) depends on the intent to delay, and not on the intent being productive of the effect.

It has been determined, in several cases, that the assignment of the

(1) Bull. N. P. 39; *Round v. Hope*, Coke's B. L. 59; *Smith v. Currie*, 3 Campb. N. P. C. 349; *Shaw v. Thompson*, Holt's N. P. C. 159.

(2) Where the authority to deny is expressly proved, proof of actual denial is not required. *Infra*, 640, and n. 3. In *Lloyd v. Heathcote* (2 Bro. & Bing. 388), the order was given to the bankrupt's wife. See *Ex parte Foster*, 17 Ves. 416; *Dudley v. Vaughan*, 1 Campb. N. C. 271.

(3) *Dickinson v. Foord*, Barnes, 160. See the reasoning in the judgment of Lord Ellenborough, in the case of *Robertson v. Liddell*, 9 East, 487; *Mucklow v. May*, 1 Taunt. 479; *Williams v. Nun*, Id. 270; *Chenoweth v. Hay*, 1 Maule & Selw. 677; 14 Ves. 86; *Harvey v. Ramsbottom*, 1 Barn. & Cress. 55; *Lagat v. Watham*, 5 Moore C. P. 313; *Lloyd v. Heathcote*, 2 Bro. & Bing. 382.

There are several cases, in which the contrary has been decided. See *Hawkes v. Saunders*, Coke's B. L. 79; *Jackmar v. Nightingale*, Bull. N. P. 40. (These cases are stated in Selw. N. P. 177, 3d ed.) *Garret v. Maule*, 5 T. R. 575. In the last cited case (in which the evidence of the act of bankruptcy was like that above stated in the text, and an arbitrator had determined that the proof failed, because a denial had not been proved), a rule for setting aside the award being applied for, Lord Kenyon said, "on trials in cases of this kind, the question has always been asked, whether or not the debtor was denied to the creditor? which shows in what light the statute has been considered. I will not presume to say, whether or not this construction should have been put on the statute at first; but that construction having obtained, I am afraid now to disturb it." It may be observed of all these cases, that at the time when they were determined, the words of the statute received a construction different from that which has been so firmly established by the case of *Robertson v. Liddell* (9 East, 487.) The construction which then prevailed, was the same that was afterwards adopted in the case of *Fowler v. Padget* (7 T. R. 509); and this has been overruled by the case of *Robertson v. Liddell*.

(4) 1 Taunt. 273; *Vincent v. Prater*, 4 Taunt. 603.

(5) 9 East, 493.

(6) 1 Maule & Selw. 679.

whole of a trader's property is an act of bankruptcy ;(1) and that a colorable exception of an inconsiderable part of his effects will not prevent this doctrine from applying.(2) A voluntary assignment or delivery of *part* of a trader's property will be an act of bankruptcy, if made in contemplation of bankruptcy.(3) It is not necessary to prove that the party expected the actual and immediate issuing of a commission ; he will be considered to have committed an act of bankruptcy, if he is proved to have known himself at the time of transferring his property, in such a situation that he must be presumed to have thought bankruptcy probable.(4) And where the fact of the bankruptcy was left to the jury, upon the question, as to the opinion of the bankrupt respecting the state of his affairs at the time he transferred his property, rather than the intent to defeat or delay other creditors, the direction was considered proper.(5) Contemplation of insolvency alone, the party expecting that his creditors would give him

(1) *Dutton v. Morrison*, 17 Ves. 199 ; *Kettle v. Hammond*, Co. B. L. 100. The subject of fraudulent conveyances is further considered in the chapter on Actions against Sheriffs.

(2) *Compton v. Bedford*, Bl. R. 362 ; *Law v. Skinner*, 2 Bl. R. 996. See *Berney v. Davison*, 1 Bro. & Bing. 408 ; *Berney v. Viner*, 1 Bro. & Bing. 482.

(3) NOTE 1122.—* * See *ante*, notes, p. 638. On the subject of fraudulent preferences, in contemplation of bankruptcy, by confessing judgments, making payments or assignments, &c., see 1 Steph. N. P. pp. 531–576, where the cases are collected and stated. "In contemplation of bankruptcy," in the statute, means, in contemplation of a *state* of bankruptcy ; of actually stopping business, because of incapacity to carry it on. *Freeman v. Deming*, 3 Sandf. Ch. R. 327 ; *Hutchins v. Taylor*, 5 Law Rep. 289 ; *Arnold v. Maynard*, 2 Story's R. 349 ; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131. And see *M'Lean v. Meline*, 3 M'Lean, 199 ; *M'Lean v. Johnson*, Id. 202 ; *M'Lean v. Lafayette Bank*, Id. 185, 587 ; *Everett v. Stone*, 3 Story, 446 ; *Winsor v. Kendall*, Id. 507 ; *Morse v. Godfrey*, Id. 364 ; *Peckham v. Burrows*, Id. 544. It makes no difference that, at the time of the assignment or transfer, the party did not intend to take the benefit of the act *M'Allister v. Richards*, 6 Barr, 133. But if a debtor, believing himself to be insolvent, but intending to continue his business with the hope of retrieving his affairs, make a payment in pursuance of such intention, and not for the purpose of giving a fraudulent preference, the payment is not fraudulent, though he immediately after becomes bankrupt. The jury are to pass upon the intention, under the instructions of the court. *Jones v. Howland*, 8 Metc. 377. And see *Miller v. Black*, 1 Barr, 420, S. P. But such a payment is fraudulent, if not made by the bankrupt in the prosecution of his business, and with the hope of retrieving his circumstances. *Beekman v. Wilson*, 9 Metc. 434, and the cases, *supra*. In a suit by the assignee of an insolvent debtor, to recover the value of property, alleged to have been transferred by the debtor, by way of fraudulent preference, the burden is upon the plaintiff to show, that the creditor had reason to believe that the debtor was insolvent when he made the transfer ; and the question is for a jury. *Butler v. Leavitt*, 7 Metc. 164. On the subject of assignments, generally, for the benefit of creditors, see 1 Am. L. Cas. pp. 69–85, where the cases, relating to fraudulent assignments and preferences, are well collected. And see *Jackson v. Cornell*, 1 Sand. Ch. R. 348, where the question, whether an assignment of partnership property, preferring individual creditors, is void as against the copartnership creditors, was elaborately considered, and decided in the affirmative. * *

(4) By *Bayley J.*, in *Gibbins v. Phillips*, 7 Barn. & Cress. 534, and in *Poland v. Glyn*, 2 D. & R. 311 ; S. C., 4 Bing. 22, n.

(5) *Gibbins v. Phillips*, 7 Barn. & Cress. 534. See *Morgan v. Horseman*, 3 Taunt. 241 ; *Pulling v. Tucker*, 4 Barn. & Ald. 382 ; *Poland v. Glyn*, 4 Bing. 22, n. ; *Flook v. Jones*, 4 Bing. 25.

time, is not sufficient.(1) An assignment or delivery of part of a trader's property, if made at the instance of the creditor, on being pressed for payment or security, is not an act of bankruptcy.(2) The circumstance of a transfer being voluntary, is not sufficient to render the transaction an act of bankruptcy, unless it appears to have been in contemplation of bankruptcy;(3) though, on the other hand, a bill of sale of the whole of a trader's stock, made under a pressure or a threat, has been held to be fraudulent, inasmuch as the act does not redeem him even from any present difficulty.(4) A valid *deed*, binding on the party, must be proved, unless in the case of a fraudulent gift, delivery, or transfer of goods and chattels.(5)

Where the act of bankruptcy, insisted upon by the plaintiffs, is a fraudulent grant or conveyance, and the deed is produced in evidence, the execution must be proved in the ordinary course. An admission by the defendant, of the execution of the deed, will not dispense with the evidence of a subscribing witness; not even if the defendant is a party to the deed.(6) And if the defendant, at the trial, should himself produce the deed in compliance with a notice, this will not be a sufficient ground for dispensing with the ordinary proof,(7) although that was at one time considered to be the rule;(8) the mere possession of an instrument by one party cannot, in general, absolve the other party from the necessity of calling the attesting witness. But where the defendant, in pursuance of a notice, produces a deed under which he holds property, the instrument may, upon the principle laid down in the case of *Pearce v. Hooper*,(9) and *Orr v. Morice*,(10) be properly considered a valid instrument, so far

(1) *Fidgeon v. Sharpe*, 5 Taunt. 539. See *Flook v. Jones*, 4 Bing. 25; *Wheelwright v. Jackson*, 5 Taunt. 109.

(2) See *Crosby v. Crouch*, 2 Campb. N. P. C. 165; 11 East, 256; *Thompson v. Freeman*, 1 T. R. 155; *Smith v. Payne*, 6 T. R. 152; *Bayley v. Ballard*, 1 Campb. N. P. C. 416. A demand of further security for a debt not due, has the same effect. *Hartshorn v. Slodden*, 2 Bos. & Pul. 582.

(3) See by *Bayley, J.*, in *Gibbins v. Phillips*, 7 Barn. & Cress. 534.

(4) *Thornton v. Hargreaves*, 7 East, 544. A bill of sale given to a pressing creditor, with an ulterior trust for relatives, made in contemplation of bankruptcy, has been held fraudulent. *Morgan v. Horseman*, 3 Taunt. 241.

(5) 4 Burr. 2478; *Peake's C.* 168; *Holt's C.* 15; *Gl. & J.* 233; 17 Ves. 190, 202.

(6) See Vol. II, tit. Admissions, Deeds.

NOTE 1123.—* But an explicit admission by a party, in respect of the contents of a deed or other writing, will dispense with its production. 1 Taylor's Ev. 293, 294; *Slatterie v. Pooley*, 6 Mee. & Welsb. 664. See also, *Bethel v. Blencoe*, 3 Mann. & Gr. 119; *Howard v. Smith*, 3 Manning & Granger, 254; *R. v. Welsh*, 2 C. & Kirwan, 296, overruling Lord Tenterden's decision, in *Bloxham v. Elsie*, Ry. & Moo. 187. And see tit. Admissions, in the indexes to Vols. I and II.

(7) *Gordon v. Secretan*, 8 East, 548. See Vol. II, tit. Admissions, Deeds.

(8) *R. v. Middlezoy*, 2 T. R. 43; *Bowles v. Langworthy*, 5 T. R. 366.

(9) 3 Taunt. 62. See Vol. II, tit. Admissions, Deeds.

(10) 3 Brod. & Bing. 139; Vol. II, tit. Admissions, Deeds.

as relates to the execution, against the defendant who claims under it.(1)

One of the acts of bankruptcy, as before mentioned, is the lying in prison two months or more after an arrest for debt. The detention, therefore, and the cause of the detention, are to be proved. For the purpose of proving the detention in prison, the prison books, containing entries of the dates of the several commitments and discharges, are admissible; but they are not evidence of the cause of the commitment; the committitur itself is higher proof, and, if in existence, ought to be produced.(2)

It has been doubted, whether, under the 5th section of the late statute, the act of bankruptcy by lying in prison has relation to the first day of the imprisonment.(3) It was held, under the former statutes, that the day of the arrest was to be counted as inclusive,(4) and that where bail were put in, the time was to be computed from the surrender.(5) The party will be considered as lying in prison within the meaning of the act, though not actually within the walls of the prison, if he is either attended by an officer, or on security for the day; the principle of the act being, that it is evidence of insolvency, if a man is unable to get bail.(6)

A person who has been a trader does not cease to be an object of the bankrupt laws by ceasing to carry on trade. If he retire from trade, and afterwards do what would be an act of bankruptcy in a trader, the debts contracted in the course of his former trade remaining unpaid, such subsequent act will be in him also an act of bankruptcy.(7)

The act of bankruptcy must be proved to have been committed before

(1) Upon this principle, perhaps, the decision in the case of *Bowles v. Langworthy* (5 T. R. 366) may be supported. That was an action of trover by assignees, to recover goods of the bankrupt, taken by the defendant. The act of bankruptcy relied upon by the plaintiffs, was a bill of sale, from the bankrupt to the defendant, of all his effects; and, under the bill of sale, the defendant had taken the goods in question. The plaintiffs, instead of proving the execution of the instrument by the attesting witness, produced the defendant's examination before the commissioners, in which examination he had admitted the execution; and this was held at the trial, and afterwards adjudged by the Court of King's Bench, to be sufficient evidence. Lord Kenyon and Mr. Justice Buller decided the point on the authority of the case of *The King v. Middlezoy*. But this case of *The King v. Middlezoy*, has been overruled; and it is now clearly settled, that an admission by the defendant, in answer in chancery, will not dispense with the regular proof of execution. *Call v. Dunning*, 4 East, 53. The authority, therefore, of the case of *Bowles v. Langworthy*, unless it may be rested on the ground suggested above, cannot any longer be supported.

(2) *Salte v. Thomas*, 3 Bos. & Pull. 188.

(3) In the case of *Tucker v. Barrow* (1 Mo. & M. 139), Lord Tenterden, Ch. J., would have reserved the point, but it became immaterial.

(4) *Glassington v. Rubins*, 3 East, 407; *Saunderson v. Gregg*, 3 Stark. N. P. C. 72. A portion of the day may be considered, for the purpose of showing a valid act to have been done before the bankruptcy.

(5) *Tribe v. Webber*, Willes, 464.

(6) *Stevens v. Jackson*, 4 Campb. N. P. C. 164; *Soames v. Watts*, 1 C. & P. 400.

(7) *Meggot v. Miles*, 1 Ld. Raym. 286; *Ex parte Bainford*, 15 Ves. 449; *Ex parte Dewdney*, 15 Ves. 495.

the issuing of the commission. If the issuing of the commission and the act of bankruptcy happened on the same day, evidence is admissible to show, that the commission was issued (that is, sealed) posterior to the act of bankruptcy.(1)

If a partner in a banking concern, residing at the place where the banking-house is, and the only partner transacting the business, absenting himself from the banking-house, shut it up, and stop payment, this is not evidence of a joint act of bankruptcy, committed by him and the rest of the partners, who reside at a distance from the banking-house.(2)

The remaining point to be considered in proving the title of the assignees, is the petitioning creditor's debt. The single debt of the petitioning creditor, or of two or more partners (who are petitioning creditors), must amount, at least, to the sum of £100. The debt of two creditors, petitioning for the commission (not being in partnership), must amount to £150 at least. The debt of three or more creditors, petitioning for the commission (not being in partnership), must amount, at least, to £200.(3)

Interest, accruing before the act of bankruptcy, cannot be added to the principal sum due on a bill of exchange, in order to make up the amount required for the petitioning creditor's debt, unless interest is made payable in the body of the bill.(4) It seems that a bill for £100, drawn and issued by the bankrupt before the bankruptcy, but not falling due till afterwards, may be a good petitioning creditor's debt, and that the rebate of interest is not to be considered.(5)

The debt must be a legal debt; such as would entitle the petitioning creditor to maintain an action at law for recovering it.(6) One of several persons, to whom a joint bond has been given, cannot be the only petitioning creditor, in support of a commission against the obligor; but the other parties ought to concur in the proceeding.(7) However, though a separate commission, on the petition of one of several creditors, to whom a debt is due, cannot be supported, a separate commission may be supported against one of several partners on a debt due from the partnership.(8) The right of a husband to sue out a commission upon a debt, as due to himself alone, will depend on the circumstance, whether it would

(1) Wydown's Case, 14 Ves. 80; Hooper v. Richmond, 1 Stark. N. P. C. 507.

(2) Mills v. Bennett, 2 Maule & Selw. 556; Ex parte Mavor, 19 Ves. 543.

(3) The amount will not be considered as reduced by a payment made after notice of bankruptcy. Manor v. Shepherd, 6 T. R. 79.

(4) In re Burgess, 8 Taunt. 660; Cameron v. Smith, 2 Barn. & Ald. 305; Ex parte Greenway, Buck. 412.

(5) Brett v. Levett, 13 East, 218.

(6) The assignee of a bond cannot be a petitioning creditor. Ex parte Lee, 1 P. Wms. 782.

(7) Buckland v. Newsome, 1 Taunt. 477; 1 Campb. N. P. C. 474.

(8) Crispe v. Perott, Willes, 467; Ex parte Crisp, 1 Atk. 134. And see Windham v. Patterson, 1 Stark. N. P. C. 144; Richmond v. Heapy, 1 Stark. N. P. C. 202; Ex parte Blakely, 1 Gl. & J. 197.

have been necessary that the wife should have been joined in an action for the recovery of it.(1) It seems that a debtor to the bankrupt's estate cannot object that the petitioning creditor's debt appears to have been contracted more than six years before the issuing of the commission.(2)

By the 15th section of the new act, "every person who has given credit to any trader for valuable consideration, for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may petition or join in petitioning for a commission, whether he shall have any security in writing, or otherwise, for such sum or not." A bill of exchange may constitute a good petitioning creditor's debt for a commission against the drawer, though it has been paid by the acceptors subsequently to the commission.(3) If two persons exchange acceptances, and before the bills are mature, one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other, as will sustain a commission, before the other has paid his own acceptance.(4)

The petitioning creditor's debt must have subsisted during the trading. If the bankrupt had quitted trade before he contracted the debt, and has not since become a trader, this new creditor cannot sue out a commission on such subsequent debt, though he may prove it under a commission obtained by an old creditor.(5) But although the debt was contracted by the bankrupt before he entered into trade, yet if it was a subsisting debt during the time of his being a trader, it will support the commission.(6)

The petitioning creditor's debt must also be shown to be due before the bankruptcy; it is not enough barely to prove that it accrued before the issuing of the commission.(7) Thus, it has been held that the acceptor of an accommodation bill, who had after an act of bankruptcy, paid the amount of it to a person to whom it had been negotiated, had not a sufficient petitioning creditor's debt.(8) Where the debt arises on a promis-

(1) *Rumsey v. George*, 1 Maule & Selw. 176; *Ex parte Barber*, 1 Gl. & J. 1; *M'Neillage v. Halloway*, 1 Barn. & Ald. 218.

(2) *Mavor v. Pyne*, 3 Bing. 285; *Quantock v. England*, 3 Burr. 2628. See *Ex parte Dewdney*, 15 Ves. 488; *Ex parte Roffey*, 19 Ves. 468; 2 Rose, 245. Respecting debts due to and from infants, see *Stephens v. Jackson*, 4 Campb. N. P. C. 164; *Ex parte Barrow*, 3 Ves. 554; *Ex parte Mortam*, Buck. 42; *Executors, Rogers v. James*, 7 Taunt. 147; *Ex parte Paddy*, Buck. 235.

(3) *Ex parte Douthat*, 4 Barn. & Ald. 67.

(4) *Sarrat v. Austin*, 4 Taunt. 200.

(5) *Meggott v. Mills*, 1 Ld. Raym. 286. In *Heapy v. Birch* (3 Campb. N. P. C. 234), the continuance of the trading was presumed from circumstances. With respect to question, as to what is to be considered the old, and what new debt, see 1 Ld. Raym. 286; *Peake's N. P. C. 64*.

(6) *Penrig v. Daintry*, Sid. 411; *Butcher v. Easto*, 1 Dough. 295; *Dawe v. Holdsworth*, *Peake's N. P. C. 64*.

(7) *Ex parte Charles*, 14 East, 197; *Clark v. Askew*, 1 Stark. N. P. C. 458, n.; *Ex parte Dagget*, Whitm. 42. The acceptance of a security of a higher nature, after the bankruptcy, does not prevent a commission being sued out on the pre-existing debt. Str. 1043.

(8) *Ex parte Holding*, 1 Gl. & J. 97.

sory note of which the bankrupt is the maker, the date may afford presumptive evidence, that the debt subsisted before the act of bankruptcy.(1) But if the petitioning creditor's debt arises on a note indorsed, or bill accepted by the bankrupt, the date of the instrument affords no presumption as to the commencement of the debt; it is the time of the indorsement or acceptance, in this case, that is material; and that ought to be satisfactorily proved.(2) If a debt is shown to have been due before the act of bankruptcy, it will not be absolutely necessary to prove that the debt continued from the period when it was first contracted, down to the precise time of the act of bankruptcy; for if it is shown to have once existed prior to the act, its continuance will be presumed.(3)

The assignees must prove the debt of the petitioning creditor by the same evidence which would be necessary in an action by the creditor himself against the bankrupt. This is laid down by Mr. Justice Buller, in the case of *Abbot v. Plumbe*,(4) as an established rule: and, therefore, in that case, where the debt arose on a bond, the court determined, that the acknowledgment of the debt by the obligor (the bankrupt) would not supersede the necessity of calling the subscribing witness. So, if the debt of the petitioning creditor is on a bill of exchange, indorsed to him by the bankrupt, who drew the bill, it will be necessary, in order to prove the debt, to go regularly through the several proofs, as in an action against the drawer. For instance, it must be shown that the drawer had sufficient notice of the dishonor of the bill, or that the notice of dishonor may, under the circumstances of the case, be dispensed with. For this purpose, namely, to dispense with proof of such a notice, an acknowledgment by the bankrupt, the drawer, in a conversation between him and the petitioning creditor, the indorsee or payee, that the bill would not be paid, but would come back to him, has been adjudged to be sufficient evidence, although this declaration was made after an act of bankruptcy.(5) But the declarations of the bankrupt, made after an act of bankruptcy, are not, in general, receivable in support of the petitioning creditor's debt.(6) Declarations of the bankrupt, or entries in his books, clearly proved to have been made before the act of bankruptcy, are good evidence for this purpose.(7)

(1) *Taylor v. Kinloch*, 1 Stark. N. P. C. 175.

(2) *Cowie v. Harris*, 1 Mo. & M. 141; *Rose v. Rowcroft*, 4 Campb. N. P. C. 245.

(3) *Jackson v. Irvin*, 2 Campb. N. P. C. 50.

(4) 1 Dough. 215.

(5) *Brett v. Levett*, 13 East, 213. The admissibility of the bankrupt's declarations, for any purpose, after the act of bankruptcy, seems very questionable. *Smallcombe v. Bruges*, 13 Price, 136.

(6) *Smallcombe v. Bruges*, 13 Price, 136; *Sanderson v. Laforest*, 1 C. & P. 46; *Robson v. Kemp*, 4 Esp. N. P. C. 234; *Hoare v. Coryton*, 4 Taunt. 560.

(7) *Watts v. Thorpe*, 1 Campb. N. P. C. 376; *Hoare v. Coryton*, 4 Taunt. 560.

But proof of the trading, the act of bankruptcy, and the petitioning creditor's debt, will be dispensed with, unless the assignees have received notice of an intention to dispute them. The necessity of giving notice to dispute the proceedings under the commission, is not confined to those cases only where the assignees are named as such upon the record; but a notice is equally required where the opposite party knows that they make out their title under the commission.(1) And a notice must be given though the assignees are not the only defendants on the record; as, where there are other co-defendants, who justify as their servants.(2) But in an action between third persons, if the validity of a commission of bankruptcy comes incidentally in question, it must be regularly proved.(3)

The statute requires the notice, on the part of the plaintiff, to be given before issue joined. A notice, therefore, delivered at the time of delivering the issue with notice of trial, is plainly insufficient.(4) The notice by the defendant is to be given at or before the time of pleading; if he has omitted to give notice before pleading, the regular course is to apply to the court for leave to withdraw his plea, and plead *de novo*; the last plea would then be considered the party's plea to all purposes, and a notice given at the time of pleading such plea, is a sufficient compliance with the statute;(5) but, without an application to the court, he cannot regularly withdraw the plea, and deliver it again with a notice, though the time for pleading has not yet expired.(6) With respect to the serving of the notice, service on the assignee in person is not necessary; a delivery of the notice to the attorney of the party is the best for all practical purposes, and will be sufficient. The notice may be left with the clerk or servant of the party at his house.(7)

A notice that the defendant means to dispute the validity of the commission, is not to be considered as a part of the evidence in the cause, but may be proved at the beginning of the trial, and it immediately calls upon the plaintiff to prove his title.(8) A notice of disputing the bankruptcy, without specifying whether the trading, petitioning creditor's debt, or act of bankruptcy, was to be disputed, is too general, and will not oblige the assignees to produce the proceedings.(9)

(1) *Simmonds v. Knight*, 3 Campb. N. P. C. 251; *Rowe v. Lant, Gow*, 24.

(2) *Gilman v. Cousins*, 2 Stark. N. P. C. 182.

(3) *Doe dem. Mawson v. Liston*, 4 Taunt. 741.

(4) *Richmond v. Heapy*, 4 Campb. N. P. C. 207.

(5) *Decharme v. Lane*, 2 Campb. N. P. C. 324; *Willock v. Smith*, 2 Campb. N. P. C. 184; *Gardner v. Slack*, 6 B. Moore, 489.

(6) *Poole v. Bell*, Holt's N. P. C. 328.

(7) *Widger v. Browning*, 1 Mo. & M. 27. See *Howard v. Ramsbottom*, 3 Taunt. 526.

(8) *Decharme v. Lane*, 2 Campb. 324. It seems that, if the plaintiff retains the venue, upon an undertaking to give local evidence, and the local evidence consists in the proceedings of bankruptcy, and no notice is given of disputing them, the undertaking need not be further complied with. *Soulsby v. Lea*, 3 Taunt. 86.

(9) *Tumley v. Unwin*, 6 Barn. & Cress. 537.

The clause in the late statute, which requires notice to be given to the assignees, is as follows: "In any action by or against any assignee,(1) no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, that he intends to dispute some, and which of such matters."(2)

It has been held, as to the construction of this clause, that it was the intention of the legislature to exclude all evidence, on either side, beyond the commission and assignment, where no notice had been given to dispute the trading, act of bankruptcy or petitioning creditor's debt; and that, therefore, where the deposition respecting the petitioning creditor's debt has been put in, which is imperfect, no advantage can be taken of this circumstance.(3)

In any suit brought by the assignees for any debt or demand for which the bankrupt might have sustained an action, the depositions taken before the commissioners are, by the late act, made conclusive of the matters contained in them, unless the assignees have received notice from the bankrupt of disputing the commission. The clause upon this subject is as follows: "If any bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom), within twelve months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained in all actions of law brought by the assignees for any debt or demand for which the bankrupt might have sustained any actions or suit."

In the construction of this section, it has been determined that, in cases where the bankrupt, if solvent, could have sued, and the defendant gives notice of his intention to dispute the proceedings, the depositions under the commission are conclusive evidence of the matters contained in them, unless the bankrupt has also given notice within the time prescribed by the statute. And it has been held that an action is within the operation of the act, though it be commenced before the expiration of the time limited by the statute, provided it is not brought to trial till afterwards.(4)

(1) The section extends the same benefit to commissioners of bankrupt, and persons acting under their warrant.

(2) If after notice given, the assignees prove their title to the satisfaction of the judges, he is entitled, by the same section, to grant a certificate to that effect, which will entitle the assignees to the costs occasioned by the notice.

(3) *Macbeath v. Coates*, 4 Bing. 36. See *Smith v. Evans*, 2 B. Moore, 474.

(4) *Earl v. Schroder*, 1 Mo. & M. 25.

Though the depositions taken under the commission are made, in particular cases, conclusive evidence of the matters contained in them, yet it may be inferred, from the principle of the decision under the former acts, that if they do not prove the subject matter to which they apply, they may be objected to as defective and insufficient. Thus, where the deposition of petitioning creditor states only that the debt was due to him at and *before the time of suing forth the commission*, not showing that it existed at the time of the act of bankruptcy, this has been held to be insufficient.(1) So, also, a deposition stating that the party absented himself on a certain day, and that he had declared to the deponent that his motive for absenting himself was to avoid his creditors; but not stating the time when the declaration was made, is not sufficient proof of an act of bankruptcy.(2)

It seems that, in certain cases, the statute makes the depositions evidence, where such evidence, if given by parol, would not have been admissible. Thus, the deposition of the petitioning creditor has been held, under the 49 G. III, c. 131, admissible evidence of the petitioning creditor's debt, though he himself would not have been a competent witness to support the commission.(3) And where a deposition stated that the deponent witnessed the party's execution of a deed by which he assigned his property to A. B. (such a deed as would be an act of bankruptcy), that was received as evidence of the deed being executed, without the production of the deed.(4) And the depositions are evidence of a debt due to a party in the character in which he claims it; as if it is claimed as being due to the petitioning creditor in the character of executor, it will not be necessary to produce the probate.(5) These points were determined upon the construction of the stat. 49 G. III, c. 131, in cases where no notice had been given to dispute the proceedings.(6) But the principle of them seems to be applicable to cases within the operation of the 92d section of the new act.(7)

If the depositions are insufficient, other evidence may be given in support of the commission.(8) And the assignees may rely on any act of bankruptcy previous to the issuing of the commission; they are not re-

(1) *Clarke v. Askew*, 1 Stark. N. P. C. 458. And see *Cooper v. Machin*, 1 Bing. 426, where the omission of an averment of presentment of a bill rendered the proof of the debt insufficient. The depositions are evidence of the time of the act of bankruptcy. By Lord Mansfield, Doug. 257.

(2) *March v. Meager*, 1 Stark. N. P. C. 353. And see by Lord Tenterden, Ch. J., 2 Barn. & Cress. 561; *Tucker v. Jones*, 2 Bing. 2.

(3) *Bisse v. Randall*, 2 Campb. N. P. C. 493.

(4) *Kay v. Stead*, 2 Stark. N. P. C. 200.

(5) By Lord Tenterden, Ch. J., in *Skaife v. Howard*, 2 Barn. & Cress. 562.

(6) Such evidence appears to have been inadmissible under the old acts, where notice was given. By Lawrence, J., *Bisse v. Randall*, 2 Campb. N. P. C. 493; *Doe v. Liston*, 4 Taunt. 741.

(7) *Vide supra*, p. 648.

(8) *Clarke v. Askew*, 1 Stark. N. P. C. 458.

stricted to the proof of that contained in the depositions, and upon which the commission was founded.(1)

Where the depositions, taken under the commission, are produced as evidence in the cause, it will be necessary to identify them; as by showing that they come out of the custody of the solicitor of the commission, or by proof of the handwriting of one of the commissioners before whom they were taken.(2)

Only such of the depositions as are read are to be considered as given in evidence. The opposite party cannot inspect any other deposition, for the purpose of cross-examining a witness; but he may afterwards call for that deposition, and read it in evidence, for the purpose of contradicting him.(3) The proceedings are kept for the benefit of the creditors, and there is no right to inspect them as public documents.

By the late statute, the chancellor is empowered, upon petition, to direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be entered of record.(4) And by the 97th section of the act, it is provided, "that office copies of any original instrument or writing, filed in the office, or officially in the possession of the Lord Chancellor's secretary of bankrupts, shall be received as evidence of every such original instrument or writing respectively."

With respect to the title of the assignees under joint, or several commissions, it appears, that, under a joint commission issued against different partners, the plaintiffs may sue as assignees of one of the partners, on a separate contract between that party and the defendant;(5) or they may sue as assignees of both partners, and recover, in the same action, debts due to the partners, jointly, and separately.(6) But where the commissions are separate, and the same persons are appointed assignees under each, though they may declare for a joint demand due to all, or any number of the bankrupts, yet it seems they cannot recover, in the same action, separate demands due to each bankrupt.(7) Where there are separate commissions, and the different assignees under each commission declare

(1) *Reed v. James*, 1 Stark. N. P. C. 134; *Hooper v. Richmond*, Id. 507.

(2) *Collinson v. Hillear*, 3 Campb. N. P. C. 30; 1 Mo. & M. 26. A bankrupt who has released his surplus and obtained his certificate, is a competent witness to identify the proceeding. *Morgan v. Pryer*, 2 Barn. & Cress. 15.

(3) *Bluck v. Thorne*, 4 Campb. N. P. C. 192.

(4) 6 G. IV, c. 16, § 96.

(5) *Stonehouse v. De Silva*, 3 Camp. N. P. C. 339; *Scott v. Franklin*, 15 East, 428; *Harvey v. Morgan*, 2 Stark. N. P. C. 17. If in such action, the assignees describe themselves as joint assignees, they cannot recover (*Hogg v. Bridges*, 8 Taunt. 201), unless under some circumstances, where the declaration contains counts on the possession of the assignees. *Cock v. Tunno*, 2 Wms. Saund. 470, n.

(6) *Graham v. Mulcaster*, 4 Bing. 115.

(7) *Hancock v. Haywood*, 3 T. C. 433; *Streetfield v. Halliday*, 3 T. R. 779; *Scott v. Franklin*, 15 East, 428.

for a joint debt, it will be a variance, if the assignees describe themselves as joint assignees; they should describe themselves as assignees of each bankrupt respectively.(1) The non-joinder of an assignee as plaintiff, in an action of assumpsit, is a ground of nonsuit.(2)

Title impeached.

The title of the assignees may be impeached, by showing a defect in any of the several parts of it which have been the subject of consideration. Thus, it may be shown, that there was a commission subsisting at the time of the issuing of that under which the assignees claim, in which case the latter commission is a nullity.(3) It seems that a commission which has issued at the request of a bankrupt, is not invalid.(4)

Act of bankruptcy.

Where notice is given of disputing the act of bankruptcy, the title of the assignees may be objected to, on the ground, that the act of bankruptcy was concerted;(5) or that the petitioning creditor was a party to the fraudulent deed which is relied on as an act of bankruptcy.(6)

With respect to objections to the petitioning creditor's debt, it is provided by the late statute,(7) that "no commission shall be deemed invalid by reason of any prior act of bankruptcy, provided there be an act of bankruptcy subject to the petitioning creditor's debt." If the defendant is the petitioning creditor, who sued out the commission under which the plaintiffs as assignees derive their title, it has been before mentioned that he is estopped from setting up the defence, that the debt due to him as petitioning creditor was less than a hundred pounds.(8)

Evidence in particular actions.

The evidence to be produced by or against assignees, upon different issues, has been incidentally noticed in treating of particular actions; it will be necessary only to add a few observations upon such points as there has not been an occasion for noticing. In actions brought by assignees, it will be competent for the defendant to avail himself of any transaction or

(1) *Put v. Rawsterne*, Raym. 472; *Cooper v. Chitty*, 1 Burr. 31. So it was held a variance, where A. & B. assignees under one commission, and C. under another, sued as joint assignees. *Ray v. Davies*, 8 Taunt. 134.

(2) *Snelgrove v. Hunt*, 2 Stark. N. P. C. 424. On the mode of declaring in case of the appointment of a new assignee, see *Skarratt v. Kittridge*, 8 B. Moore, 372.

(3) *Till v. Wilson*, 7 Barn. & Cress. 684.

(4) *Shaw v. Williams*, 1 Ry. & Mo. 19. A concerted commission will not be supported in equity. *Ex parte Grant*, 1 Gl. & J. 17.

(5) *Bull. N. P. 39*; by Lord Tenterden, Ch. J., in *Shaw v. Williams*, 1 Ry. & Mo. 19.

(6) *Tope v. Hockin*, 7 Barn. & Cress. 101; *Hooper v. Smith*, 1 Bl. 441; *Bamford v. Barn*, 2 T. R. 594; *Back v. Gooch*, 4 Campb. N. P. C. 232.

(7) 6 Geo. IV, c. 16, § 10.

(8) *Harmer v. Davis*, 7 Taunt. 577. *Vide supra*, p. 630.

dealing really and *bona fide* made with the bankrupt, or of any execution against his lands or goods, *bona fide* levied more than two months before the issuing of the commission ;(1) or of any payment really and *bona fide* made to the bankrupt, or really and *bona fide* made by him, if not by way of fraudulent preference,(2) at any time before the bankruptcy.(3) But it will be answer to the defence in these cases, to show a knowledge, at the time, of an act of bankruptcy committed by the bankrupt.(4).

The only constructive notice recognized by an act, is the issuing of a commission, and the advertisement of the adjudication of bankruptcy in the Gazette.(5) It has been held, that although notice of an intention to strike a docket is not now sufficient evidence of a notice of an act of bankruptcy, yet that, where such a notice is connected with the circumstance of a party requiring a security previous to making a payment, a jury may properly infer, that he was apprised of an act of bankruptcy which had been committed.(6)

It has been held, in the construction of the new act, that the doctrine of fraudulent preference in payments, only applies to cases occurring within two months of the commission ; it does not affect the *bona fides* of anything done before ; for the imputed fraud only consists in the evasion of the bankrupt law, and is not inherent in the nature of the transaction ; and, therefore, those transactions which take place more than two months before the issuing of the commission, must be taken to be *bona fide*, which (not being void or illegal, independently of the bankruptcy) are really what they profess to be, and not a color for something else.”(7)

The statute of 6 G. IV, it has been said, is confined to executions *bona fide* issued. And on this ground, it has been held that it does not repeal the provisions of the 3 G. IV, c. 39, § 2 (directing that warrants of attorney should be filed within twenty-one days, unless judgment is entered and execution is issued thereon within the same time), in cases where the execution issues after an act of bankruptcy. It seems that the provisions

(1) 6 Geo. IV, c. 16, § 81.

(2) As to what is a fraudulent preference, *vide supra*, p. 641 ; Flook v. Jones, 4 Bing. 20.

(3) Sect. 82.

NOTE 1124.—* * By section 2 of the Bankrupt Act of the United States of 1841, it is enacted, that all dealings and transactions by and with any bankrupt, *bona fide* made and entered into, more than two months before the petition filed against him, or by him, shall not be invalidated or affected by this act, *provided*, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act.” See *Miller v. Black*, 1 Barr, 420 ; *Taylor v. Whitthorn*, 5 Humphr. (Tennessee) R. 340 ; *Beekman v. Wilson*, 9 Metc. 434 ; *Jones v. Howland*, 8 Metc. 377 ; *Haldeman v. Michael*, 6 Watts & Serg. R. 128. * *

(4) Sect. 82.

(5) Sect. 83.

(6) *Spratt v. Hobhouse*, 4 Bing. 83.

(7) By Lord Tenterden, Ch. J., in *Tucker v. Barrow*, 1 Mo. & M. 141.

of the 3 G. IV, would not be applicable to a case, where the execution had issued before the act of bankruptcy.(1)

With respect to the right of set-off in actions by assignees, it is provided by the new act,(2) "that, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt, before the credit given to, or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."(3)

Very particular evidence of the time when the debt claimed to be set off accrued, is not, in all cases, to be expected. Thus, it has been held that the receipt of provincial notes, a short time before a bankruptcy, to the amount of the set-off claimed, was evidence for the jury, from which they might infer that the notes so received were the identical notes upon which the set-off was founded.(4)

Reputed ownership.

In actions brought by assignees, for the property belonging to the bankrupt, the question often arises, whether the bankrupt was reputed owner of the property at the time of his bankruptcy. The provision in the new act upon the subject is as follows: "If any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have the power to sell the same.(5)

(1) By Lord Tenterden, Ch. J., in *Wilson v. Whitaker*, 1 Mo. & M. 9. It does not appear from the report, that there was any other ground, besides the fact of the bankruptcy, from which the execution might be inferred not to have issued *bona fide*.

(2) Sect. 50.

(3) NOTE 1125.—* * As to *set-off*, in actions brought by the assignees of a bankrupt, see 1 Steph. P. N. (pp. 679–689), where the modern cases are well collected. The point in the text is amply discussed and illustrated in the two leading cases, *Smith v. Hodson* (4 Term R. 211), and *Rose v. Hart* (8 Taunt. 499), and in the learned notes to those cases. 2 Smith's Lead. Cas. 125–132, 211–220. * *

(4) *Moore v. Wright*, 6 Taunt. 518. See *Dickson v. Evans*, 6 T. R. 57. With respect to the nature of mutual credits as distinguished from debts, *vide supra*. On the right of set-off by insurance brokers against the assignees of an underwriter, see *Graham v. Russel*, 2 Marsh. 561. With respect to the time of debts accruing, see further, *supra*.

(5) Sect. 72. An action is made of mortgages and assignments of ships under the 4 Geo. IV, c. 41. As to which, see *Ex parte Burn*, 1 J. & W. 373.

The statute does not apply to goods which have come to the possession of the bankrupt *after* the bankruptcy;(1) or to goods which are taken out of his possession before the bankruptcy;(2) or to property affixed to land;(3) or to property in the bankrupt's possession, as executor or trustee; or where the possession has been delivered to the bankrupt for a specific purpose, and not on a general account, or has been obtained by him through the means of a fraud, or without the owner's consent.

Where the bankrupt has once been the absolute owner of property, which has continued in his disposition till the time of the bankruptcy, but has ceased to be the real owner, he will be presumed to have had the reputed ownership, unless he has made the change of property notorious. But where the bankrupt has never been the absolute owner of the property, it will in general be necessary for the assignees to establish the fact of a reputed ownership, by other means than proof of possession.(4)

Proof of sale.

The notoriety of ownership may be shown by various means, as by proof of a public sale;(5) or the usage of the country; and usage may show that no inference is to be drawn as to the ownership of the property in question, from the mere circumstance of possession.(6) It seems that the circumstance of the real owner putting his initials upon the property is not entitled to much weight.(7) Evidence of the reputation of the neighborhood is admissible upon the question of the notoriety of the ownership.(8)

A tenant in common, or a partner, under whose control property is left, with the interference of his co-tenant, or of a dormant partner, may acquire a reputed ownership within the meaning of the statute.(9) And

(1) *Lyon v. Weldon*, 2 Bing. 334.

(2) *Jones v. Dwyer*, 15 East, 21; *Arbruin v. Williams*, 1 Ry. & Mo. 72, where the goods were removed the day before the bankruptcy. It was ruled in the same case, by Lord Gifford, Ch. J., that goods in the possession of the bankrupt, on the day of the bankruptcy, would pass to the assignees.

(3) *Horn v. Baker*, 9 East, 215; *Ryal v. Rolle*, 1 Atk. 165; *Steward v. Lombe*, 1 Bro. & Bing. 506.

(4) By *Bailey, J.*, in *Lingard v. Messiter*, 1 Barn. & Cress. 312; by *Lord Tenterden*, Ch. J., in *Storer v. Hunter*, 3 Barn. & Cress. 374.

(5) *Watkins v. Birch*, 4 Taunt. 823.

(6) *Storer v. Hunter*, 3 Barn. & Cress. 376.

(7) *Lingard v. Messiter*, 1 Barn. & Cress. 308; *Knowles v. Horsfall*, 5 Barn. & Ald. 134. See *Ex parte Marrable*, 1 Gl. & J. 402.

(8) *Oliver v. Bartlett*, 1 Bro. & Bing. 269; *Gurr v. Rutton*, Holt's N. P. C. 327; *Muller v. Moss*, 1 Maule & Selw. 335.

* * To the point in the text, see 1 *Stephens' N. P.* 607-638, where the cases are collected. The title *Bankruptcies*, in Mr. *Stephens'* valuable work on Nisi Prius law, is very valuable, and contains all the learning on the subject, necessary in ordinary practice. * *

(9) *Kirkley v. Hodgson*, 1 Barn. & Cress. 588; *Ex parte Enderby*, 2 Barn. & Cress. 398; *Ex parte Dyster*, 2 Rose, 256.

goods which are sent upon sale and return are not considered in the same light as if they were in the hands of a factor, but as conferring a reputed ownership on the vendee.(1)

It has been seen that a mistake in the particulars of demand, not calculated to mislead, is immaterial. And accordingly, in a late case, where the bill of particulars, delivered by the plaintiffs, who were assignees of a bankrupt, stated certain moneys to have been received to their use, which were, in fact, received to the use of the bankrupt, the chief justice refused to nonsuit for such a variance, as the plaintiffs had given substantial information of the nature of their claim.(2)

Examinations.

The examinations of witnesses, taken before commissioners of bankrupt, often form a material part of the evidence brought forward by the assignees. The examination of a witness so taken, is evidence against him, although the questions were improperly put to him with a view to the action,(3) and though he might have demurred to them, as exposing him to penalties.(4) If the witness, examined before the commissioners, has signed the examination after it was read to him, it must obviously be immaterial with respect to the question of admissibility, whether every word used by him was taken down, or only the substance of what appeared to be relevant.(5) If he refers, in his examination, to a written document, as containing a statement of the facts to which he is questioned, that document may be read, as part of his examination.(6) It has been held, that parol evidence is admissible to prove matters deposed by a witness, on his examination before commissioners of bankrupt, material to the inquiry, though they are not contained in the written examination.(7) It seems that a disclosure made to the commissioners under a compulsory examination, is not evidence of an account stated.(8)

Admissions by petitioning creditor.

With respect to admissions made by parties who are not produced as witnesses in the cause, it has been held, that the declarations and admissions of the petitioning creditor may be received as evidence, in actions against a sheriff (who defends on the ground that the party with respect to whom the question arises was a bankrupt), for the purpose of

(1) *Livesay v. Hood*, 2 Campb. N. P. C. 83; *Gibson v. Bray*, 1 Holt's N. P. C. 556; *Thackwaite v. Cook*, 3 Taunt. 487.

(2) *Tucker v. Barrow*, 1 Mo. & M. 138.

(3) *Stockfleth v. De Tastet*, 4 Campb. 10.

(4) *Smith v. Beadnell*, 1 Campb. 30.

(5) *Milward v. Forbes*, 4 Esp. N. P. C. 172.

(6) *Falconer v. Hanson*, 1 Campb. 171.

(7) *Rowland v. Ashby*, 1 Ry. & Mo. 232.

(8) *By Littledale, J.*, 7 Barn. & Cress. 625.

showing the insufficiency of the petitioning creditor's debt. Thus, in the case of *Young v. Smith*(1) (which was an action against a sheriff for a false return of *nulla bona*, and the defence was, that, at the time of the levy, the party was a bankrupt), the plaintiff was allowed to prove, by the admission of one of the petitioning creditors, who were partners, that their alleged debt was not a subsisting debt at the time of the act of bankruptcy, the debt having arisen from the sale and delivery of goods, which, as one of the creditors afterwards declared, had been sold on a credit, and the credit had not expired when the act of bankruptcy was committed. And in the case of *Dowden v. Fowle*,(2) the same point was determined in an action similar to the one last cited. It was proved, in this case, that the instructions for the defence had been given by the assignees, one of whom was the petitioning creditor; the plaintiff proposed to prove, in answer to the defendant's case, that, subsequently to the suing out of the commission, there had been a settlement of accounts between the bankrupt and the petitioning creditor, and the latter then acknowledged that the balance due to him at the time of the act of bankruptcy, and subsequently, did not exceed the sum of eight pounds. The objection to the evidence proposed was, that what the petitioning creditor might have said or done subsequently to the commission could not be admitted for the purpose of impeaching the commission in an action against the sheriff. But Mr. Justice Dampier held, that as the assignees appeared to be the real parties to the action, the subsequent declaration of the petitioning creditor, one of the assignees, was admissible: "Although he once swore to the existence of a debt of one hundred pounds, he might have found upon a further investigation of the accounts, that he was mistaken."

By bankrupt.

It has been noticed that declarations by the bankrupt, and entries in his books, made before the bankruptcy, are evidence in support of the petitioning creditor's debt.(3) And that his declarations and letters are, under certain circumstances, admissible to show the character of his dealings, or his motives in quitting his house, as being part of the *res gesta*.(4) An admission, made after an act of bankruptcy, is evidence against the bankrupt himself, in an action brought by him against an assignee, to try the validity of the commission; and the proof of his conduct and demeanor, in the investigation of accounts before the commissioners, is admissible

(1) 6 Esp. N. P. C. 121.

(2) 4 Camp. 38, by Dampier, J.

(3) *Vide supra*, p. 646. And see *Brett v. Levett*, 13 East, 213, *supra*, p. 646, where an acknowledgment having the effect of dispensing with notice of the dishonor of a bill, made after bankruptcy, was received. As to the point, whether the bankrupt's admissions are evidence of the trading, *vide supra*, p. 635.

(4) *Vide supra*, pp. 634, 638.

evidence against him in such action, as an admission of the petitioning creditor's debt.(1)

In an action by the assignees against a sheriff, to recover the value of goods taken in execution, the representations of the bankrupt, made to a witness before his bankruptcy, are admissible, for the purpose of showing, that the commission had been founded in a collusion between himself and the petitioning creditor.(2) But no questions can be asked as to what the bankrupt has said with respect to the contents of a written instrument without the production of the instrument, or a sufficient reason assigned for not producing it.(3)

In a late case, where the plaintiffs sued as assignees of a bankrupt, the defendant offered evidence of an admission made by one of the plaintiffs, before he was appointed assignee; but such an admission, it was held, could not be received, as the person making it appeared, at the trial, in a different character.(4)

With respect to the competency of witnesses produced in suits to which assignees are parties, it seems to be an established rule, that a bankrupt is an incompetent witness to prove any material fact to support or defeat the commission.(5) The ground upon which a bankrupt, though he may have obtained his certificate and executed a release, has been considered incompetent, in an action by the assignees, to prove any of the material facts, necessary to support the commission (such as, the act of bankruptcy, the trading, or the petitioning creditor's debt), is stated to be this, that he has an interest in supporting the commission upon which the certificate and discharge from his prior debts must depend: for, if the commission is not good, the certificate and all proceedings are void, and the bankrupt will be liable again to his debts, from which the certificate would dis-

(1) *Jaratt v. Leonard*, 2 Maule & Selw. 265.

(2) *Thompson v. Bridges*, 8 Taunt. 336.

(3) *Bloxam v. Elsie*, 1 Ry. & Mo. 188.

(4) *Fenwick v. Thornton*, 1 Mo. & M. 51.

(5) The following are the cases upon this point: That a bankrupt is incompetent to prove his own act of bankruptcy, see *Field v. Curtis*, 2 G. II, 2 Str. 828; *Ewens v. Gold*, 8 G. II, by *Hardwicke*, C. J., S. P., Bull. N. P. 40; S. P., Adm. by Lord Kenyon, in *Oxlade v. Perchard*, 1 Esp. N. P. C. 288; S. P., Adm. by Lord Ellenborough, in *Hoffman v. Pitt*, 5 Esp. N. P. C. 25; S. P., *Wyatt v. Wilkinson*, 5 Esp. N. P. C. 187, by *Chambre*, J. That a bankrupt is incompetent to prove the petitioning creditor's debt, see *Cross v. Fox*, 5 G. II, by *Raymond*, C. J., 2 H. Black. 279, note *a*, S. P.; *Flower v. Herbert*, 1754, by Sir D. Ryder, C. J., on the trial of an issue from chancery; 2 H. Bl. 279, note *a*, S. P.; *Chapman v. Gardner*, 34 G. III, by C. P., 2 H. Bl. 279. (*Eyre*, C. J., having admitted his evidence at the trial.) That a bankrupt is incompetent to disprove the alleged act of bankruptcy, or to explain an equivocal act, see *Hoffman v. Pitt*, by Lord Ellenborough, 5 Esp. N. P. C. 22, ruled *contra* by Lord Kenyon, in *Oxlade v. Perchard*, 1 Esp. N. P. C. 286; by *Mansfield*, Ch. J., *Rabbett v. Gurney*, 1 Mont. B. L. 482, n., 1805; *Binns v. Tetley*, M'Cl. & Y. 404, in which latter case all the authorities were reviewed. *Raymond*, Ch. J., admitted a bankrupt to give evidence as to the time of an act of bankruptcy. 12 Vin Ab. 11; Bl. 28.

charge him.(1) But as the verdict in an action brought by or against the assignees, could not be evidence for or against the bankrupt in any other proceeding, the rule in question seems to be an anomalous exception to the general principles of the law of evidence.(2) The rule extends to the cross-examination of the bankrupt, who cannot be interrogated respecting the facts material to support or defeat the commission, though he is called by the opposite party.(3)

The rule, as to the incompetency of a certified and releasing bankrupt, is restricted, at the furthest, to evidence affirming or disaffirming the bankruptcy. Thus, in an action by the assignees, to recover money levied under an execution on a warrant of attorney, a bankrupt has been admitted to prove, that the defendant knew of his insolvency at the time when the execution was issued.(4) "The rule," said Lord Ellenborough, "is restricted to evidence affirming or disaffirming the bankruptcy." And in *Morgan v. Prior*,(5) the Court of King's Bench determined, after a review of all the cases, that a certificated bankrupt who had executed a release of his share in the surplus, is competent to prove the signatures of the commissioners in the proceedings, or any facts excepting such as are material to the support of the commission, as, the trading, the petitioning creditor's debt, and the act of bankruptcy.

A bankrupt is not a competent witness, in an action by his assignees, to prove property in himself or a debt due to himself, or in any other manner to increase the fund.(6) The amount of the allowance that may be granted to the bankrupt, under the commission, will depend upon the clear amount of his estate recovered by the assignees;(7) this, therefore, is a direct and immediate interest.

It is an established rule, that a bankrupt may be a witness to diminish the fund, though he has not obtained his certificate; because, in so doing, he speaks most manifestly against himself; for he may not only defeat his title to the benefit, which the law allows him, if the fund is of a certain amount, but he hazards the displeasure of all his other creditors.(8) In an action of assumpsit, therefore, for goods sold and delivered to the defendant, the Court of King's Bench determined, that a witness, who had

(1) See 2 H. Bl. 279.

(2) See by the judges in *Morgan v. Pryor*, 2 Barn. & Cress. 19, and in *Binns v. Tetley*, M'Clel. 402.

(3) *Binns v. Tetley*, M'Clel. 397; *Elsom v. Brailly*, 1 Selw. N. P. 253; *Wyatt v. Wilkinson*, 5 Esp. N. P. C. 187. See *Fletcher v. Woodmas*, 1 Selw. N. P. 253, n.

(4) *Reed v. James*, 1 Starkie N. P. C. 134. It is not stated in the report of this case, whether the bankrupt had obtained his certificate, and executed a release; but that must be presumed to have been so.

(5) 2 Barn. & Cress. 14.

(6) *Ewens v. Gold*, Bull. N. P. 43; *Butler v. Cooke*, Cowp. 70; *Ex parte Burt*, 1 Madd. 46.

(7) See stat. 6 G. IV, c. 16, § 132.

(8) By the court in *Langden v. Walker*, cited Cowp. 70.

been twice bankrupt, and had not obtained his certificate, was competent to prove on the part of the defendant, that the goods had been delivered on his, and not on the defendant's account.(1) So it has been held, that he may prove property in another person, or a debt due to another and not to himself;(2) the direct tendency of such evidence being to diminish the fund.

In order that the bankrupt may be rendered a competent witness, it seems necessary that he should have obtained his certificate.(3) And he must also have released to the assignees his share in the surplus and in the dividends; though a general release to the assignees will be sufficient.(4) In an action by the assignee to recover money lost by the bankrupt at play, the bankrupt, on being called to prove the loss, was objected to as incompetent, on the ground that if the action should succeed, his certificate would be void, and his future effects liable to the payment of his debts: to remove this objection, three releases were proved;—one, a release by the bankrupt to the plaintiff, as assignees, of all surplus and allowance; a second, a general release executed by the petitioning creditor, and by the creditors who had proved under the commission, of all actions, causes of actions, &c., and of his lands, goods, &c.; a third, executed by the plaintiff, as assignee, to the bankrupt. The Court of King's Bench held, that these releases rendered the bankrupt competent. The question principally turned upon this, whether it was reasonable to presume that the second release had been executed by *all the creditors*; with respect to which, as it appeared that a year had elapsed between the issuing of the commission, and the date of the release, during which time several meetings (at which it was probable, the creditors would prove) for the choice of assignees, and the signing of the certificate, had taken place, and no question had been put to the witness, on the *voir dire*, as to there being other creditors, the court were of opinion, that the second release might be presumed to have been executed by all the creditors, and was, therefore, sufficient.(5) But no release can make the bankrupt a witness to prove his own act of bankruptcy.(6) And, after a second bankruptcy, he cannot be a witness to increase the fund, though he is certificated, and has given a release, unless he has paid fifteen shillings in the pound; for, in the event of his not making that payment under the second commission, his future effects are liable.(7)

(1) *Butler v. Cooke*, Cowp. 70.

(2) *Ewens v. Gold*, Bull. N. P. 43.

(3) See *Masters v. Drayton*, 2 T. R. 496, decided previous to Sir S. Romilly's Act.

(4) *Nares v. Sanby*, cited 2 T. R. 497; *Ewens v. Gold*, Bull. N. P. 43. It has been held sufficient for the bankrupt to state, on the *voir dire*, that he obtained his certificate, and released his assignees, without producing the release. *Carlisle v. Eady*, 1 C. & P. 234.

(5) *Carter v. Abbott*, 1 Barn. & Cress. 444.

(6) *Field v. Curtis*, 2 Str. 829; *Wyatt v. Wilkinson*, 5 Esp. N. P. C. 188.

(7) By stat. 6 G. IV, c. 16, § 127; *Kennett v. Greenwollers*, Peake N. P. C. 3.

As the bankrupt is not competent to support the commission, so neither is the bankrupt's wife; for an unity of interests subsists between them. The stat. 6 Geo. IV, c. 16, § 37, which empowers the commission to examine the wife, implies, that without such statutory provisions, she would not have been competent to give evidence.(1)

In an action by assignees to recover a promissory note, which had been paid by the bankrupt into the hands of the defendants who were bankers (the balance on the general account between them and the bankrupt being against the latter), the wife of the bankrupt was called by the plaintiffs, to prove, that the note had been paid in contemplation of bankruptcy; and, on an objection taken to her competency, as interested for her husband to increase the dividend, Lord Kenyon held, that she was indifferent in point of interest; since, if the plaintiffs recovered in this action, the defendants would be creditors against the bankrupt's estate to the amount of the note.(2) However, as it has been justly observed,(3) if the bankrupt's property would not pay twenty shillings in the pound, the witness had a greater interest on the side of the plaintiffs than on that of the defendants; for, in case the plaintiffs should recover, the defendants would have to pay the whole amount of the note; and though they might afterwards, as creditors, prove a debt to that amount, they would not receive the whole; and what they lose, the dividends would gain; so that the general fund would be more increased by the addition of the amount of the note, than it would be diminished by the deduction of the dividend paid to the defendants; and the higher the dividends are, the greater will be the allowance of the bankrupt; and the greater, consequently, the interest of the bankrupt and the bankrupt's wife.

In an action brought by the assignees of a bankrupt, the bankrupt may allow an attorney, employed by him before the bankruptcy, to give in evidence privileged communications; and such evidence will be received, though it is offered as proof of the act of bankruptcy.(4)

A creditor of a bankrupt is not competent to increase the fund, out of which he may receive a dividend.(5) He cannot, therefore, give any evidence to deprive the bankrupt of his allowance.(5)

A commission of bankruptcy passes the whole of the bankrupt's real as well as personal estate to the assignees, and appropriates immediately, to the satisfaction of his debts, that which can only be reached remotely and partially by the process of common law. It is in this respect, therefore, a proceeding evidently favorable to the creditors; and therefore, on the

(1) See *Ex parte James*, 1 P. Wms. 611; 12 Vin. Ab. 11, pl. 23.

(2) *Jourdain v. Lefevre and others*, 1 Esp. N. P. C. 66.

(3) See the observations on the case of *Jourdain v. Lefevre*, in *Christian's Treatise on the Bankrupt Law*, Vol. I.

(4) *Merle v. More*, 1 Ry. & Mo. 390.

(5) 2 Campb. N. P. C. 301; *Shuttleworth v. Bravo*, 1 Str. 507.

trial of an issue, whether a person was a trader, a creditor, who had not proved, was not allowed to support the commission, under which he might afterwards prove and receive a dividend.(1)

The Lord Chancellor has also determined, that a creditor is not competent to prove an act of bankruptcy at the opening of a commission: "It is not enough that the creditor has not availed himself of the commission; it ought to be certain that he never will, in order to render him competent.(2)

The petitioning creditor, it seems, may be called, as a witness, to defeat a commission,(3) or to reduce the amount of his own debt.(4) But he is not a competent witness to prove the commission regularly sued out;(5) because he enters into a bond to the Lord Chancellor, conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed. In one species of bankruptcy, that committed by a member of Parliament,(6) the act of bankruptcy must necessarily be proved, to a certain extent, by a creditor: for the party is adjudged by the statute to be a bankrupt, unless within one calendar month after personal service of summons, he shall pay, secure or compound for his debt to the satisfaction of his creditor, or enter into a bond prescribed by the statute; and the creditor is in ordinary cases, the only person, who can prove that the debt has not been paid, secured, or compounded for, to his satisfaction. With reference to such negative circumstances, said Lord Eldon, in a late case,(7) "the evidence of a creditor must, in this particular act of bankruptcy, be admitted to that extent; but the necessity, which exacts this admission, limits the extent of it; and although you must admit him to prove what he alone can prove, yet he is not to be admitted to prove what can be established by the evidence of others. The circumstance, for example, of the bankrupt being a member of Parliament and a banker, could have been derived from other sources, and ought not to have been left to depend upon the statement of the creditor, upon his statement, too, made in another court, and for another purpose."

A creditor who releases his debt to the assignees, is competent to prove the act of bankruptcy, although the action is brought by the bankrupt,

(1) *Adams v. Malkin*, 3 Campb. N. P. C. 543, by Lord Ch. J. Gibbs; *Crooke v. Edwards*, 2 Stark. N. P. C. 303, by Lord Ellenborough, overruling *Williams v. Stevens*, 2 Campb. N. P. C. 301. And see *Ex parte Malkin*, 2 Rose, 27; *Ex parte Osborn*, 2 V. & B. 177.

(2) By the Lord Chancellor, 1 Rose, 392, n.

(3) 2 Campb. 412; *In re Codd*, 2 Schoal. & Lef. 116.

(4) *Lloyd v. Stretton*, 1 Starkie N. P. C. 40.

(5) *Green v. Jones*, 2 Campb. 411. It has been noticed that the deposition of the petitioning creditor may be received as proof of his debt, *supra*, p. 648.

(6) 6 G. IV, c. 16, § 10.

(7) *Ex parte Harcourt*, 2 Rose Bank. Cas. 203.

who disputes the commission;(1) and a release to the assignees, without releasing the bankrupt, is sufficient.(2) Or if the creditor sell his debt to another person, and undertake to assign it when required, this will extinguish his interest and restore his competency:(3) for though a debt cannot be assigned at law, yet an assignment would be valid in a court of equity; and, after the sale, the creditor is merely a naked legal trustee for the purchaser, and has no interest in the debt. If the witness is assignee under the commission as well as a creditor, a release of all his personal claims on the bankrupt's estate will render him competent; for after such release, he is in the situation of a mere trustee whose trust is not coupled with any personal interest.(4)

A commissioner has been permitted to be examined as a witness in support of the commission under which he has acted. Lord Ellenborough, on receiving his evidence, observed that he could not be called upon to refund the fees which he had received; and added, that he would not then pronounce upon the question.(5)

CHAPTER II.

OF EVIDENCE IN ACTIONS BY OR AGAINST EXECUTORS OR ADMINISTRATORS.

FIRST, of evidence in an action by an executor or administrator.

Title when admitted.

If an executor or an administrator bring an action for a thing which they demand in right of a testator or intestate, they ought to name themselves executor or administrator, and make a *profert* of the probate, or letters of administration.(6) In such actions, brought in right of the de-

(1) *Koopes v. Chapman*, Peake N. P. C. 19.

(2) *Ambrose v. Clendon*, Rep. temp. Hard. 267.

(3) *Granger v. Furlong*, 2 Black. Rep. 1273; *Heath v. Hall*, 4 Taunt. 326. The debt, in the first case, was sold for less than five shillings in the pound. And see *Sinclair v. Stephenson*, 1 C. & P. 582, where the release was given, on the assignee undertaking to pay the witness what was due.

(4) *Tomlinson v. Wilkes*, 2 Brod. & Bing. 397.

(5) *Crooke v. Edwards*, 2 Stark. N. P. C. 303.

(6) If they do not name themselves executor or administrator, the defendant may plead in abatement. An omission of the *profert* is bad, on special demurrer. Com. Dig. Pleader, 2 D, 1 C. 17.

NOTE 1126.— * * The practice as to *profert* of the letters, is not uniform in the United States; and the rule requiring it is itself an exception from the general rule, which requires *profert* of deeds only. Gould on Pleading, p. 442, § 43. The necessity of a *profert* depends upon the local laws of the states. *Mattheson's Adm'r's v. Grant's Adm'r's*, 2 Howard U. S. R. 264. As to the rule in Massachusetts, see *Langdon v. Potter*, 11 Mass. 311. In Connecticut, *Champlin v. Tilley*,

ceased, if the defendant plead the general issue, or any other plea in bar, the plaintiff will not be obliged to prove himself invested with the character in which he claims.(1) Thus, if the plaintiff sue as executor, on a breach of covenant in a lease, charged to have been committed in the time of the testator, and the defendant plead *non est factum*, or that he has not broken the covenants in the lease, this is an admission, on the record, of the plaintiff's title to sue. Or if the plaintiff sue as administrator, in an action of assumpsit on promises to the intestate, the plea of *non assumpsit* admits the title of the administrator, so that the letters need not be produced;(2) and if they are produced, the defendant cannot object to them for want of a stamp.(3) But it seems that a plea in bar will have the effect of admitting the plaintiff's title, only where a profert is made of the letters testamentary, or of administration.(4) The defendant will not be allowed to prove, under the general issue, that there is another executor living besides the defendant, this being matter of plea in abatement.(5)

Plaintiff suing in his own right.

Where the plaintiff's cause of action is in his own right, he need not name himself executor or administrator, or make profert of the letters testamentary;(6) and if he so names himself, when it is improper, it will be merely surplusage.(7) A party may, however, properly sue as executor or administrator, for a cause of action arising after the death of the person whom he represents, where the damages, when recovered, will be assets.(8)

3 Day, 305. The omission of it in a *scire facias* was held to be fatal, on special demurrer, in *Campbell v. Baldwin*, 6 Blackf. 364; but cured after verdict, in *Copewood v. Taylor*, 7 Porter, 35. * *

(Where the plaintiff sues as indorsee of a promissory note describing himself as administrator, and alleging an indorsement to himself as such, without making *profert* of his letters of administration; a demurrer to the complaint, under the New York Code, on the ground that the complaint does not show his appointment as administrator, is frivolous. *Bright v. Currie*, 5 Sand. 433. In such a case, he shows title in himself in his individual capacity; and the circumstance that he describes himself as administrator does not vitiate the complaint. *Merritt v. Seaman*, 2 Selden N. Y. Rep. 168. It is sufficient if the plaintiff alleges his appointment as administrator (*Welles v. Webster*, 9 How. Pr. 241); though a description of himself as administrator, &c., is not sufficient. *Sheldon v. Hay*, 11 Id. 12. As to the old rule, see *Beach v. King*, 17 Wend. 197.)

(1) * * As to when, and how, the plaintiff must prove his title as executor or administrator. see 2 Stephens' N. P. 1904, *et seq.* * *

(2) *Watson v. King*, 4 Campb. N. P. C. 272. And see *Marsfield v. Marsh*, 2 Lord Ray. 824.

(3) *Thynne v. Prothero*, 2 Maule & Selw. 553.

(4) 4 Campb. N. P. C. 274; 2 Maule & Selw. 553.

(5) Com. Dig. Abatement, E, 13.

(6) Com. Dig. Pleader, 2 D, 1; *Himsay v. Dimmocke*, Ventre, 119; *Wallis v. Lewis*, 2 Lord Ray. 1215.

(7) Com. Dig. Pleader, 2 D, 1.

(8) *Cowell v. Watts*, 6 East, 405. And, therefore, when a note is given to an administrator which would be assets, the administrator *de bonis non* of the intestate may sue upon it, though, in some cases, the representative of the administrator might, and ought to sue. *Catherwood v.*

But if the plaintiff is suing for a cause of action which has accrued in his own time (not arising out of any personal contract with himself, or founded on his own actual possession), it seems it will be a good defence for the defendant, under the general issue, to show a want of title to the representation. Thus, where the plaintiff declared as administrator, for a conversion of property in his own time which had never been in his actual possession, it was held by Lawrence, J., that the styling himself administrator was of no avail; he was bound to prove himself such; and that the question was raised by the plea of not guilty in trover, which went to the foundation of the plaintiff's title.(1)

Proof of executor.

Where the title of the plaintiff, as executor, is not admitted on the record, and it becomes necessary, either on account of a plea denying his title, or any of the grounds before mentioned, to prove his title, he should be prepared with proof of the probate.(2) Although the executor derives his title from the will by which he is appointed, and from the probate of the will, yet it is the probate alone which authenticates his right; and the probate is the only legitimate evidence of the executor's appointment.(3) An examined copy of the will is not evidence of that fact; nor can the original will itself be read in evidence unless it bear the seal of the spiritual court, or some mark of authentication.(4) An exemplification of the probate from the records of the spiritual court will be evidence of the will having been proved.(5)

A probate under the seal of the ordinary unrevoked is conclusive as to the appointment of executor and the contents of the will; and cannot be impeached by evidence in the courts of common law.(6) Proof, that the will was forged, or that the testator was insane, or that another person is executor, is, therefore, not admissible.(6) But the defendant may show,

Chabaud, 1 Barn. & Cress. 154. With respect to the liability to costs, in such cases, see 6 East, 405; Grimstead v. Shirley, 2 Taunt. 116.

(1) Hunt v. Stephens, 3 Taunt. 115. See Catherwood v. Chabaud, 1 Barn. & Cress. 153, by Lord Holt in Mansfield v. Marsh, 2 Lord Ray. 824.

(2) * * See 2 Steph. N. P. 1904, *et seq.*; 1 Gr. Ev. §§ 518, 519, and notes; 2 Id. § 339, n. 4; 2 Starkie's Ev. pp. 516, 547, 550. And the letters are conclusive in favor of the administrator, in a suit by him, on the point of unfitness of a relative to whom letters had been refused. Flinn v. Chase, 4 Denio, 85. * *

(3) See Vol. II. A grant of the probate subsequent to the commencement of the action, and before declaration, is sufficient, as it is but the evidence of title. Smith v. Miles, 1 T. R. 480; Salk. 301.

(4) Vol. II; Gorton v. Dyson, *infra*, 669.

(5) Vol. II.

(6) Vol. II. As to the proof of a revocation of a probate, see Id. An entry in the book of the Prerogative Court is good evidence. Ramsbottom's Case, Leach C. C. 30, n.

(Letters testamentary or of administration, that appear to have been granted by a court of competent jurisdiction, cannot be drawn in question in an action by the administrator for a demand due to the intestate. Emery v. Hildreth, 2 Gray (Mass.) 228; Miller v. Jones, 26 Ala.

that the seal attached to the supposed probate has been forged,(1) or that the supposed testator is still alive, or that the letters testamentary have been revoked and annulled. And the defendant, it seems, may show that the testator left *bona notabilia*, where that would have the effect of making the probate void, and not merely voidable, as the defendant thereby confesses the ordinary's seal, but denies his jurisdiction.(2)

Proof of administrator.

The title of the plaintiff, as administrator, may be proved by the letters of administration; or by the original book of acts, which directs the grant of letters of administration, with the surrogate's *fiat*;(3) or by an examined copy of the entry in such original book. The letters of administration must be properly stamped, or they are absolutely void; if it appear, therefore, that the plaintiff sues, as administrator, for a greater value than is covered by the *ad valorem* stamp of the letters of administration, he cannot recover in the action.(4) Letters of administration, granted to a wrong person, are voidable; but if granted in a wrong diocese, they are void.(5)

Administrator de bonis non.

Where the action is brought by the administrator *de bonis non* it is sufficient, upon the issue of *ne unques administrator*, for the plaintiff to give in evidence the letters of administration granted to himself, reciting letters of administration granted to a deceased administrator, without giving further proof of the first letters.(6)

Wherever it is intended to show that the letters of administration are void, by some matter *dehors* them, or that they are not applicable to the subject matter of the suit; the defendant where he is bound to plead that the plaintiff is not administrator, must state, on the face of his plea, the

247. That such letters may be so questioned, on the ground that the Probate Court had no jurisdiction, see *Fish v. Norvell*, 9 Texas, 13. But where that court has jurisdiction, the letters cannot be impeached collaterally. *Petigru v. Ferguson*, 6 Rich. Eq. (S. C.) 378.)

* * See *ante*, note. But forgery of a probate, and want of jurisdiction in the court granting the probate, may be shown. See the text, Vol. II. * * See *Campbell v. Toncey*, 7 Cow. 68.

(1) 1 Stra. 378; Bull. N. P. 247.

(2) 1 Lev. 236; Bull. N. P. 143, 247. *Vide infra*, "Proof of administrator." See *R. v. Logan*, 1 Str. 75; *Combie's Case*, 1 P. Wms. 767; 1 Saund. 275, u.; *Allan v. Dundas*, 3 T. R. 131. As to what are *bona notabilia*, see *Com. Dig. Administration*. Toller, b. 1, ch. 2, § 5 (6th ed.) Debts by specialty are *bona notabilia* where securities are found; but debts by simple contract are esteemed the effects of the deceased where the debtor resided at the creditor's death. Judgments are *bona notabilia* where they are recorded. *Id.*

(3) Vol. II; 8 East, 187; 13 East, 232. *Vide supra*, "Proof by executor."

(4) *Hunt v. Stevens*, 3 Taunt. 113. The amount of the stamp was proved by a copy of the bond given to the ordinary, entered in the book of the officer of the Prerogative Court.

(5) Bull. N. P. 141; Toller, b. 1, c. 2, § 5.

(6) *Catherwood v. Chabaud*, 1 Barn. & Cress. 155.

particular circumstances which render the letters of administration void, or prevent the plaintiff from being entitled to sue. And, therefore, where an intestate had left *bona notabilia* in two dioceses of two different provinces (in which case the letters of administration are not void, though not given by either metropolitan), it was held that the defendant could not, under the plea of *ne unques administrator*, in its ordinary form, show that the intestate resided out of the province in which the letters exhibited by the plaintiff had been granted, and that, therefore, they were not applicable to the particular debt sought to be recovered.(1)

Particular actions.

The evidence in particular actions brought by executors and administrators has been before fully considered. Thus it has been mentioned, in what manner promises made to executors must be stated and proved by the plaintiff, in an action of assumpsit, in order to have the effect of avoiding the operation of the Statute of Limitations.(2) A defendant, in an action of assumpsit brought by the rightful representative, may prove a payment to an executor acting under an existing probate to a forged will; or to an administrator, though there be a valid will appointing an executor, if the letters of administration were unrepealed at the time of the payment.(3) The circumstances have been noticed which an *executor de son tort* may avail himself of, in mitigation of damages in an action of trover, where the action is brought by the rightful executor.(4) In an action of ejectment, brought by an executor, it is sufficient *prima facie* evidence that the testator had a chattel interest in the premises sought to be recovered, to

(1) *Stokes v. Bate*, 5 Barn. & Cress. 493. See 6 Mod. 134. (An appointment of an administrator, where no citation has been issued and no notice of the application given to the parties in interest, is void. *Torrance v. McDougald*, 12 Geo. 526. So, where the statute gives the administration in the first instance to the widow and next of kin, the surrogate or a judge of probate has no power to issue letters to a stranger until the persons entitled to letters of administration have severally renounced their rights in the premises (*Munsey v. Webster*, 4 Foster (N. H.) 126); or waived their rights by failing to apply for letters. *Stokes v. Kendall*, Busbee Law N. C. 242. Having waived their rights, the appointment of a stranger is regular. *Cole v. Dial*, 12 Texas, 100. Any fact which shows that the surrogate had not power to issue the letters, or that he did not have jurisdiction, will render them void. Though the granting of letters is *prima facie* evidence of the death of the person on whose estate they are issued (*Peterkin v. Inloes*, 4 Md. 175), such letters are rendered void by proof that such person is still living. *Hooper v. Stewart*, 25 Ala. 408. So the appointment of an administrator *de bonis non*, while the administrator first appointed is still living and unremoved, is void. *Matthews v. Douthill*, 27 Ala. 273. As to the rights of an administrator *de bonis non*, see *Marsh v. The People*, 15 Ill. 234. When the right to letters of administration depends upon a fact to be found by the surrogate, the remedy for an erroneous appointment is by appeal (*McMahon v. Harrison*, 2 Selden N. Y. R. 443); in this case letters were refused to a gambler on the ground of his improvidence.)

(2) *Vide supra*, pp. 450, 454, 455.

(3) *Allan v. Dundas*, 3 T. R. 125; *Wooley v. Clark*, 5 Barn. & Ald. 741; Bull. N. P. 141; 4 East, 441.

(4) *Vide supra*, p. 548. And see *Wooley v. Clark*, 5 Barn. & Ald. 744; *Curtis v. Vernon*, 3 T. R. 587; *Mountford v. Gibson*, 4 East, 441, by Lawrence, J.; 3 East, 453.

put in the defendant's answer to a bill in chancery, stating his belief that the testator was *possessed* of the *leasehold* premises in question.(1)

In an action at the suit of an executor or administrator, a person who has an unsatisfied demand on the estate of the deceased has been held an incompetent witness for the plaintiff, where the estate is insolvent.(2) But a creditor of the estate is an admissible witness to recover a debt due to the deceased, unless it be shown that the other funds are deficient.(3) And in the absence of such proof, a paid legatee has been admitted a witness for an executor, to increase the estate of the testator.(4) The residuary legatee is not rendered a competent witness for the executor, by releasing all claim to the debt sought to be recovered in the action; for, if the plaintiff failed in the suit, he must pay costs to his own attorney, which costs he would be entitled to be allowed out of the estate (the action being brought *bona fide*); and thus independently of the debt to be recovered, the residuum would be diminished.(5)

Secondly, of evidence in an action against an executor or administrator.

Action against executor.

If the defendant intend to controvert the fact of his being executor or administrator, he ought to plead that he is not such: unless he pleads this matter specially, he admits himself to be executor or administrator, as charged in the declaration; and the point cannot afterwards be contested at the trial of the cause. But if the defendant plead, in bar of the action, that he is not executor, or that he is not administrator, in that case the plaintiff will have to prove the affirmative of the proposition.(6)

(1) Doe v. Steel, 3 Camp. N. P. C. 116.

(2) Craig v. Cundell, 1 Campb. N. P. C. 381.

(3) Paull v. Brown, 6 Esp. N. P. C. 34.

(4) Clarke v. Gunnon, 1 Ry. & Mo. 31.

(5) By Lord Ellenborough, Baker v. Tyrwhitt, 4 Camp. N. P. C. 28; Vol. I.

(6) Bull. N. P. 143.

NOTE 1127.—* S. P., Reynolds v. Torrance, 2 Brevard, 59; Turner v. Boykin, 6 Ala. 353. In Haig v. Smith (1 Brevard, 529), the defendant was allowed to withdraw his plea of *ne unques executor*, and plead *plene administravit*. The defendant's official character must be distinctly averred. The words "the defendant, being the executor as aforesaid," are not sufficient. Brown v. Hicks, 1 Pike, 232. And where an executor sues, there must be a substantial averment of his official character. Sabin v. Hamilton, 2 Pike, 485; Watkins v. McDonald, 3 Pike, 266. *Ne unques executor* is a plea to the merits, within the meaning of the Alabama statute of 1824, which authorizes a defendant to plead on his demurrer being overruled. Stallings v. Williams, 6 Ala. 509. * *

(Where a person is sued as executor and pleads to the merits and also the Statute of Limitations, he will not be permitted to show on the trial that he is only executor *de son tort*. Railroad Co. v. Joyce, 8 Rich. S. C. 117. By appearing and pleading to the merits of the action, the executor waives all formal objections, such as want of demand before suit, &c. Thomas' Ex'r v. Thomas, 15 B. Mon. (Ky.) 178. So where he omits to plead a full administration, and judgment is entered against him in one state, and an action thereon is brought against him in another, he cannot interpose such plea. White v. Archbill, 2 Sneed (Tenn.) 588. As to the nature of this plea, see Reid v. Nash, 23 Ala. 733.

Proof of being executor.

It seems to be now settled that the plaintiff would fail upon an issue joined on the plea of *ne unques executor*, unless he could prove not only the appointment of the defendant as executor, but also that he has taken upon himself to act as such, or has proved the will.(1) It has been held, that, in assumpsit against several defendants as executors, the plaintiff may have a verdict against one of the defendants as the real executor, though he fails to prove that the other defendants are executors; the other defendants will, in that case, be discharged.(2)

Executor de son tort.

Proof that the defendant has intermeddled with the property of the deceased, so as to make himself executor *de son tort*,(3) is sufficient proof of his being executor, and will render him chargeable as such. The instances most commonly mentioned, by which a person makes himself executor *de son tort*, are such as taking possession of the goods of the deceased, and converting them to his own use, paying the debts of the deceased out of his assets, receiving or releasing debts due to the deceased, answering as executor in a suit;(4) and other acts of the same kinds; such acts directly affect the interest of the creditors, and they are characteristic of an executor. But the defendant will not be involved in the charge of an executorship by such an act as ordering the funeral of the deceased, or taking an inventory of his effects, or paying out of his own

If the administrator makes a specific objection to a demand presented, which relates merely to the sufficiency of the presentation, he will not be allowed to interpose a different defence on the trial. *Hansell v. Gregg*, 7 Texas, 223.)

(1) *Per Cur.* in *Douglas v. Forrest*, 4 Bing. 704; by Le Blanc, J., in *Cottle v. Aldrich*, 1 Stark. N. P. C. 384; *Maule & Selw.* 175; by Holroyd, J., in *Atkins v. Tredgold*, 2 Barn. & Cress. 30. See *Wentw. Off. of Executor*, 38; *Toller*, 471; *Com. Dig. Administration*, B, 9; *Rawlinson v. Shaw*, 3 T. R. 559, where it was held, that an executor might sue the acting executor.

(2) *Griffiths v. Franklin*, 1 Mo. & M. 146.

(3) * * As to *executors de son tort*, see 2 Steph. N. P. pp. 1867-1870. In New York, an executor of an executor has no authority to sue or maintain any action or proceeding in respect of the estate, effects or rights of the testator of the first executor, or to the custody or control thereof, as such executor. 2 R. S. 448, § 11. For the English cases, see Index to the first 47 Vols. of E. C. L. R. p. 303; and for numerous American decisions, see 2 U. S. Dig. 392; 1 Suppl. to U. S. Dig. 830, 831; 1 and 2 Annual U. S. Dig. tit. *Executors and Administrators*. * *

(The taking out of letters of administration by an executor *de son tort*, legalizes his previous acts. *Magner v. Ryan*, 19 Mis. (4 Bennett) 196. As to the liability of executors *de son tort*, and the effect of sales made by them, see *Wiley v. Truett*, 12 Geo. 588; *Smith v. Porter*, 35 Maine, 287; *Woolfork v. Sullivan*, 23 Ala. 548; *Graves v. Page*, 17 Mis. (2 Bennett) 91; *Thompson v. Harding*, 20 Eng. Law and Eq. 145; *Emery v. Berry*, 8 Foster (N. H.) 473; *Morrison v. Smith*, *Busbee Law N. C.* 399; *Simonton v. McLane*, 25 Ala. 353; *Carter v. Robbins*, 8 Rich. S. C. 29.)

(4) 3 Bac. Ab. tit. *Executor*, 21; *Com. Dig. Administrator*, ch. 2, § 3; *Padgett v. Priest*, 2 T. R. 97; *Edwards v. Harden*, 2 T. R. 587; *Hall v. Summersett*, Wight. 16.

money the debts of the deceased, or any part of the legacies ;(1) for these are rather the acts of kindness, or charity, than any assumption of the office of executor. If a person comes to the possession by color of legal title, though he is not able to make out such title in every respect, he shall, nevertheless, not be liable to be charged as executor *de son tort*.(2) Though a person who possesses himself of the effects of the deceased, under the authority of, and as agent for the rightful executor, cannot be deemed an executor *de son tort* ;(3) yet he will be subject to be charged in that capacity if he continues to act after the death of the executor who has made him his agent ; and this, though he act under the advice of another executor, who has not proved the will.(4) What acts will make a man executor *de son tort* is a question of law ; but it is for the jury to say, whether such acts are sufficiently proved.(5)

The formal and documentary proof of being executor or administrator has been before briefly mentioned. For the purpose of introducing such evidence, it may be always prudent, but it is not always necessary, to give notice to the defendant to produce at the trial the probate of the will or the letters of administration.(6) In the case of *Davis v. Lady El. Williams*(7) (where an examined copy of an entry in the act book, in the registry of the Prerogative Court, stating that administration had been granted at a certain time to Lady El. Williams, was received as proof of the fact of her being administratrix), a previous notice to produce the letters of administration was considered to be unnecessary ; the proof there offered was clearly not of a secondary or inferior nature, and would be good primary evidence even on behalf of the person described in the entry, in support of his claim as administrator.

In the case of *Gorton agt. Dyson and another*, sued as executors of J. H.(8) (where for the purpose of proving an acknowledgment by J. H.

(1) 3 Bac. Ab. Executor ; Com. Dig. Administrator ; Toller's Law of Executors, 40. See *Mountford v. Gibson*, 4 East, 441.

(2) *Femings v. Jarratt*, 1 Esp. N. P. C. 335. An executor *de son tort* cannot discharge himself by delivering goods to the rightful executor after action brought. *Curtis v. Vernon*, 3 T. R. 587.

(3) *Hall v. Elliott*, Peake's N. P. C. 119.

(4) *Cottle v. Aldrich*, 4 Maule & Selw. 175. See *Graham v. Keble*, 2 Dow. 24.

(5) *Padgett v. Priest*, 2 T. R. 97.

NOTE 1128.—* * The common-law rule, that an executor might commence an action before probate, and that it was enough if he had obtained letters testamentary when he came to declare, is changed by statute. *Thomas v. Cameron*, 16 Wend. 579. An executor cannot act until he has qualified according to the statute ; and letters testamentary or of administration, granted by a foreign jurisdiction, give no authority to act in New York. *Robinson v. Crandall*, 9 Wend. 425. And see 2 Gr. Ev. §§ 343, 344, and notes. * *

(6) * * Where the nature of the action charges a party with the possession of an instrument, notice to produce it is not necessary to let in secondary evidence of its contents. *Hays v. Riddle*, 1 Sandf. S. C. R. 248, and the cases there cited. And see *supra*, the text, Vol. II. * *

(7) 13 East, 234.

(8) 1 Broderip & Bingham's Rep. C. P. 219.

in his will, of his having received a sum of money, for which the action was brought, it became material to prove the contents of the will), an officer of the Ecclesiastical Court produced a document, purporting to be the original will of J. H., under the seal of the Ecclesiastical Court; and there was an indorsement on the will, by the officer of the Ecclesiastical Court, purporting that probate had been granted to the defendants upon it as the will of J. H., and that the defendants had accordingly sworn to the value of the effects; (1) this evidence was held by the Court of Common Pleas to have been properly admitted. A notice to produce the probate of the will, it may be observed, had in this case been given to the defendant. But even without such notice, it seems, the evidence would have been admissible for the purpose for which it was produced; for since the defendants had obtained probate on this document, and had thus acted upon it as the will of J. H., the document would be admissible against them, after such an admission, as the genuine writing of the testator. (2)

Although proof of a notice to produce the probate or letters of administration is necessary, before secondary evidence of them can be received, yet it will not be previously necessary to prove also, that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession: (3) and the notice to produce them, therefore, will at once enable the plaintiff to give secondary evidence of the defendant's appointment. Some proof of the identity of the party, namely, that the person described in the documentary evidence as executor or administrator, is the party sued, will be indispensably necessary.

Plea of plene administravit.

If the defendant plead in bar, that he had not in his possession, at the time of the commencement of the suit, nor has had at any time since, any goods of the deceased to be administered; and the plaintiff reply, that the defendant had goods, &c., in his possession at that time, upon which the parties join issue, here the burden of proof will be on the plaintiff, who ought to prove assets in the possession of the defendant, either before or at the time alleged. (4) He cannot prove, under this issue, that assets have

(1) See p. 221 of the report.

(2) See the opinion of Richardson, J., 1 Brod. & Bing. p. 221.

(3) * * See 2 Saund. on Pl. and Ev. 511, 512; 2 Stark. Evid. 320; Douglas v. Forrest, 4 Bing. 686, 704; Atkins v. Tredgold, 2 B. & C. 23, 30; Cottle v. Aldrich, 4 M. & S. 175. *See quere* as to this presumption. And see Waite v. Gale, 2 Dowl. & Lowndes, 925; 9 Jur. 782; 2 Gr. Ev. § 344, n. And see *ante*, p. 669, note 6. * *

(4) This plea is a complete answer to the action; so that if the issue on this plea is found for the defendant, he will be entitled to the *general* costs of the action, though he should fail on other pleas pleaded by him in bar. Edwards v. Bethel, 1 Barn. & Ald. 254; Ragg v. Wells, 8 Taunt. 129, S. P.

NOTE 1129.—* * S. P., Bentley v. Bentley, 7 Cowen, 701; Fowler v. Sharp, 15 J. R. 323. And see 2 Gr. Ev. § 346, n.; 1 Supplement to U. S. Dig. pp. 810–821; and 1 Annual U. S. Dig.

been received subsequently to the commencement of the suit; to be admitted into such proof, he should have replied this matter specially.(1) In addition also to the proof of assets, it will be necessary for the plaintiff, in an action of assumpsit, to prove the amount of the debt, which he seeks to recover; for though the plea admits some debt, it does not admit the amount.(2) The rule is said to be different in an action of debt.(3)

The stamp affixed to the probate is *prima facie* evidence that the executors have received assets to the amount covered by the stamp.(4) An inventory of the goods of the deceased, which has been delivered by the defendant to the Spiritual Court, is evidence against him as proof of assets; and it will be competent to the plaintiff to prove, that the goods comprised

271, 272; where numerous American cases on the point will be found. As to the liability of the corporation of the city of New York, for the acts of the public administrator, where there is a deficiency of assets, see *Matthews v. The Mayor, &c., of New York*, 1 Sandf. S. C. R. 132. In that case it was held: 1. That the city was liable for the costs and expenses incurred by one, against whom the public administrator, as such, had brought a wanton suit; the party having obtained a judgment for costs, and there being no assets of the intestate, or property of the administrator, out of which the same could be collected; 2. That the city was liable for the amount of such judgment, it being uncollectable because of the public administrator's waste of assets, and his being destitute of property; 3. That the city was in like manner liable for a *devastavit* of the assets of the intestate; 4. That the liability of the corporation was direct and primary, and not of a secondary or collateral character; and that, therefore, debt was the proper form of action, in favor of the party aggrieved. The corporation are compensated for their risk, in respect of intestate estates, by being allowed to use the funds without being chargeable with interest. *Suarez v. The Mayor, &c., of New York*, 2 Sandf. Ch. R. 173. * *

(1) *Mara v. Quin*, 6 T. R. 10. See Bull. N. P. 144. The defendant, under this plea, is only liable to the amount of assets proved. *Harrison v. Beccles*, cited 3 T. R. 688.

(See *Eidson v. Fontaine*, 9 Gratt. (Va.) 286, holding that the proof may be given, though the defendant will not be chargeable with costs.)

(2) NOTE 1130.—* * Where issue is joined on a plea of payment, in assumpsit, and no evidence is given by either party, the plaintiff will be entitled to a verdict for a *nominal* sum; but if the defendant prove the payment of any sum, however small, to the plaintiff, the onus will be upon the latter to show that his demand exceeded the payment, and if he fail to show it, the defendant will be entitled to a verdict. *Dry Dock Bank v. McIntosh*, 5 Hill, 290. And see *supra*, Vol. I, and the cases cited in note 196. In New York, a judgment by default against executors is not an admission of assets, and in an action on such judgment, suggesting a *devastavit*, they may deny a sufficiency of assets. *Butler v. Hempstead*, 18 Wend. 666. But see *contra*, *Dickson v. Wilkinson*, 3 How. U. S. R. 57, where Mr. Justice McKimley said: "It is well settled, that a judgment by default against an executor, or administrator, is an admission of assets to the extent charged in the proceeding against him, whether it be by action on the original judgment, or by *scire facias*. *Ewing's Executors v. Peters*, 3 Term R. 685; *The People v. The Judges of Erie*, 4 Cowen, 446." * *

(3) 1 Show. 81; 1 Salk. 296; Bull. N. P. 140. The plea of *plene administravit præter* admits the plaintiff's demand to the amount of the assets confessed. *Young v. Cordery*, 3 B. Moore, 66.

(4) *Foster v. Blakelock*, 5 Barn. & Cress. 328; *Curtis v. Hunt*, 1 C. & P. 180. As to what are assets, see Toller's Law of Executors, tit. Assets; Com. Dig. tit. Assets; *Vincent v. Sharp*, 2 Stark. N. P. C. 507; *Worral v. Hand*, Peake's N. P. C. 24; Bull. N. P. 140, a; 1 Barnes, 240. As to the distinction between legal and equitable assets, see *Clay v. Willis*, 1 Barn. & Cress. 364.

* * But the point in the text is not clearly agreed. See *Foster v. Blakelock*, 5 B. & C. 328; *Curtis v. Hunt*, 1 C. & P. 180; *Stearn v. Mills*, 4 B. & Ad. 657; *Mann v. Lang*, 3 Ad. & Ell. 699. * *

in the inventory, have been undervalued.(1) If the inventory produced does not distinguish, in the article concerning debts, between the desperate and such as are separate, it has been considered sufficient to charge the executor with the whole as *prima facie* assets; and that he would then be called upon to prove them desperate: the opinion of Lord Hardwicke is cited as an authority for this rule.(2) In a later case, however, relative to this point, Lord Ellenborough stated it to be the practice to require further evidence than is afforded by the inventory, of the payment of debts, though not stated to be desperate; but that the presumption of payment might depend on the time, and a number of other circumstances.(3) In the case of *Young v. Cordery*, which occurred subsequently to the case before Lord Ellenborough, but in the discussion of which that authority was not cited, the Court of Common Pleas seem to have recognized the rule as laid down by Lord Hardwicke, but the express point was not decided.(4) The executor may discharge himself, by showing a demand and refusal of payment.(5)

Admissions.(6)

An account rendered by an executor to the plaintiffs, stating that a certain sum has been awarded in favor of the estate of his testator, is not evidence of assets, without proof of the receipt of the money.(7) An admission by the defendant, that a debt is a just debt, or a promise to pay it

(1) Bull. N. P. 140; *Giles v. Seward*, 1 Stark. N. P. C. 32. The inventory, it has been said, must be signed by the defendant; it is not sufficient that it has been signed by the appraisers. Bull. N. P. 140.

* * See the last note. Giving his own promissory note for a debt of the deceased, is evidence of assets. *Bank of Troy v. Hopping*, 13 Wend. 577; *Holland v. Clark*, 2 Y. & C. 319. * * (The administrator may show that the assets coming to his hands have depreciated in value. *Armstrong v. Walkup*, 12 Gratt. 608.)

(2) Bull. N. P. 140; *Smith v. Davis*, Selw. N. P. 712.

(3) *Gyles v. Dyson*, 1 Stark. N. P. C. 32.

* * See the last note. Judgment recovered by an administrator, is *prima facie* evidence of assets; and that there was once a conveyance by quit claim of the premises to the administrator, by the intestate in his lifetime, does not rebut the presumption. *Blodget v. Brinsmaid*, 7 Vermont R. 9. * *

(4) 3 B. Moore, 69.

(5) Bull. N. P. 140, *d*; Salk. 296.

(6) NOTE 1131.—* * As to how far the admissions or acts of one administrator, in reference to the acknowledgment or liquidation of demands against the estate, are obligatory upon his co-administrator, or binding upon the estate, see *M'Intire v. Morris*, 14 Wend. 90. An administrator has no power to confess judgment against his co-administrator. *Heisler v. Knipe*, 1 Browne, 319. In an action against administrators, the admission of indebtedness by one will not entitle the plaintiff to recover. Such evidence, if admitted as a link in the chain of testimony, should be excluded from the consideration of the jury, unless the admission of all the administrators is shown. And the opinion of *Spencer, J.*, in *James v. Hackley*, 16 J. R. 277, *contra*, was disapproved in *Forsyth v. Garson*, 5 Wend. 558. * *

(7) *Williams v. Innes*, 1 Campb. N. P. C. 364. And see 1 Salk. 207; *Cro. Eliz.* 43, that a judgment recovered is not assets till execution levied.

as soon as he can, is not evidence to charge him with assets:(1) such admission, said the court, must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a *devastavit* by paying this debt, before others of a higher nature. Or, if an administrator submit to an arbitration respecting the amount of a debt supposed to be due from the intestate, such a submission is not an admission of assets, unless the question of assets be also referred.(2) Nor will an executor admit assets by paying interest on a bond due from the testator:(3) it would be unreasonable, that he should be liable for the whole debt, or by paying a part out of his own funds, or that because he has enough in his hands to pay for the interest, he should be thereby concluded from disputing assets for the principal.

Assets exhausted.

In answer to the proof of assets, the defendant may show, under the issue joined on the plea of *plene administravit*, that he has exhausted the assets, by discharging other debts of the deceased, not inferior in their nature to that of the plaintiff.(4) In an action, therefore, on a judgment recovered against the deceased, to which the defendant pleaded *plene administravit*, and at the trial, the plaintiff did not prove, that the judgment had been docketed, in pursuance of the stat. 4 & 5 W. & M. c. 20, the defendant was allowed to prove payment of bond debts to the extent of the assets;(5) for the statute of W. & M. expressly enacts, that judgments, not docketed in the manner therein mentioned, shall not affect lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of the estates of their ancestors, testators, or intestates; so that all such judg-

(1) *Hindsley v. Russell*, 12 East, 232.

(2) *Pearson v. Henry*, 5 T. R. 6; *Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 453.

(3) *Cleverly v. Brett*, cited by Buller, J., 5 T. R. 8. But it seems that the payment of interest throws the onus of disproving assets on the executor. *Id.* If the executor refers the creditor to another person, for information upon the subject of assets, which that person says is equivalent to an admission by himself (1 Camp. N. P. C. 364), the executor may admit assets by his pleading, or by suffering judgment by default, and will thereby be concluded in proceedings suggesting a *devastavit*. 1 Wils. 259; 1 Salk. 310; 3 T. R. 685; 1 Saund. 335, u.

(4) And the rule is the same where issue is taken on the plea of *plene administravit præter*. *Bl. R.* 1105.

* * See 2 Ann. U. S. Dig. p. 186, 1 Supplement to U. S. Dig. pp. 818, 827, 828, 837; 2 Gr. Ev. § 348, n. c. * *

(An order or decree of the surrogate directing the payment of a sum certain is conclusive upon the executor in an action against him for the money. *Baggott v. Boulger*, 2 Duer (N. Y.) 160; *Ralston v. Wood*, 15 Ill. 159.)

(5) *Hickey v. Haytor*, 6 T. R. 384. Respecting the legal order for payment of debts, see Toller's Law of Executors, b. 3, ch. 2; Com. Dig. Administration, C, 2. Rent for land demised, whether by deed or parol, is regarded as a specialty debt. *Id.*; *Thompson v. Thompson*, 9 Price, 471. Where the person dies in a foreign country, see *Bruce v. Bruce*, 2 Bos. & Pull. 229, n.

ments are put on the footing of simple contract debts. And, for this reason, the defendant in the last cited case might have proved payment of debts on simple contract, as well as debts by specialty. If the action were upon a bond, it seems that the defendant could not prove payment of simple contract debts, under the plea of *plene administravit*, though he may not have had notice of the bond debt; but he ought to plead that such payments have been made without notice.(1) But where the executor had paid all the debts and legacies, after the expiration of the year from the testator's death, and paid over the residuary estate to the residuary legatee, without notice of any other subsisting demand, evidence of these facts was admitted, upon an issue joined on the plea of *plene administravit*.(2) If payments of debts in equal degree have been made, without notice, or if debts of a superior degree have been discharged, after the commencement of the action, this cannot be given in evidence under this plea, in the common form.(3)

If the action is assumpsit, and the debt, which the defendant has paid, is one by simple contract, the creditor himself is competent to prove it: he may also prove his receipt of the money from the defendant. If the action is brought upon a bond of the deceased, and the defendant intends to give evidence of payment of other bond debts in the course of administration of assets, the execution of those bonds ought to be proved in the regular manner, by proof of the sealing and delivery; and if there is a subscribing witness, the bond creditor would not be competent to prove the execution, though he may prove the payment of money upon the bond, and that he delivered it up to the defendant.(4) But if the debt, which has been paid, is a bond debt, and the action against the executor is assumpsit on a simple contract, there, it is said, proof of payment is sufficient without proof of the sealing and delivery of the bond; and the reason given is, that if there is no bond, yet in this action the administration will be good;(5) and in such case, says Mr. Justice Buller,(6) the

(1) See 6 T. R. 388, by Lawrence, J. See *Sawyer v. Mercer*, 1 T. R. 690. Constructive notice of judgments, if docketed, and of other debts of record, is sufficient; but actual notice is required, in the case of other species of debts; such notice need not be by suit. Toller, 292 (6th ed.)

(2) *Chelsea Water Works Company v. Cowper*, 1 Esp. N. P. C. 275; 1 Mod. 174; 3 Mod. 115. As to the proof of due administration in the case of limited administration, see 1 Mod. 174; Latch. 150; *Vackham's Case*, 6 Rep.

(3) *Dyer*, 33 a; Com. Dig. Administration, C, 2; 2 Cro. 9. See 1 Leon. 312; 2 Leon. 60; Salk. 155; Vin. Ab. Ev. P. 6, pl. 3.

(4) In the case of *Kingston v. Grey* (1 Lord Raym. 745), the report states, that "a creditor was admitted by Lord Holt, Chief Justice, to prove his bond, and the debt due upon it, upon *plene administravit*, he having before received of the administrator, and delivered up the bond." This is the whole of the report; from which it does not appear, whether the action against the defendant was assumpsit, or whether debt upon bond; nor does it appear, whether the execution of the bond was attested by a subscribing witness.

(5) *Saunderson v. Nicholle*, 1 Show. 81; Bull. N. P. 143.

(6) Bull. N. P. 143, citing 1 Lord Raym. 745. *Vide supra*, n. 4.

creditor may prove his bond, and the debt upon it, and the payment of it.

The defendant may show, under the plea of *plene administravit*, that he has paid out of his own money to the amount of the value of the assets in his possession, provided he has made the payment in discharge of debts not inferior in their kind to the debt of the plaintiff, and before the commencement of the action.(1) He may also give in evidence a debt of equal or higher degree, due to himself.(2) And he may, under this plea, retain to the amount of the expenses of administering, for which he has made himself personally responsible.(3) But payment to a co-executor, though made for the express purpose of satisfying the plaintiff, is a sufficient defence against the plaintiff's demand.(4)

Executors de son tort.

An executor *de son tort* cannot retain for his own debt, though it may be of a superior nature;(5) but he may prove, under the plea of *plene administravit*, that he delivered over the property of the deceased to the rightful administrator, before the action was brought.(6) And to deprive him of the privilege of retaining, it has been said, that the plaintiff must give the will in evidence, and show who are the rightful executors.(7)

It is usual to plead a retainer of assets specially, and this appears to be necessary where the defendant intends to give in evidence the existence of outstanding debts of a higher nature.(8) With respect to the proof of

(1) Co. Litt. 283 a; Bull. N. P. 140; Jenk. Cent. p. 188; 1 Brownl. 65. *Vide supra*, p. 673.

(2) 1 Will. Saund. 333, n; Plumer v. Merchant, Burr. 1380; Bull. N. P. 141. See Bond v. Green, Brownl. 75; Harry v. Jones, 4 Price, 89.

NOTE 1132.— * * A debt barred by the Statute of Limitations is not a legal demand; and an executor has no right to retain for such a demand due to him personally, although the will direct the payment of all just debts, and the testator was the parent of the executor. Rogers v. Rogers, 3 Wend. 505. Nor can an administrator retain to pay on a contract for the sale of lands, which has been canceled, and thus benefit the intestate's heirs at the expense of his creditors. Harmon v. Durham, 3 Wend. 367. An executor *de son tort* cannot retain for his own debt. Partee v. Caughran, 9 Yerg. 460; Kinnard v. Young, 2 Rich. Eq. 247. And see 1 Suppl. to U. S. Dig. pp. 796, 831; 2 Gr. Ev. § 350, n. Where a party sued in New York, claims to retain money, as the administrator of a deceased person, he must distinctly allege the fact that letters have been granted to him, and the name of the officer by whom they were granted. Beach v. King, 17 Wend. 197. * *

(3) Gillies v. Smither, 2 Stark. N. P. C. 528. It was held not necessary to plead the bill for the expenses, as an outstanding debt.

(4) Crosse v. Smith, 7 East, 246.

* * See 1 Suppl. to U. S. Dig. 831; 1 Ann. U. S. Dig. 189. * *

(5) Curtis v. Palmer, 3 T. R. 587.

(6) 1 Salk. 313; 3 T. R. 590.

(The surrender does not in all cases discharge one has become liable *de son tort*. Morrison v. Smith, Busbee Law, (N. C.) 399.

(7) Bull. N. P. 143. The executor *de son tort* may prove the payment of debts in their order under the plea of *plene administravit*.

(8) Bull. N. P. 141. See Bond v. Green, Brownl. 75. It will be presumed that the securities

such debts, where issue is taken on an averment, that there are not assets except to a particular amount, the substance of the issue is, Whether the assets exceed the amount covered by the debts?(1) Where the judgment or debts, pleaded as outstanding, are upon penalties, the penalties are considered as the debts legally due; but, in a proper form of replication, objection may be taken to the executor insisting on a larger outstanding debt than the amount of the sums secured.(2) Where the plaintiff replies, that a judgment, pleaded by an executor, was obtained, or kept on foot by fraud, he may prove that the judgment has been entered for more than the amount of the debt due; in answer to this, however, the executor may show a mistake in entering up the judgment.(3) A judgment creditor is not a competent witness to prove the fairness of his own debt.(4) If an executor pleads a retainer for his own debt, and also a judgment recovered, or several judgments recovered, or bonds outstanding, the plaintiff will entitle himself to a verdict, by falsifying or avoiding any part of the defendant's plea.(5)

Replication as to time of having assets.

If an executor plead *plene administravit*, and the plaintiff reply that he sued out his original on such a day, and that the defendant had assets then; and the defendant, in his rejoinder, takes issue, that he had not assets then; the plaintiff need not give in evidence a copy of the original, to prove the time of its being taken out, because the defendant admits it by his rejoinder. But if the plaintiff reply assets at the time of exhibiting his bill, namely, on such a day, and conclude his replication to the country, as in such case he may, there, although the plaintiff states his bill to have been exhibited on the first day of the term, yet if, in fact, it was exhibited afterwards, the defendant may take advantage of this on the evidence, so that he shall not be bound for what he paid before.(6) The difference between these two cases, says Mr. Justice Buller, depends solely on the manner of the plaintiff's replying; for, in the first case, the plaintiff alleges the time of suing out the original, as a distinct positive fact, and concludes with an averment; and so the defendant is at liberty

entered into by the testator, were for just debts, unless the contrary be averred in pleading. Bull. N. P. 142.

(1) Moore v. Andrews, Hob. 133; 1 Saund. 333, n.

(2) 1 Saund. 334, n; 3 Lev. 368; Bull. N. P. 141; 5 T. R. 307.

* * See United States v. Hoar, 2 Mason, 312. * *

(3) Pease v. Naylor, 5 T. R. 80; 2 Saund. 50, n. It may be shown that the creditor would have taken less than the sum pleaded, if the executor be proved to have had assets to that amount. Parker v. Atfield, 1 Salk. 312. An executor may confess a judgment, for the express purpose of defeating the action. Tolputt v. Wells, 1 Maule & Selw. 404; Pickstock v. Lyster, 3 Maule & Selw. 375.

(4) Campion v. Bentley, 1 Esp. N. P. C. 343.

(5) Campion v. Bentley, 1 Esp. N. P. C. 343; Salk. 312; Bull. N. P. 142; 1 Saund. 337 a, n.

(6) Bull. N. P. 144.

to take issue, in his rejoinder, on the time of the issuing of the original, or on his having assets; but, in the last case, the defendant has no opportunity of putting in issue the time of exhibiting the bill; but is obliged to join in the issue taken by the plaintiff, that the defendant had assets on the day when the plaintiff exhibited his bill, and the day mentioned in the replication, being alleged under a *videlicet*, is totally immaterial.

The evidence in suits brought against executors and administrators has been considered in the observations on the particular actions before treated of; and particularly the effect of their acknowledgments of debts barred by the Statute of Limitations.(1) The time of limitation, where the deceased dies abroad, begins to run only from the time of obtaining probate or the grant of the letters of administration.(2) It seems that no action of law can be maintained against an executor, for a legacy, or an administrator, for the distributive share of an intestate's property, notwithstanding there is proof of assets, and of an express promise of payment.(3) An action at law lies against an executor to recover a specific chattel bequeathed after his assent to the bequest.(4) A co-obligor in the bond to the ordinary entered into by the administrator, under stat. 22 and 23 Car. II, c. 10, is a competent witness, on his behalf, to prove a tender; for the bare possibility of an action being brought against the witness is no objection to his competency.(5)

(1) *Vide supra*, p. 455.

* * See further, Angell on Limitations, p. 278; 2 Kent C. 416; Index to E. C. L. R. Vol. 37, p. 307; 2 U. S. Dig. 385; Suppl. to U. S. Dig. 822, 823; 1 Ann. U. S. Dig. 267; 2 Id. 183; 2 Gr. Ev. §§ 342, 359, n.; 2 N. Y. Dig. 1030. * *

(The following are some of the later cases involving the right of the executor or administrator to interpose the Statute of Limitations. Perryman, Ex parte, 25 Ala. 79; Wilkinson v. Moore, 27 Mis. (5 Cush.) 61; Ryan v. Jones, 15 Ill. 1; Rutherford v. Lewis, 5 Ind. 530; King v. Tirrell, 2 Gray (Mass.) 331; Allen v. Farrington, 2 Sneed (Tenn.) 526; Stillman v. Young, 16 Ill. 318; Reeves v. Bell, 2 Jones' Law N. C. 254; Rawlings v. Adams, 7 Md. 26; Smith v. Smith, Id. 55; Young v. Mackall, 4 Md. 362.)

(2) Douglas v. Forrest, 4 Bing. 697; Murray v. E. I. Company, 5 Barn. & Ald. 204. With respect to the effect of the letters of administration, as to vesting the property of the intestate by relation, see by Lord Ellenborough, R. v. Horsley, 8 East, 410; by Lord Tenterden, Wooley v. Clark, 5 Barn. & Ald. 746; Com. Dig. Administration, B, 10; 2 Roll. Abr. 554, 615, 25.

* * See the next preceding note. * *

(3) Deeks v. Strutt, 5 T. R. 690; Jones v. Tanner, 7 Barn. & Cress. 544. See Atkins v. King, Cowp. 284; Hawkes v. Saunders, Cowp. 289; Gorton v. Dyson, 1 Bro. & Bing. 219. In Deeks v. Strutt, it was remarked by Grose, J., that in that case there was no evidence of an express promise; as to which, see by Littledale, J., 7 B. & C. 544.

(4) Doe v. Guy, 3 East, 120.

(5) Carter v. Pearce, 1 T. R. 164.

CHAPTER III.

OF EVIDENCE IN ACTIONS AGAINST SHERIFFS.

PREVIOUS to treating of the particular actions which are usually brought against sheriffs, it will be convenient to premise some general observations on the subject of variances, in the statement of the proceedings in which they are concerned, and respecting their responsibility for the acts of their officers.

First, with respect to the subject of variance in actions brought against sheriffs, the distinctions between allegations of matter of substance, and allegations of matter of description, has been before adverted to; and it has been shown, that the former are to be substantially proved, but the latter must be proved literally.(1) Where the pleadings contain irrelevant matter, that need not be proved: but where the allegations are material, and cannot be altogether omitted, there, although they are stated with unnecessary minuteness, they must be supported in evidence, according to the precise manner in which they are set forth.(2)

Where, in an action for an escape, an averment was made of a recognizance of bail having been entered into, before a judge at chambers, on account of the person making the escape, who surrendered, in discharge of his bail, and was thereupon committed, and it appeared, by an examined copy of the record, that the recognizance purported to be taken

(1) *Vide supra*. It has been said that a *scilicet* has a healing effect where the averment is of matter of substance, by Lord Tenterden, and Bayley, J., in *Draper v. Garratt*, 2 Barn. & Cress. 5.

NOTE 1133.—* * In consideration of the onerous and responsible duties of the office of sheriff, he is especially favored by various statutory provisions, in most or all of the states, in respect of the mode of pleading their defence, of costs and of limitations of actions against them. In actions against sheriffs for acts done *virtute officii*, in New York, they may in all cases plead the general issue and give the special matter in evidence, without notice. 2 R. S. 277, § 29. And they are entitled to double costs, where they defend and have judgment upon verdict, demurrer, nonsuit, *non pros.* or discontinuance. Id. 330, § 3. Actions against them for official acts, done or omitted by them, must be brought within three years, except for escapes, which must be brought within one year from the time of the escape. Id. 224, §§ 21, 22. But this does not apply to acts done *colore officii*, as where the officer is guilty of a trespass, and the aggrieved party cannot resort to his official bond. 19 Wend. 283; 13 Id. 35. And see *Fisher v. Pond*, 1 Hill, 672, as to the time when the statute commences to run. And the above distinction between acts done *virtute officii*, and *colore officii*, applies in relation to venue; actions in the former case being local, and in the latter transitory. 2 R. S. 277, § 28; *Fairchild v. Case*, 24 Wend. 381. And where a sheriff is sued for acts done in the execution of process, he may retain his own attorney and conduct the defence, although he is indemnified by the party suing out the process. *Peck v. Acker*, 20 Wend. 605. * *

(The limitation of time prescribed by the code within which actions may be brought against the sheriff, is three years; except as to the action for an escape. Code of N. Y. § 92. The latter action must be brought within one year. § 94.)

(2) By Lord Alvanley, Ch. J.; *Turner v. Fyles*, 3 Bos. & Pull. 461; *Bristow v. Wright*, Doug. 667. See Vol. I.

before the Court of King's Bench, the variance was held fatal; and evidence was not allowed to be given by the filazer's book, that the bail was, in fact, put in before the judge at chambers.(1) Here it was attempted to introduce new matter to prove an indispensable averment. In like manner, in an action brought against the sheriff, upon the st. 8 Anne, ch. 14, for removing goods, without satisfying the landlord his rent, where it was alleged that the *fieri facias*, under which the sheriff seized the goods, issued out of the Court of King's Bench, and it was proved to have issued out of the Court of Common Pleas; it was held, that the seizure and removal of the goods under the writ was the foundation for the action, and that the plaintiff was bound to prove the issuing of it according to his allegation.(2)

Where a former judgment was stated to be for damages for the non-performance of several promises, and the judgment produced appeared in consequence of a remittitur having been entered on all the counts except the first, to be for the non-performance of one promise, the variance was held fatal.(3) Where the declaration stated that the party was "arrested under a writ indorsed for bail, by virtue of an affidavit now on record," but no proof of the affidavit was produced, the plaintiff was nonsuited.(4) And in an action for a false return to a *testatum fieri facias* against the bail, where the declaration stated that the plaintiffs, by the judgment of the court, recovered against the bail a certain sum, which was adjudged by the court; and the proof of this averment was an office copy of the recognizance of the bail, and an office copy of the *scire facias* roll, which concluded in the common form, "therefore it is considered that the plaintiffs have this execution against the bail;" the court held, that this was a

(1) *Bevan v. Jones*, 4 Barn. & Cress. 407.

(Under the present practice, the variance is not deemed material where it does not mislead the opposite party. *Harmony v. Bingham*, 1 Duer R. 210; *Catlin v. Gunter*, 1 Kernan R. 368; Code of N. Y. § 169. The variance is fatal, when the plaintiff fails to prove the cause of action set forth in his complaint, though he succeeds in proving another and different cause of action. *Walter v. Bennett*, 16 New York State (2 Smith), 250. When the action was for the recovery of personal property, *i. e.* a bill of exchange, with damages for its wrongful detention, and the proof was that the defendant, acting as plaintiff's agent, sold certain property, and received for it a draft, which he procured to be discounted and placed to his own credit, no demand of the draft or proceeds having been made of him before suit.)

(2) *Sheldon v. Whitaker*, 4 Barn. & Cress. 758. If the process stated in the pleadings is a *letitat*, in a plea of trespass, and that proved is in trespass *ac etiam*, &c., it will be a ground of nonsuit. *Gunter v. Clayton*, 2 Lev. 85. But an allegation of a writ of *ca. sa.* will be supported by proof of an *alias*. Bull. N. P. 65.

(3) *Edwards v. Lucas*, 5 Barn. & Cress. 658.

(4) *Webb v. Sheriff of Middlesex*, 1 Bos. & Pull. 281; 2 Esp. N. P. C. 671; *Tildar v. Sutton*, Bull. N. P. 66. See *Wilcoxon v. Nightingale*, 4 Bing. 503. When the declaration alleges that the affidavit was made generally, without saying by whom, it is sufficient to prove it by an office copy; though if it were alleged to have been made by the plaintiff, perhaps the original ought to be produced. *Casburn v. Reed*, 2 B. Moore, 60; *Croke v. Dowling*, Bull. N. P. 14. Actions for malicious arrest.

variance between the allegation and the proof: the allegation is, that by the *judgment* of the court the plaintiffs *recovered*; in other words, that the plaintiffs had *judgment to recover*; but the record only proved that they had *judgment of execution*, or, more properly speaking, it is an award of execution.(1)

Where in an action for an escape, the plaintiff, in stating the proceedings previous to the writ of execution, under which the person making the escape had been taken into custody, alleged the issuing of *scire facias*, which he failed to prove, but which was unnecessary, inasmuch as the writ had been issued within a year of the judgment, the variance was held immaterial.(2) And where, in an action for a false return to a *feri facias*, the declaration stated, that the judgment was recovered in a particular term, "as appeared by the record," and the proof was of a judgment in a different term, this was held not to be a material variance; and that the averment, "as appears by the record," was surplusage, and might be rejected.(3) And in an action against the sheriff, for taking insufficient pledges in a replevin bond, a variance in the statement of the names of the suitors before whom the county court was holden, was considered immaterial.(4)

In the case of *Wigley v. Jones*, the declaration alleged, that the party was brought before a judge, by virtue of an *habeas corpus*, and by him committed to the custody of the marshal at the suit of the plaintiff, "as by the *record* thereof, now remaining in the Court of King's Bench manifestly appears;" and in proof of this commitment, the plaintiff produced in evidence the writ of *habeas corpus*, with the *committitur* indorsed thereon, from the office of the clerk of the papers in the King's Bench prison. It was objected, that this was not a record of the court, within any proper sense of the word; but the objection was overruled at the trial, and, as the Court of King's Bench afterwards held, properly overruled; for according to the practice of the court, such writs with the *committitur* indorsed, are never returned, or filed, or kept by the court at Westminster, or elsewhere, but have always remained, as any other warrant naturally would, in the hands of the officer to whom it was directed, as his voucher

(1) *Phillipson v. Mangles*, 11 East, 516.

(2) *Bromfield v. Jones*, 4 Barn. & Cress. 385. The declaration, after alleging the previous proceedings, together with the issuing of the *scire facias*, stated that the writ *thereupon* issued.

(3) *Stoddart v. Palmer*, 3 Barn. & Cress. 2. See *Purcell v. Macnamara*, 9 East, 157; *Phillips v. Shaw*, 4 Barn. & Ald. 435. Where matter of record is insisted on, only by way of inducement, the party insisting on it need not include "*prout patet per recordum*." Co. Litt. 303; *Wate v. Brigg*, 1 Lord Raym. 35.

(4) *Draper v. Garratt*, 2 Barn. & Cress. 2. The case of *Bushey v. Watson* (2 Black. P. 1050), where in an action for a malicious prosecution, the indictment was stated to have been preferred at the *general sessions*, omitting the word *quarter*; and it was held, that where the declaration set out a count which has authority to proceed, it need not exactly copy the style of the count. And see further on the subject of variances in actions against sheriffs, 1 Sid. 5; Bull. N. P. 65; *Hendray v. Spencer*, cited in *R. v. Pippett*, 1 T. R. 235.

and authority: nor can they properly be entered on record, either by themselves, or as part of any other record or proceeding. The allegation, therefore, respecting such a writ, is either an impertinent allegation, and may be rejected as surplusage, or, at any rate, may be considered as not requiring any other proof than what it received by the production of the writ and return, which are *quasi* of record.(1)

(Under the present practice the variance will not be regarded as material, where it does not mislead the opposite party, or does not constitute a failure of proof. The general rules on this subject, which apply to all actions, have been previously noticed.)(2)

Responsibility of sheriff.

With respect to the responsibility of a sheriff for the acts of his inferior officers, it is an established rule, that for all civil purposes, the acts of the under-sheriff, and the sheriff's bailiff, are the acts of the sheriff; and that the sheriff is answerable for a seizure made by his bailiff under the color of a warrant, though the seizure may not be authorized by the warrant and though he has done nothing to recognize the illegal act of his officer.(3)

(1) *Wigley v. Jones*, 5 East, 440. In a previous case of *Turner v. Eyles* (3 Bos. & Pull. 456), it was held, that in an action for an escape out of *execution*, where the commitment is stated to be filed of record, this must be proved. But in the case of *Cooper v. Jones* (2 Maule & Selw. 202), it was said, that the Court of Common Pleas, in the case of *Turner v. Eyles*, were under a mistake as to the practice of filing commitments of record. In the case, however, of *Barns v. Eyles* (2 B. Moore, 565), a recommitment by the court, in execution, upon a *habeas corpus*, was considered as a record, and that it must be so expressly, or, at least, substantially alleged. In *Turner v. Eyles*, as well as in *Wigley v. Jones*, and *Cooper v. Jones*, the commitment was by a single judge.

(2) * * On the subject of variances, see *ante*, note 680; the notes to *Bristow v. Wright*, 1 Smith's Lead. Cas. 329; Vol. I of the text and the notes, tit. *Pleading* in the United States Digest (by Curtis and others), and in the supplement thereto. See also 1 Gr. Ev. §§ 59-66; 3 Stark. Ev. 1525, *et seq.*; 1 Chit. Pl. (5th Am. ed.) 208, *et seq.*, and the cases there cited in the notes. The exercise by the court of its discretion to disregard variances, is not generally subject to be reviewed. *Conover v. Mut. Ins. Co.*, 3 Denio, 254; *Mann v. Herk. Mut. Ins. Co.*, 4 Hill, 187; *Slocum v. Fairchild*, 7 Hill, 292. But see the cases cited *ante*, note 680 as to correcting a clear and manifest error in the exercise of such a discretion. * *

(3) *Ackworth v. Kempe*, 1 Doug. 40; *Saunderson v. Baker*, 2 Bl. R. 832; S. C., 3 Wils. 317; *Cameron v. Reynolds*, Cowp. 403. The sheriff is not liable for the execution of process out of the County Court, in which he is a judicial officer. 1 Mo. & M. 57.

NOTE 1134.—* * An action will not generally lie against an under or deputy sheriff for a breach of official duty. 2 Johns. R. 63; *Paddock v. Cameron*, 8 Cowen, 212. And the sheriff is not amenable for the acts of his deputy, unless they are performed in the ordinary line of his official duty as prescribed by law. *Gorham v. Gale*, 7 Cow. 739. And see *Watson v. Todd*, 5 Mass. 271; *Draper v. Arnold*, Id. 449; *Knowlton v. Bartlett*, 1 Pick. 271; *The People v. Dunning*, 1 Wend. 16; *Walden v. Davison*, 15 Wend. 575; showing that the sheriff is responsible, in the first instance, for the acts of all his subordinate officers, done in the execution of process. And see U. S. Dig. (by Curtis and others), and the supplements, tit. *Sheriff*; 2 Gr. Ev. §§ 580 to 583, and notes. * *

(Where the deputy acts under color of his office, the sheriff is answerable for his trespass. *State v. Moore*, 19 Mis. (4 Bennett) 369. So also the sheriff is answerable for the acts of a special deputy, though the latter is appointed on the nomination of the party for whom he acts, the

The fact of the sheriff having given authority to the bailiff, is best proved by the warrant itself, which, in cases where it has been executed, is usually kept in the custody of the officer. For the purpose, therefore, of having it produced, the officer should be served with a *subpœna duces tecum*; and if it has been returned to the sheriff's officer, which appears to be the usual practice with respect to unexecuted warrants,(1) notice to produce it should be regularly given.(2) A notice, served upon the sheriff, is not sufficient, unless the warrant has been returned.(3) But where it has been returned, it will be sufficient to serve a notice to produce it upon the sheriff's attorney on the record, if the sheriff still remains in office; for the possession of his under-sheriff, is in law identified with his own.(4) After proof of the due service of notice, secondary evidence of the warrant will be admissible.

A written paper, purporting to be a copy of the warrant of execution and delivered as such by the officer at the time of the seizure, is not sufficient to charge the defendant; this is nothing more in effect, than an admission by the bailiff that, he was acting under the warrant of the defendant; but the bailiff is not the sheriff's general officer, as the under-sheriff is, and any statement made by him, as to his acting under the authority of his superior, is not admissible evidence against the sheriff; the warrant itself ought to be produced, as the best proof of the authority.(5) Nor is the bond of indemnity, which the bailiff gives to the sheriff, any proof of his acting under the authority of the sheriff on a particular occasion; for he is not the sheriff's general officer, but he gives a bond, to execute such warrants as shall be directed to him; and when he receives a warrant, he becomes the sheriff's special officer.(6)

There has been much contradiction in the authorities, respecting the effect of the indorsement of the name of a particular officer on the writ returned by the sheriff. It is clear that, if the name of the officer is

nomination being fairly made. *Martin v. Martin*, 2 Jones' Law N. C. 285. So where a person acts for a deputy or bailiff, according to the usual custom, and receives an execution and makes a levy under color of the execution, the sheriff is answerable for the act. *Gregory v. Cotterell*, 34 Eng. Law and Eq. 63. If the execution creditor gives the deputy special instructions, as to sell on credit, and he follows the instructions so given, he thereby becomes the agent of the execution creditor, and the sheriff is not answerable for the acts of his deputy. *Gorham v. Gale*, 6 Cowen R. 467. But if the execution creditor gives the deputy instructions to sell on a particular credit, and the latter does not comply with the instructions given, the sheriff is answerable. *Sheldon v. Payne*, 3 Selden R. 453.)

(1) *Martin v. Bell*, 1 Stark. N. P. C. 415. Executed warrants are usually kept by the officer, for his own justification. *Id.* And see by Gibbs, Ch. J., *Holt's N. P. C.* 219; *Morgau v. Brydges*, 2 Stark. N. P. C. 314.

(2) As to the notice to produce, and the service and proof of such notice, see Vols. I and II.

(3) *Martin v. Bell*, 1 Stark. N. P. C. 415; by Gibbs, Ch. J., in *Hill v. Leigh*, *Holt's N. P. C.* 219.

(4) *Taplin v. Atty*, 3 Bing. 166.

(5) *Drake v. Sykes*, 7 T. R. 113, 116.

(6) 7 T. R. 113, 117.

proved to have been indorsed on the writ by the under-sheriff, or some person connected with the sheriff's office, it will be sufficient evidence of the sheriff's authority to the bailiff to execute the writ.(1) And it seems that the indorsement itself is evidence for this purpose, without showing by whom it was made;(2) especially, if it be proved to be the practice of the sheriff's office, to indorse upon the writ the name of the officer appointed to execute it.(3)

Recognition by sheriff.

Instead of proving the previous authority of the sheriff, by the warrant or indorsement of the writ, if it can be shown that the sheriff, or the under-sheriff (who represents the sheriff in all the business of the office), has recognized the acts of the bailiff, this will dispense with other proof of the bailiff having acted under due authority.(4) Thus, where a paper produced from the sheriff's office, containing as well an order to the officer to give the necessary instructions for making a return to the writ in question, as also his return; this was held to be a clear recognition by the sheriff, of his having authorized the officer to execute the writ.(5) So in the late case of *Martin agt. Bell*,(6) an action against the sheriff for the extortion of a bailiff in taking bail, in which case, a notice was proved to have been served on the sheriff, calling upon him to produce the bail bonds, which had been executed and delivered to the bailiff, and it was further proved that one of these bonds had been returned to the sheriff, upon which he had made his return of *cepi corpus*; Lord Ellenborough held, that this evidence was sufficient to prove the bailiff's agency; the sheriff having, by his return on the bail bond, taken the fruits of the

(1) *Francis v. Neave*, 3 Brod. & Bing. 26.

(2) *Bowden v. Waithman*, 5 B. Moore, 183; *Fermor v. Philips*, 5 B. Moore, 184, n.; 3 Bro. & Bing. 27, n.; *Blatch v. Archer*, Cowp. 63; *M'Neil v. Perchard*, 1 Esp. N. P. C. 263; *Tealby v. Gascoigne*, 2 Stark. N. P. C. 202. See *contra*, *Hill v. Sheriff of Middlesex*, Holt's N. P. C. 217; S. C., 7 Taunt. 8; *Morgan v. Brydges*, 2 Stark. N. P. C. 314; *Jones v. Wood*, 3 Campb. N. P. C. 229; *Martin v. Bell*, 1 Stark. N. P. C. 413.

(3) *Tealby v. Gascoigne*, 2 Stark. N. P. C. 202.

* * The return of a person styling himself deputy sheriff is not *prima facie* evidence of his appointment, in an action against the sheriff. *Slaughter v. Barnes*, 3 A. K. Marsh. 413. And see U. S. Dig. and supplement, by Curtis, tit. *Sheriff*. * *

(The return, though made by the deputy in the sheriff's name, is the act of the sheriff, and when the question comes up directly between one of the parties to the execution and the sheriff, the latter is not permitted to gainsay it. *Sheldon v. Payne*, 3 Selden R. 453; *Haynes v. Small*, 22 Maine, 14.)

(4) *Saunderson v. Baker*, 2 Bl. R. 832; *Jones v. Wood*, 3 Campb. N. P. C. 228. It is, in general, not advisable to call the bailiff to produce the warrant, as he will then be liable to cross-examination, and the suit is, in fact, the suit of the witness. 2 Stark. N. P. C. 315.

* * See Story on Agency, and Paley on Agency (by Dunlap), *passim*, as to the recognition and adoption, generally, of acts done by agents. * *

(5) *Jones v. Wood*, 3 Campb. N. P. C. 228.

(6) 1 Stark. N. P. C. 416. And see *Fairlie v. Birch*, 3 Campb. N. P. C. 397.

arrest by the bailiff, which he could not do, without also adopting his act.(1)

Admission by under-sheriff.

A question has sometimes occurred with respect to the admissibility of statements and admissions by the under-sheriff, or by the sheriff's officer, as evidence against the sheriff. As to admissions by the under-sheriff, the earliest case, usually referred to, is that of *Yabsley v. Doble*,(2) of which the note is as follows: "The question was, if the confession of an under-sheriff of an escape, be any evidence against the high sheriff; and adjudged that it is: for though the sheriff is suable, yet the under-sheriff gives him a bond to save him harmless, and therefore it will all fall upon him; and this confession therefore is good evidence, because in effect it charges himself." This is the whole of the note in the report; in which, it may be observed, many important particulars are entirely omitted; nothing is stated with regard to the circumstances under which the admission is made, or what is more material, as to the time or date of the admission. The report of the case is expressed in such general and broad terms, as to warrant the position, that an admission by the under-sheriff at any period, as to the subject matter of the suit, is evidence against the sheriff. Some observations were made on this case, in *Drake v. Sykes* (3) before noticed, where the question was, whether a written paper, which had been delivered by the bailiff at the time of the execution, as a copy of the sheriff's warrant, could be admitted in evidence against the sheriff, no notice having been given to produce the original warrant: and, in that case, Mr. Justice Lawrence expressed himself in the following terms: "The case in *Lord Raymond* seems to have proceeded on the ground of the indemnity given by the under-sheriff, by virtue of which, his confession was in effect received against himself; and the same argument would also apply to the bailiff. But I do not feel the strength of that argument: it does not follow, that because he charges himself, the sheriff has a remedy over; for perhaps the sheriff may suffer much beyond the extent of the indemnity. The admission of the under-sheriff may affect the high sheriff, because he is the general officer of the sheriff; but I do not think that the bailiff is his general officer." And Lord Kenyon takes the same view of the case, considering the under-sheriff as the general agent, or servant of the sheriff, appointed by him to execute his office. Now, the admission of a general agent, concerning the business intrusted to him has, in several cases, been allowed to be equivalent to the acknowledgment of the principal;(4) and upon this principle, which considers the

(1) By Lord Ellenborough, 1 Stark. N. P. C. 416.

(2) 1 Lord Raym. 190.

(3) 7 T. R. 117.

(4) *Burt v. Palmer*, 5 Esp. N. P. C. 145; *Paletthorp v. Furnish*, 2 Esp. 511, n.

under-sheriff as a general agent identified with the sheriff, an adoption and recognition by the former, as to the acts of the bailiff has been considered as equivalent to a recognition by the sheriff himself.(1)

Admission by bailiff.

The bailiff stands in a different relation towards the sheriff; he is not, like the under-sheriff, the general deputy of the high sheriff for all official purposes; he gives a bond to execute such warrants as shall be directed to him: and when a warrant is granted, he becomes the special officer of the sheriff.(2) The admissions, therefore, of a bailiff, will not affect the high sheriff, like those of the under-sheriff. They are not admissible as evidence of the agency, or of the authority under which he is supposed to act. This was determined in the case of *Drake v. Sykes* (3) before referred to; in which case, the distinction between the admissions of the under-sheriff and those of the bailiff was fully recognized. "The admission of the under-sheriff," said Mr. Justice Lawrence, "may affect the high sheriff, because he is the general officer of the sheriff; but I do not think that the bailiff is his general officer." Nor are the bailiff's representations or admissions under any circumstances admissible, unless in the first instance, the relation between him and the sheriff, in the particular transaction, is clearly proved by other independent evidence, as, by the warrant, or by proof of some recognition of the agency on the part of the sheriff. But when this relation has been proved, such admissions of the bailiff, as form a part of the transaction, in which he represents the defendant, and for which the defendant is responsible, are properly admissible

(1) *Saunderson v. Baker*, 2 Blackst. 832. It is a general rule, that an employer, who adopts the acts of his agent for a moment, is bound by them. See *Ward v. Evans*, 2 Salk. 442; *Smith v. Cologan*, 2 T. R. 189; *Howard v. Bailie*, 2 H. Bl. 618.

* * See tit. *Admission* in Indexes to Vols. I and II; also 2 Gr. Ev. § 180, note 8; 2 Id. § 533, and notes. * *

(The general rule is, that the principal is bound by the declarations of the agent uttered in the transaction authorized. *Barnard v. Henry*, 25 Vt. 289. The fact of agency is to be first proved; after that the declarations of the agent in the business intrusted to him are admissible. *Brigham v. Peters*, 1 Gray (Mass.) 139; *Royall v. Sprinkle*, 1 Jones' Law N. C. 505; *The Trustees of the Wabash and Erie Canal v. Bledsoe*, 5 Ind. 133; *Latham v. Pledger*, 11 Texas, 439. The agency being established, the general rule is that the declarations of the agent bind the principal when they form a part of the *res gestæ*, but not otherwise. *United States v. Martin*, 2 Paine C. C. 68; *Patton v. Meinsinger*, 25 Penn. State R. 393; *Ronk v. Ten Eyck*, 4 Zabr. N. J. 756; *Welsh v. Johnson*, 2 Sneed (Tenn.), 73; *Burnham v. Ellis*, 39 Maine, 319. See *Hunter v. Hudson River Iron & M. Co.*, 20 Barb. N. Y. 493; *Covington and Lexington R. R. Co. v. Ingles*, 15 B. Mon. (Ky.) 637. The case of a contract made by a master of a vessel with seamen forms an exception to the rule. *The Enterprise*, 2 Curtis C. C. 317. But the declarations of a deputy sheriff, made after his agency has terminated, in respect to past transactions, do not bind the sheriff. *Smith v. Bodfish*, 39 Maine, 136. So in respect to declarations made by the agents of a bank, in regard to past transactions. *Franklin Bank v. Cooper*, Id. 542.)

(2) 7 T. R. 116, 117. He will be considered the sheriff's agent, where he was put in bail to prevent the sheriff being fined. *Evans v. Sweet*, 1 C. & P. 277.

(3) 4 T. R. 113, 117.

in evidence against the sheriff. Thus, in the case of *North v. Miles*,⁽¹⁾ an action for a false return of *non est inventus*, where it was proposed to give evidence of an acknowledgment by the bailiff to the plaintiff's attorney, on his inquiring why the writ had not been executed, and this evidence was objected to, Lord Ellenborough ruled, that it was admissible: for, "although the bailiff's general conversation with any indifferent person certainly is not evidence against the sheriff, yet what he said on the occasion, when remonstrated with by the plaintiff's attorney, must be considered as part of his act touching the execution of the writ, for which the defendant is responsible." And in the case of *Bowsher v. Challey*,⁽²⁾ which was an action for an escape, Lord Ellenborough held, that what the bailiff had said, respecting his custody of the debtor, while he had the debtor in custody, must be considered as part of the act for which the defendant was responsible, and, therefore, strictly admissible in evidence. Thus, then, it appears that the admissions of the bailiff, who is proved in the particular transaction to have acted under the authority of the sheriff, are received in evidence upon the same footing as the admissions of any other agent.

Declarations of agent.

On the general subject of the admissibility of statements made by an agent, the judgment of the late master of the Rolls, in the case of *Fairlie v. Hastings*,⁽³⁾ is so clear and comprehensive, that nothing can be added or taken from it, without hurting its effect. "As a general proposition," Sir William Grant said, "what one man says not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly within the scope of his authority, bind his principal by his agreement, and, in many cases, by his acts. What the agent has said, may be what constitutes the agreement of the principal, or the representations or statements made by him may be the foundation or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted, to prove that the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business, in which the person, making that assertion, was employed as

(1) 1 Campb. N. P. C. 389. The same point was ruled by Heath, J., in *Nelson v. Sir W. Heron*, Linc. Sum. Ass. 1809.

(2) 1 Campb. N. P. C. 391.

(3) 10 Ves. 123. Judgment of Sir William Grant.

agent. The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting anything which any person has asserted as to him, as to his conduct or his agreement, merely because that person has been his agent. If any fact material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion.”(1)

The order in which it is proposed to treat of the clause of actions against sheriffs, is first, to consider the action for taking the plaintiff's person or goods in execution; secondly, the action for not arresting a debtor; thirdly, the action for taking insufficient pledges; fourthly, the action to recover money levied; fifthly, the action for taking the goods of a tenant in execution, without paying the arrears of rent; sixthly, the action for an escape on mesne process; seventhly, the action for an escape in execution; eighthly, the action for an extortion of the bailiff; ninthly and lastly, the action for a false return.

First, of an action for the taking the plaintiff's person or goods.(2)

Action for illegal seizure.

One of the most common actions against a sheriff, is an action for the seizure of the plaintiff's person or his goods, under a writ of execution issued against a third person. The points to be proved, in this action, are the taking by the defendant, and, in the case of a seizure of goods, the plaintiff's property in them; and, lastly, the connection or relation between the defendant and the bailiff in the particular transaction, which is the subject of the action. The last point has already been the subject of discussion.(3)

(1).NOTE 1135.—* * As to admissions and declarations by agents, see *supra*, Vol. I, and notes; by under-sheriff, bailiff, guardian, &c., Id. and notes. Where the deputy is bound by the record, his admissions are evidence against the sheriff; and the record concludes him, both as to the facts it recites, and the amount of damages, where he has been notified of the action and required to defend it. When not so bound by the record, his declarations are not admissible except as part of the *res gestæ*. The declarations of a creditor, who has indemnified the sheriff, are in like manner admissible, on the ground of identity in interest. In addition to the cases cited *supra*, Vol. I, and also in the text, see *Snowball v. Goodricke*, 4 B. & A. 541; *Jacobs v. Humphrey*, 2 C. & M. 413; *S. C.*, 4 Tyrwh. 272; *Mott v. Kip*, 10 Johns. R. 478; *Mantz v. Collins*, 4 H. & M'Hen. 216; *Proctor v. Lainson*, 7 C. & P. 629. * *

(2) NOTE 1136.—* * For the learning relating to attachments of the person, for contempts, see the great cases of *Yates v. Lansing*, 5 Johns. R. 291; *Stockdale v. Hansan*, 9 Ad. & El. 1; and impeachment of Judge Peck, *passim*. A ministerial officer is protected in the execution of process, regular and legal on its face, though he has knowledge of facts rendering it void for want of jurisdiction. *The People v. Warren*, 5 Hill, 440. See *Watson v. Watson*, 9 Conn. R. 140; *Webber v. Gay*, 24 Wend. 485; *Cornell v. Barnes*, 7 Hill, 35, and the learned notes by the reporter, Id. pp. 36–39. But he is not bound to serve the process. *Earl v. Camp*, 16 Wend. 567, 568, and the cases there cited; *M'Donald v. Bunn*, 3 Denio, 46. * *

(3) *Vide supra*, p. 682.

Proof of seizure.

With respect to the proof of the seizure, it is sufficient for the plaintiff to give in evidence the warrant issued by the under-sheriff, under the sheriff's seal of office, without proving on which the warrant is founded; it will be presumed, that the seal was properly affixed, unless evidence to the contrary was adduced; and if the under-sheriff has improperly issued the warrant without having received a writ, upon which it purports to be founded, the defendant may prove that as an answer to the plaintiff's case.(1) A bill of sale, executed by the sheriff, which recites the writ and seizure, is also evidence of the taking.(2)

The sheriff will not be allowed to justify the seizure of a person, or of the goods of a person, who is wrongly named in the writ.(3) But there is a distinction, in this respect, between mesne and final process, as, in the latter case, the party is estopped by the judgment, from denying the name by which he has been sued.(4) His own admissions will also, in some cases, have the same effect.(5) The sheriff is liable, in an action of trover, for taking the goods of a bankrupt, though he had no notice of the bankruptcy, and a commission has not been sued out at the time of the execution.(6)

Defence. Fraudulent assignment.

One of the most common defences to this action is, that a third person against whom the execution issued, had fraudulently assigned his effects to the plaintiff, for the purpose of defeating the execution creditor. The

(1) *Gibbons v. Phillips*, 7 Barn. & Cress. 535, n; *Grey v. Smith*, 1 Camp. 387.

(2) *Woodward v. Larkin*, 3 Esp. N. P. C. 286. The authority of the under-sheriff to execute the bill of sale, will be implied, *supra*, p. 616; *Doe v. Brawn*, 5 Barn. & Ald. 243.

(3) *Shadgett v. Clipson*, 8 East, 328; *Cole v. Hindson*, 6 T. R. 634; *Scandover v. Warner*, 2 Camp. 270; *R. v. Sheriff of Surrey*, 1 Marsh. 75, where the sheriff returned that he "had taken A. B. sued by the name of C. B."

(4) *Reeves v. Slater*, 7 Barn. & Cress. 487; *Gould v. Barnes*, 3 Taunt. 488.

(5) *Price v. Harwood*, 3 Camp. N. P. C. 108. See *Morgan v. Brydges*, 2 Stark. N. P. C. 314.

(6) *Price v. Helyar*, 4 Bing. 597; *Lazarus v. Waithman*, 5 B. Moore, 313. See *Smith v. Miles*, 1 T. R. 475; *Cooper v. Chitty*, 1 Burr. 20; *Potter v. Starkie*, cited in *Stephens v. Elwall*, 4 Maule & Selw. 259. It appears that *trespass* cannot be sustained against the sheriff in such a case (1 T. R. 475), and that payment of the money to the execution creditor would be a defence in an action for money had and received. *Lee v. Lopes*, 15 East, 230. It has been said, that to make the taking amount to a conversion by the sheriff, the goods ought to have been removed. By Lord Ellenborough, *Wyatt v. Blades*, 3 Campb. N. P. C. 396. It is necessary to make a demand on the sheriff. Bull. N. P. 41. The sheriff is not entitled to notice, when he distrains for taxes, under statute 48 G. III, c. 141. 1 Bing. 369.

NOTE 1137.— * * And see *Acker v. Campbell*, 23 Wend. 372, where the sheriff was held liable in replevin, to the owner of goods fraudulently purchased of the plaintiff, for taking them from the fraudulent purchaser on an execution against him, upon the supposition that they were his property. *Ash v. Putman*, 1 Hill, 311, S. P. And see the English and American notes to the leading case of *Armory v. Delamirie*, 1 Smith's L. Cas. 151, *et seq*; *Balme v. Hutton*, 1 Crompton & Meeson, 262; S. C., 9 Bingham, 471. And see *ante*, note 1125. * *

defendant, in such a case, will have to prove the writ, which issued against the debtor, and produce also an examined copy of the judgment, upon which the writ was grounded.(1) The writ, of itself, without proof of the judgment, is not sufficient evidence, unless where the action is brought by the person against whom the writ of *feri facias* issued, in which case, proof of the judgment will not be necessary; for though a judgment may be inferred from the *feri facias*, as between the parties to that suit, yet it cannot be so inferred against a stranger. It seems, however, that if the plaintiff, claiming under the fraudulent assignment, has never been in possession of the goods seized, he will fail in showing a right to recover, although the defendants are not prepared with a copy of the judgment, and, where the action is in trespass, although they have not pleaded the judgment or writ.(2)

With respect to the proof of fraud, which will vitiate an assignment of property made for the purpose of defeating the claims of creditors, it appears from the authorities, that where an assignor, who is in embarrassed circumstances, remains in possession of the property assigned, it has always been considered a circumstance of great suspicion.(3) But, it does not

(1) *Lake v. Billers*, 1 Lord Ray. 733; *Martin v. Podger*, 5 Burr. 2632; *Ackworth v. Kempe*, Doug. 40; 2 Bl. 1104; *Glasier v. Eve*, 1 Bing. 209.

(2) See *Martin v. Podger*, 5 Burr. 2633.

(3) St. 13 Eliz. ch. 5; *Twyne's Case*, 3 Rep. 80; *Edwards v. Harben*, 2 T. R. 587; *Wordall v. Smith*, 1 Campb. N. P. C. 312; *Hodgson v. Newman*, cited in *Holbird v. Anderson*, 5 T. R. 238, where the possession was merely colorable.

NOTE 1138.— * * Retaining possession of property, after selling or mortgaging it, has always been a badge of fraud, as between the debtor and his creditors, since the decision of *Twyne's Case*, 3 Coke, 80. The cases are well collected in the English and American notes to *Twyne's Case*, 1 Smith's L. Cas. 29-60, to which the learned reader is referred for an ample discussion and illustration of the point in the text. In New York, fraud is no longer a conclusion of law from such possession; it is a question of *intent* for the jury. *Hoe v. Acker*, 23 Wend. 653; *Barker v. Van Wyck*, 1 Hill, 438; *Prentiss v. Slack*, Id. 467; *Cole v. White*, 26 Wend. 511; *Hanford v. Archer*, 4 Hill, 273; *Butler v. Miller*, 1 Comstock, 496. But if no consideration is shown for a bill of sale (where the possession continues in the vendor), fraud is a conclusion of law. *Tift v. Barton*, 4 Denio, 171. And see *Connagh v. Sedgwick*, 1 Barb. S. C. R. 210. In 1833, a law was passed in New York (2 R. S. 136), requiring personal mortgages to be filed, and making them absolutely void as against creditors and purchasers, if not filed, unless there was an immediate and continued change of possession, under the mortgage. See *Seymour v. Lewis*, 19 Wend. 515; *Benedict v. Smith*, 10 Paige, 126. The cases upon the point in the text, decided in the other state, and in the federal courts, are referred to in the notes to *Twyne's Case*, cited *supra*. * *

(The question of fraudulent *intent* is one of fact, and not of law. *Ames v. Blunt*, 5 Paige, 13; *Goodrich v. Downs*, 6 Hill R. 438; 4 Barb. 546. But an assignment of property to pay debts with power to revoke the same, is illegal, is fraudulent on its face. *Riggs v. Murray*, 2 John. Ch. 565; S. C., 15 John. 571. So, reserving a power to give future preferences renders the assignment void. *Hyslop v. Clarke*, 14 John. 458; *Boardman v. Halliday*, 10 Paige, 223; *Averill v. Jousks*, 6 Barb. 470. Giving the assignee such a power, or a power to compound with any or all of the creditors, renders the assignment illegal. *Barnum v. Hempstead*, 7 Paige, 568; 10 Id. 223; *Wakeman v. Grover*, 4 Id. 41; S. C., 11 Wend. 187, 203. So an assignment authorizing the assignee to sell on credit, is void. *Nicholson v. Leavitt*, 2 Selden (N. Y.) 510. So is

appear from other facts in the case, that this takes place under a fraudulent arrangement between the parties for the purpose of delaying creditors, it is not of itself a conclusive badge of fraud.(1) In several cases, where goods have been seized under an execution, and *bona fide* sold, and the buyer has suffered the debtor to continue in the possession of the goods, they have been protected against subsequent executions, the circumstances under which he has had possession, being known in the neighborhood.(2) And the circumstances of the possession of the debtor being consistent with the terms of the assignment, and of the terms being known at the time, to the person who afterwards becomes the execution creditor, are grounds for repelling the imputation of fraud.(3)

A preference given to a particular creditor, by confessing a judgment to him, on which execution is levied, or an assignment by a person, for the benefit of his general creditors, is not fraudulent, though it may have been given with a view of defeating a particular execution.(4) A similar rule, it has been noticed, prevails in the case of executors, where the debts are of equal degree; and, in transactions *inter vivos*, there is no distinction, in this respect, between judgment and simple contract creditors.(5)

For the purpose of proving that an assignment has been made with a design of defrauding creditors, the declarations of the party, at the time of his signing and executing the instrument, are admissible in evidence, as part of the transaction, against the plaintiff claiming under him; but declarations which he has made at any other time, cannot be received.(6)

an assignment that relieves the assignee from all liability that does not happen by his gross negligence or willful misfeasance. *Litchfield v. White*, 3 Selden, 438.)

(1) By Lord Tenterden, C. J., *Eastwood v. Brown*, 1 Ry. & M. 313; by Lord Ellenborough in *Hoffman v. Pitt*, 5 Esp. N. P. C. 25; *Benton v. Thornhill*, 7 Taunt. 149; *Prec. in Chanc.* 287; 1 Campb. N. P. C. 334, n.; 1 Bro. & Bing. 512. * * See *ante*, note 1138. * *

(2) *Latimer v. Batson*, 4 Barn. & Cres. 652; *Kidd v. Rawlinson*, 2 Bos. & Pull. 59; *Leonard v. Baker*, 1 Maule & S. 251; *Watkins v. Birch*, 4 Taunt. 833; *Joseph v. Ingraham*, 8 Taunt. 838.

* * See *ante*, note 1138. * *

(3) *Wooderman v. Baldock*, 8 Taunt. 676; *Steel v. Parry*, 1 Taunt. 381; by Buller, J., *Edwards v. Harben*, 2 T. R. 595. It has been said, that the rule, respecting the retaining of goods assigned being a badge of fraud, applies only to assignments made to a creditor. By Lord Eldon in *Kidd v. Rawlinson*, 2 Bos. & Pul. 60. See by Lawrence, J., in *Steel v. Parry*, 1 Taunt. 382.

* * See *ante*, note 1138. * *

(4) NOTE 1139.— * * S. P., *Waterbury v. Sturtevant*, 18 Wend. 553, in error. On the subject of assignments for the benefit of creditors, and the conditions which constitute them valid or void as against creditors, see the cases collected in 1 Am. L. Cases, pp. 69–85. Also *Connagh v. Sedgwick*, 1 Barb. S. C. R. 210. See also, *Jackson v. Cornell*, 1 Sandf. Ch. R. 348, where an assignment of individual property, preferring copartnership creditors, was held to be fraudulent and void as against the individual creditors of the assignor. * *

(5) *Holbird v. Anderson*, 5 T. R. 238; *Meux v. Howell*, 4 East, 1; *Pickstock v. Lyster*, 3 Maule & Selw. 371; by Richards, C. B., 3 Price, 16.

(6) *Phillips v. Eamer*, 1 Esp. N. P. C. 367; *Pen v. Schooley*, 5 Id. 243.

(See also *Head v. Halford*, 5 Rich. Eq. 128; *Stewart v. Redditt*, 3 Md. 67; *Garland v. Harrison*, 17 Mis. (2 Bennett) 282. The rule is well settled in New York that the declarations of the owner of a chose in action are not admissible to affect the rights of one subsequently deriving

The person against whom the execution issued, is not a competent witness on the part of the defendant to prove the goods his property. (1)

2. Action for not arresting.

2. Another kind of action against the sheriff is for not arresting a debtor. The declaration in this case, after stating in general terms the plaintiff's cause of action against his debtor, the process issued for the recovery of the debt, and the delivery of the writ or the precept to the sheriff, proceeds to aver that the sheriff had notice of the debtor's being in his bailiwick, between the delivery and the return of the writ. (2)

First, then, the cause of action must be proved as averred. (3) And it has been held, that whatever evidence would be sufficient to charge the original party, in a suit against him, will also be admissible in this action as evidence against the sheriff. Thus, in the case of *Sloman v. Herne*, (4) an acknowledgment by the party that the money had been paid on his account by the testator of the plaintiff, was admitted; and in two other cases, (5) where the debt arose on a bill of exchange, an acknowledgment by the party (the drawer of the bill) of having received notice of its dishonor, was held to be sufficient evidence of that fact.

Secondly, as to the proof of the process issued:—if the writ has been returned and filed, an examined copy of the writ and of the return will be the best evidence of the issuing and delivery of the process. If the writ has not been returned as regularly as it ought to be, the plaintiff will have to establish that fact by proof of the requisite search at the treasury; and, after proving the delivery of the writ to the under-sheriff, or at the sheriff's office, and a notice to the defendant's attorney to produce the original, secondary evidence of the process will be admitted.

Thirdly, as to the notice to the sheriff; some proof of the sheriff's having had an opportunity to arrest the debtor will be necessary; as that the debtor appeared in public, in the sheriff's bailiwick, after the delivery

title from him. *Paige v. Cogwin*, 7 Hill R. 361; *Stark v. Boswell*, 6 Id. 405; *Beach v. Wise*, 1 Id. 612; *Whitaker v. Brown*, 8 Wend. 490; *Kent v. Walton*, 7 Id. 256; *Booth v. Swezey*, 4 Selden R. 276. Where there is a privity of interest between the former owner and the party to the suit, as where the party to the suit sues or defends as administrator of the person whose declarations are offered in evidence, the evidence is admissible. Per Denio, J., in *Brown v. Mailler*, 2 Kern. 118. But the declarations of an assignor, for the benefit of creditors, made prior to the assignment are not admissible. *Jones v. East Society M. E. Church of Rochester*, 21 Barb. 161.)

(1) *Bland v. Ansley*, 2 N. R. 331. See Vol. 1, *res gesta*.

(2) * * If the sheriff relies upon vague information, and do not go to the residence of the party to serve his process, he incurs the peril of being answerable for a false return. *Hinman v. Borden*, 10 Wend. 267. And he is bound to serve process notwithstanding a claim of privilege, *Willard v. Sperry*, 1 Wend. 32. * *

(3) *Gunter v. Clayton*, 2 Lev. 85; *Alexander v. Macauley*, 4 T. R. 611; *Barker v. Fenn*, 2 Esp. N. P. C. 476. *Vide infra*, *Action for escape*.

(4) 2 Esp. N. P. C. 695.

(5) *Gibbon v. Coggon*, 2 Camp. 188; *Williams v. Bridges*, 2 Stark. N. P. C. 42.

of the process, and that this was known to the under-sheriff or sheriff's officer, to whom the warrant was directed. The sheriff is bound to execute the process of the law in the most effectual manner; and it is the duty of the bailiff to use all means in his power to search and make the arrest. If the person against whom the plaintiff had a writ does not abscond, but continues in his daily occupation, and appears publicly as usual, and the bailiff neglects to arrest him, the sheriff is responsible.(1) A notice to the under-sheriff's agent in London, respecting the place where the debtor is to be found, will not be a sufficient notice to the sheriff;(2) such person cannot be considered the agent of the sheriff for the purpose of receiving the notice, his functions being of a nature entirely different.

The sheriff's officer, who has given security for the due execution of the process, is not a competent witness for the sheriff to prove that he endeavored to make the arrest;(3) for the verdict in this action against the sheriff might be given in evidence, in a subsequent action brought by him against the bailiff, as to the quantum of damages sustained by the sheriff in consequence of the officer's neglect. The declarations of the bailiff, upon inquiry being made of him by the plaintiff's attorney, before the return of the writ, of his reasons for not executing it, are evidence against the sheriff.(4)

3. Action for taking insufficient pledges.

3. Another action against the sheriff is for taking insufficient pledges in replevin. On the subject of replevins in general, the stat. of Westm. 2, c. 2, provides that sheriffs or bailiffs shall receive pledges for the pursuing of the suit, and for the return of the goods taken, if the return be awarded; and, in the particular case of a replevin for rent, the stat. 11 G. II, c. 19, § 23, enacts that all sheriffs, and other officers having authority to grant replevin, shall, in every replevin of a distress for rent, take from the plaintiff, and two responsible persons, as sureties in their own names, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded before any deliverance be made of the distress. The statute then proceeds to require an assignment of the replevin bond by the sheriff.

In an action against the sheriff, for taking insufficient sureties in a

(1) *Beckford v. Montague*, 2 Esp. N. P. C. 474. The plaintiff is entitled to nominal damages though the party is arrested on the day after the return of the writ. *Barker v. Green*, 2 Bing. 317.

(2) *Gibbon v. Coggon*, 2 Campb. N. P. C. 189.

(3) *Powell v. Hord*, 2 Lord Raym. 1411. An assistant employed by the sheriff's officer, is a competent witness for the defendant, without a release. *Clarke v. Lucas*, 1 Ry. & Mo. 32.

(4) *North v. Miles*, 1 Campb. N. P. C. 389.

* * As to the declarations which are admissible as part of the *res gestæ*, see *ante*, note 1135. * *

replevin for rent,(1) the common form of declaration states the taking of the distress, the delivery of the distress by the sheriff to the party distrained upon, the plaint of the party in the sheriff's court, the proceedings in the court below,(2) and the subsequent default of the party. It then proceeds to aver; that the sheriff, before delivering the distress, took a bond from the party, with two sureties, which sureties were not sufficient for the purpose; and concludes with averring that the distress has not been returned, nor the rent paid.(3)

The fact of the replevying of the distress, therefore, is to be proved; and the best proof of the fact that the goods were replevied by order of the sheriff is the original precept to deliver. For this purpose, a writ of *subpoena duces tecum* should be served on the bailiff; and in case he may have returned the precept to the sheriff's office, a notice should also be served on the defendant's attorney to produce it at the trial.(4) A recognition of the bailiff's act on the part of the defendant will have the effect of dispensing with such proof.(5)

With respect to the proof of the replevin bond, it has been held, that,

(1) The measure of damages against the sheriff, in this action, is double the value of the goods distrained; and to that amount his responsibility is limited. See *Evans v. Brander*, 2 H. Bl. 547, which is later than the case of *Yeo v. Lethbridge*, 4 T. R. 433, or than *Concanen v. Lethbridge*, 2 H. Bl. 36, and was approved of in *Baker v. Garrat*, 3 Bing. 60. The expenses of proceedings against the sureties cannot be recovered, unless notice has been given to the sheriff of an intention to sue them. 3 Bing. 60. When the action is brought against the sheriff, for the insufficiency of one of the sureties, the jury cannot, in their verdict, exceed the value of the goods. *Scott v. Waithman*, 3 Stark. N. P. C. 171.

(2) Respecting variances in the statement of the proceedings of the court below, *vide supra*.

(3) NOTE 1140.—* The statute 23 Hen. VI, c. 10, which regulates the taking of bail, has always been recognized as common law in the United States. The statute authorizes the sheriff to take sureties; but being for his benefit, he may take a bond with only one surety. 2 Saund 61 d, n. 5, by Williams. If he take but one, he is responsible for his solvency, at all events. *Long v. Billings*, 9 Mass. 479; *Rice v. Hosmer*, 12 Mass. 129, 130; *Glezen v. Rood*, 2 Metc. 490. Where the sheriff takes the requisite number of sureties, he may avoid his liability for their insufficiency by showing that they were apparently responsible and in good credit when taken; or that he exercised a reasonable discretion in holding them to be sufficient: of which the jury are to judge. See the cases cited in the text. It is not necessary before suing the sheriff, to proceed against the bail, but their insufficiency may be proved by any competent evidence at the trial. *Young v. Hosmer*, 11 Mass. 89. And he is liable to the plaintiff for accepting a forged bond, though he believed it to be genuine. *Marsh v. Bancroft*, 1 Metc. 487.

The mode of taking sureties and bail, in replevin, is regulated by statute in New York. 2 Burrill's (N. Y.) Practice, pp. 5—11. If the requisitions of the statute are not complied with by the sheriff, he is liable. And if security and bail be taken by him, as required, and they are not excepted to within the prescribed period, his liability for their insufficiency ceases, and he holds the replevin bond for the benefit of the defendant, and the bail bond for the benefit of the plaintiff. * *

(Under the New York Code, the provisions of the chapter on the "claim and delivery of personal property," are substituted in the place of the former action of replevin. §§ 206—216; *Roberts v. Randall*, 5 How. Pr. 327; *Rockwell v. Saunders*, 19 Barb. 481.)

(4) *Vide supra*.

(5) *Vide supra*.

where the replevin bond has been assigned to the plaintiff, it is unnecessary to give any evidence of the execution of it by the sureties;(1) and in a case where the bond was produced by the sheriff in consequence of a notice, it was held unnecessary to prove its execution by the attesting witness.(2)

Having shown, by the replevin bond, who are the sureties, some proof of their insufficiency must be produced by the plaintiff; but it is reasonable that slight proof should be allowed to cast the burden of proof on the defendant, who must be supposed to know the sureties, and who ought to have taken care of their sufficiency.(3) For all evidence, as was observed by Lord Mansfield, is to be weighed according to the proof which it is in the power of the one side to produce, and in the power of the other to contradict.(4) In proof of the insufficiency of the circumstances of the sureties, it is good evidence to show that they were in debt, and had been applied to for payment, and had broken promises to pay.(5) Although the sureties appear to the world as persons of responsibility, yet, if either of them are known by the sheriff not to be responsible, from the circumstance of writs passing through his hands, or other reasons, or, if having the means in his power of informing himself upon the subject, the sheriff neglects to use them, then, notwithstanding appearances, he is responsible, in the event of the surety being in reality insufficient.(6)

The sheriff is, in general, justified in taking a person as a surety who appears to the world as a person of responsibility.(7) And the sheriff will, in such case, not be liable, though the party may have been recently a bankrupt, and though the sheriff may not have made personal inquiries upon the subject of his credit.(8) It seems, that, where the party does not reside in the bailiwick of the sheriff, it is proper to search the sheriff's office where he does reside, in order to ascertain whether any process has been sued out against him before the bond is taken.(9)

(1) *Barnes v. Lucas*, 1 Ry. & Mo. 264.

(2) *Scott v. Waithman*, 3 Stark. N. P. C. 168. See Vol. II. It appeared that on inquiry made, whether a replevin bond had been executed, the original bond was shown to the plaintiff, and a copy delivered to him.

(3) *Sanders v. Darling*, Bull. N. P. 60.

(4) *Blatch v. Archer*, Cowp. 65.

(5) *Gwillim v. Scholey*, 6 Esp. N. P. C. 100.

(6) *Scott v. Waithman*, 3 Stark. N. P. C. 168.

(The bond or undertaking must be taken in the manner prescribed by the statute, so that the party entitled to except to its sufficiency may have an opportunity to take his exception. If the sheriff takes sham security that fails to justify, and acts upon it, he will be liable. *Manley v. Patterson*, 3 Code Rep. 89. See provisions of N. Y. Code §§ 206—217.)

(7) *Hindle v. Blades*, 5 Taunt. 225; by Lord Tenterden, 3 Stark. N. P. C. 170.

(8) 5 Taunt. 227, where it was said, that under the circumstances, it was not necessary for the sheriff to make inquiries; *Sutton v. Waite*, 8 B. Moore, 27, where inquiries were made by a person known to the sheriff.

(9) *Sutton v. Waite*, 8 B. Moore, 27.

General reputation is admissible in evidence to show the opinion of the neighborhood respecting the credit of the sureties.(1) What either of the sureties has said about the time of his executing the bond, in answer to applications by creditors for the payment of debts (such as frequent promises to pay, which promises he had as frequently broken), have been held admissible evidence on this subject, the fact in issue being as to the fitness or unfitness of the sureties.(2) The sureties themselves are competent witnesses to prove whether they were, or were not, sufficient.(3)

4. Action to recover money levied.

4. In an action of assumpsit against the sheriff, to recover money levied under a writ of *feri facias* at the plaintiff's suit, the plaintiff will have to prove the taking and selling of the goods, and the connection between the bailiff and the defendant. These facts are established most satisfactorily by proof of an examined copy of the writ, and of the defendant's return upon it, that so much had been levied;(4) or it would be sufficient to prove, in addition to the proof of the sale, that the bailiff who took the goods in execution acted under the sheriff's warrant;(4) or that a writ of *feri facias* was directed to the defendant as sheriff, and delivered at the sheriff's office.

After proof of the writ of *feri facias*, and the sheriff's return that he had levied, it will not be necessary for the plaintiff to prove a demand of payment previous to the commencement of the action:(5) the defendant might have a good ground for relief, on application to the court above (stating that he had been always ready to pay over the money, and that a notice to this effect had been given to the plaintiff's attorney),(6) but this is not a sufficient defence at the trial of the cause. Upon the sheriff's return, the sum levied is money had and received by the sheriff to the plaintiff's use; and, as the money has not been tendered to him, the plain-

(1) *Scott v. Waithman*, 3 Stark. N. P. C. 168.

(2) *Gwillim v. Scholey*, 6 Esp. N. P. C. 100.

(3) 1 Saund. 195 f, in note; *Hindle v. Blades*, 5 Taunt 225.

(4) *Dale v. Birch*, 3 Campb. N. P. C. 347; *Wilson v. Norman*, 1 Esp. N. P. C. 154, where it was held not sufficient to prove, that the person seizing the goods, was reputed to be the sheriff's officer. And see *Cook v. Palmer*, 6 Barn. & Cress. 739, where the sheriff's officer was considered to have acted as agent for the plaintiff. It seems, that the action cannot be sustained unless the sheriff has been ruled to return the writ. *Moreland v. Leigh*, 1 Stark. N. P. C. 386.

(The sheriff is liable for money received by him on an execution after the expiration of the term of his office. *Hamilton v. Ward*, 4 Texas, 356. And the sheriff's return that he has collected the money on the execution, renders him liable therefor, though he in fact took payment in something else. *Tiffany v. Johnson*, 27 Miss. (5 Cush.) 227.)

(5) *Dale v. Birch*, 3 Campb. 347; *Longdill v. Jones*, 1 Stark. N. P. C. 345.

(6) *Jefferies v. Sheppard*, 3 Barn. & Ald. 696.

(Where the action is brought against the sheriff for a failure to return, he is *prima facie* liable for the amount directed to be levied. *Ledyard v. Jones*, 3 Selden R. 550. The statute requires him to return the execution. *Wilson v. Wright*, 9 How. Pr. 460.)

tiff has strictly a right to bring an action for recovering it, without any previous demand of payment.(1)

The return of the sheriff, upon the writ directed to him, is conclusive against him. It is also *prima facie* evidence of the facts stated in the return, against a third person, a stranger to the sheriff; for, as was said by Lord Ellenborough in the case of *Gyfford v. Woodgate*,(2) "faith is to be given to the official act of a public officer, like the sheriff, even where third persons are concerned." The return on the writ, therefore, is evidence of this fact, that the money has been levied; but there the return closes, and the evidence likewise; the sheriff's return affords no proof, with respect to the subsequent disposition of the money, nor can it be presumed, that the money has been paid over to the judgment creditor, who sued out the execution.(3)

(1) *Dale v. Birch*, 3 Campb. 347; *Longdill v. Jones*, 1 Starkie, N. P. C. 345.

NOTE 1141.—* * *S. P.*, *Wilder v. Bailey*, 3 Mass. 294, 295; *Rogers v. Sumner*, 10 Pick. 387; *Crane v. Dygert*, 1 Wend. 534; *Armstrong v. Gerron*, 6 Cowen, 465; *Lillie v. Hoyt*, 5 Hill, 395. See also *Brewster v. Van Ness*, 18 Johns. R. 133; *Morland v. Pellatt*, 8 B. & C. 722, 725, 726, per Bayley, J.; *Green v. Lowell*, 3 Greenl. 373. The sheriff, in an action for money received by his deputy on erroneous process, cannot avail himself of the defect in the process, it having been received *colore officii*. *The People v. Dunning*, 1 Wend. 16. But where he has been sued and a recovery had against him, for selling the property out of which the money was made, which recovery exceeds or equals the amount in the execution, an action does not lie against him. *Newland v. Baker*, 21 Wend. 264. Where the sheriff retains money collected by him before the return day of the execution, he is chargeable with interest after the return day. 4 Wend. 675. * * (*Nelms v. Williams*, 18 Ala. 605.

The sheriff cannot contradict the return of his deputy showing that the money on the execution has been collected (*Sheldon v. Payne*, 3 Selden, N. Y. 453); nor can the return be varied by parol evidence. *Huntress v. Tiney*, 39 Maine, 237; *Sutton v. Allison*, 2 Jones' Law, N. C. 339. The sheriff should apply for leave to amend if the return be incorrect. *The Governor v. Bancroft*, 16 Ala. 605. But as to an insufficient return, made on information derived from the plaintiff in the execution, see *Billingsly v. Rankin*, 2 Swan (Tenn.) 82.)

(2) 11 East, 299.

(3) *Cator v. Stokes*, 1 Maule & Selw. 599.

NOTE 1142.—* * An officer who returns on a *ca. sa.*, that he has received the amount of the execution in full, will not be allowed to contradict his return by showing that he has received nothing but notes, and for his own indemnity. 5 Wend. 207. And his indorsement on an execution of the day and hour when he received it, is conclusive evidence that it was then in his hands. *Williams v. Lowndes*, 1 Hall S. C. R. 570. The return to a *ca. sa.*, "satisfied," is evidence that the money was received before the return day, although the return is not made till afterwards. *Armstrong v. Garrow*, 6 Cowen, 465. His return, generally, concludes the sheriff from questioning it collaterally. If there be error in it, he should have it corrected by a direct proceeding, so that full explanation can be given. *Baker v. M'Duffie*, 23 Wend. 289. If a sheriff make a levy, and afterwards return *nulla bona*, the *onus* is upon him to show the property out of the defendant in the execution. 5 Wend. 309.

A sheriff's return to a *fi. fa.*, setting forth a valid excuse for not having collected the money, *e. g.* that the goods seized under it were casually destroyed by fire, or that his proceedings had been stayed by a judge's order, is *prima facie* evidence of the fact, even in his own favor. *Browning v. Hanford*, 7 Hill, 120, and the cases there cited. * *

(Where the sheriff states a fact in his return, which is not responsive to the command in the

The sheriff is entitled to his poundage, which is the legal remuneration for his trouble in the business of the execution; and this he may retain. He may, therefore, at the trial, deduct the sum due to him for poundage, from the proceeds of the sale.(1) The sheriff may give in evidence under the general issue, that the money returned by him, as having been levied, was the property of the assignees of the defendant in the former suit, who had become bankrupt.(2)

5. Action for taking goods in execution, without paying arrears of rent.

5. Another action against the sheriff, is for taking goods in execution and removing them, before the landlord of the premises has received his arrears of rent.(3) This is a special action on the case,(4) under the stat. 8 Ann, c. 14, § 1, which enacts, "that no goods or chattels upon any messuage, lands, or tenements leased for life, terms of years, at will, or otherwise, shall be liable to be taken, by virtue of an execution, on any pretence whatsoever, unless the party, at whose suit the said execution is sued out, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the premises, or his bailiff, all such sums of money as are due for rent for the said premises at the time of such taking of the goods, provided the arrears of rent do not amount to more than one year's rent;" and the statute then provides, that in case the arrears exceed one year's rent, the party paying one year's rent may proceed to execute his judgment, as he might have done before the making of the act.

The plaintiff, in support of this action, will have to prove the lease of the premises, the arrears of rent, together with notice of them, and the process of execution; and further, to show the connection between the

execution, such as payment to the plaintiff, it seems that the return is not evidence in his favor of the fact so stated. *Walker v. McKnight*, 15 B. Mon. (Ky.) 467.)

(1) *Longdill v. Jones*, 1 Stark. N. P. C. 346. If the proceeds are deficient, the sheriff is entitled to no further deduction. *Buckle v. Bowes*, 3 Barn. & Cress. 688.

(2) *Brydges v. Walford*, 1 Stark. N. P. C. 389.

* * See *ante*, notes 1125, 1137. * *

(3) NOTE 1143.—* * In New York, it is provided by statute (2 R. S. p. 31, §§ 12–15), that where an execution is levied on goods liable to distress for rent, and the landlord gives notice accompanied with an affidavit of the amount of rent due, the officer shall levy the amount of rent claimed not exceeding what is due for one year, in addition to the sum in the execution. And see the following cases, giving a construction to, and illustrating the practice under the statute. *Farrington v. Bailey*, 21 Wend. 65; *Sackett v. Barnum*, 22 Id. 605; *Theriat v. Hart*, 2 Hill, 380; *Millard v. Robinson*, 4 Hill, 604, and the cases there cited; *Olcott v. Frazier*, 5 Hill, 562, overruling *Miller v. Johnson*, 12 Wend. 197. And see *Hodgson v. Gascoigne*, 5 B. & Ald. 88; *Bradley on Distr.* 229. The statute being in derogation of the common law must be strictly pursued. *Bussing v. Bushnell*, 6 Hill, 382, and the cases cited there and *supra*. What effect the abolition of distress for rent, in New York, has had upon the rights of landlords and tenants under this statute, has not yet been judicially determined. * *

(4) An action of assumpsit for money had and received will not lie. *Green v. Austin*, 3 Campb. 260.

sheriff and the officer.(1) The trustee of an outstanding satisfied term, assigned in trust to attend the inheritance, is a landlord within the meaning of this statute.(2) The accuracy required in stating the terms of the demise has been before considered.(3)

Where an allowance at a certain rate per annum, payable at fixed periods, it is to be made by an intended purchaser of premises, from the time of his entering into possession until the completion of the purchase, it will, in general, be considered as a reservation of rent, within the meaning of this statute.(4) And it is sufficient to prove that rent is due, by virtue of an agreement for paying rent in advance.(5) The plaintiff can only recover the rent due at the time of taking the goods, and not any which may accrue, during the time the sheriff continues in possession.(6) An executor or administrator may sue, for the removal of goods in the lifetime of the deceased without satisfying the rent.(7) In proving the arrears of rent it is not necessary to call the tenant of the premises, in order to state the account between the landlord and himself.(8)

It is also necessary for the plaintiff to prove, that the sheriff, or the person who took the goods in execution upon the premises, had timely notice before the removal, that arrears of rent for the premises were due at the time of taking; for the sheriff is not bound to find out whether rent is due, nor is he liable to an action as a wrongdoer, unless there has been a demand of rent before the removal.(9) No specific form of notice is required by the statute; and the only object in giving notice to the sheriff, is to establish his knowledge of the landlord's claim.(10) If it shall appear, from the proceedings under the execution—from any extraordinary haste or secrecy in the sale—or from other suspicious circumstances—that the sheriff knew of the landlord's claim, or expected a claim of rent to be made by him, that will be sufficient to make him liable to this action,

(1) *Vide supra*, p. 682.

(2) *Colyer v. Spear*, 2 Bro. & Bing. 67. The statute does not apply in favor of a person recovering in ejectment, with respect to the period between the demise and the judgment. 5 Barn. & Ald. 88.

(3) Vol. I; *Bristow v. Wright*, Doug 664.

(4) *Saunders v. Musgrave*, 6 Barn. & Cress. 524. A reservation after certain rate has been thought objectionable. *Parker v. Harris*, 1 Salk. 262. An agreement to make an allowance for repairs, will, in general, not be considered as an abatement of the rent, but as the subject of a cross action. 6 Barn. & Cress. 528.

(5) *Harrison v. Barry*, 7 Price, 690.

(6) *Hoskins v. Knight*, 1 Maule & Selw. 245, though the seizure be of growing corn, 1 Price, 174.

(7) *Palgrave v. Windham*, 1 Strange, 212.

(8) *Harrison v. Barry*, 7 Price, 690.

(9) *Waring v. Dewberry*, 1 Str. 97; *Palgrave v. Windham*, 1 Str. 212; *Smith v. Russell*, 3 Taunt. 400; 3 Barn. & Ald. 442. In *Waring v. Dewberry*, it was held, that an administrator could not sue the sheriff, where the goods had been removed without notice from the intestate, and before the grant of the administration.

(10) *Andrews v. Dixon*, 3 B. & Ald. 646; *Colyer v. Spear*, 2 Bro. & Bing. 67.

without proof of any express notice.(1) Though the sheriff does not become a wrongdoer, by the act of removing the goods, until he has notice of the landlord's claim, yet if knowledge can be brought home to him at any time before he has paid over the proceeds of the goods to the execution creditor, he will be liable to the landlord for the rent.(2)

The statute speaks only of goods taken by virtue of any execution, which according to the plain sense of the words, has been construed to mean executions on judgments;(3) but it extends to a judgment and execution by the defendant, as well as the plaintiff.(4) The sheriff is liable, if he remove any part of the tenant's goods, without satisfying the landlord a year's rent; and it is not necessary for the landlord to show, that the property left on the premises is insufficient to satisfy the rent.(5) The subject of variances in setting forth the execution under which the levy has been made, has been before considered.(6)

Defence.

It is a good defence to show, that the goods were removed with the consent of the plaintiff's agent, who had given notice of the arrears, and afterwards accepted an undertaking from the bailiff and auctioneer to pay the rent.(7) This is a waiver of the benefit of the statute; and whether the undertaking could or could not, be enforced as an agreement, it is a clear justification to the sheriff, who manifestly has not been guilty of a tort. But it is not a defence to the action, that the sheriff returned the goods to the premises, after wrongfully removing them.(8)

6. Action for escape on mesne process.

6. A creditor may bring an action against the sheriff, to recover a compensation for damages sustained by him from the escape of a debtor on mesne process, and from the consequent delay and prejudice in the recovery of his debt. The plaintiff in this case, is to prove the cause of action against the party arrested, and the process sued out, as averred in

(1) 3 Barn. & Ald. 645.

(2) *Per Cur.* 3 Barn. & Ald. 646; *Arnit v. Garnett*, 3 B. & Ald. 442, in which case the remedy was by a rule calling on the sheriff to pay over the proceeds.

* * See the cases cited *ante*, note 1143. * *

(3) *Brandling v. Barrington*, 6 Barn. & Cress. 467, where the court refused to extend the statute to a case which they considered was within the mischief intended to be remedied. A commission of bankruptcy is not an execution within the statute. *Ex parte Devisne*, Co. B. L. 190; *Lee v. Lopes*, 15 East, 230. But a sheriff, levying under an execution, after an act of bankruptcy committed, cannot insist by way of defence, that he is liable to the assignees. *Duck v. Braddy*, M'Cl. 217. See *St. John's College v. Murcott*, 7 T. R. 259; 2 T. R. 600.

(4) *Henchett v. Kimpson*, 2 Wils. 140.

(5) *Colyer v. Speer*, 2 Bro. & Bing. 70.

(6) *Vide supra*, p. 680.

(7) *Rothery v. Wood*, 3 Campb. N. P. C. 25.

(8) *Lane v. Crockett*, 7 Price, 566.

the declaration.(1) The delivery also of the process to the sheriff, the arrest, and the escape are to be proved.(2)

Proof of debt.

In the first place, the plaintiff is to prove a debt due to him from the party against whom the process issued ;(3) and he must show the same cause of action as is averred in the pleadings.(4) Thus, if the cause of action averred be for goods sold and delivered, that must be proved ; though it need not be proved to have been for the specific sum mentioned in the declaration.(5) If the declaration state that the party was indebted to the plaintiff for goods sold and delivered, and it should appear, at the trial, that the goods had been sold on a credit of three months, which had not expired at the time of the arrest, such a variance would be fatal.(6)

The admission of the debtor has been determined to be evidence of the debt against the sheriff, as it would be against the party himself.(7) Thus, where the debtor has been sued as the drawer of a bill of exchange, and it became necessary to prove the notice of dishonor, his acknowledgment of having received the notice was held to be sufficient ; and the present lord chief justice of the Court of King's Bench, who tried the cause, said, he understood the rule to be, that an admission, which would be evidence against the party, would also be evidence against the sheriff.(8)

The same process must be proved, as is stated in the declaration. If the process proved is different, the variance will be a ground of nonsuit. The subject of variances in the proof of process has already been considered ;(9) and with respect to the proof of the writ, and proof of the connection between the sheriff and the bailiff by means of the warrant, little occurs to be added to the former statements.(10) The return of *non est inventus*, or other return on the back of the writ, is evidence against the sheriff of the delivery of the writ, being an acknowledgment of the fact

(1) *Vide supra*, p. 680.

(2) NOTE 1144.—* * For the law in New York, as to the liabilities of sheriffs for escapes ; when an action lies, how it may be defended, and what is the measure of damages under the statute, see 2 Burrill's (N. Y.) Practice, 120—126. See also 2 Gr. Ev. 589, and notes ; 2 Johns. Cas. (2d ed.) p. 3, n. * *

(As to the effect of a voluntary escape, see *Wesson v. Chamberlin*, 3 Comst. 331 ; 7 Hill Rep. 578.)

(3) *Alexander v. Macauley*, 4 T. R. 611.

(4) *Parker v. Fenn*, 2 Esp. N. P. C. 476, n.

(5) *Gunter v. Clayton*, 2 Lev. 85 ; Bull. N. P. 66.

(6) *White v. Jones*, 5 Esp. 162.

(7) *Vide supra*, p. 691 ; *Gibbon v. Coggen*, 2 Campb. 188 ; *Sloman v. Herne*, 2 Esp. N. P. C. 695.

(8) *Williams v. Bridges*, 2 Stark. N. P. C. 42.

(9) *Vide supra*, p. 678. And see *Id.*, respecting the point of the proof of an affidavit to hold to bail.

(10) *Vide supra*, p. 682.

under his own hand ;(1) and proof his return of *cepi corpus*, and that the party neither put in bail above, nor was in the sheriff's custody at the return of the writ, dispenses with the direct evidence of the arrest and escape, both of these facts are sufficiently proved by the sheriff's return, and by the non-appearance of the party, according to the exigency of the writ.(2)

In a late case, an examined copy of the writ, which was given in evidence on the part of the plaintiff, contained also a copy of the sheriff's return ; and it was contended on behalf of the defendant, that this should be read at the same time, as part of one entire document ; but Mr. Justice Holroyd held, that the parts were distinct, and that the defendant was not entitled to have the return read, as part of the document produced by the plaintiff.(3) The return of the sheriff in this case was, that the party had been rescued ; and the return was held to be admissible in evidence, on the part of the defendant, though in this action clearly not conclusive.

The escape on mesne process, which subjects the sheriff to this action on the case, is an escape after the return of the writ. The form of the writ is, that he shall take the body of the debtor, and have him ready to produce on a certain day ; it will therefore be sufficient, if he bring in the body on that day. There is a distinction, in this respect, between arrests on mesne process, and arrests in execution. In the latter case, if the debtor is seen at large after the arrest, for the shortest space of time, as well before, as after the return of the writ, it will be an escape in the sheriff.(4)

It can scarcely be necessary to observe, that the proof of the surrender at a place different from that alleged in the declaration, or of an escape on a different day, will not be material as a variance, if, in fact, the escape was after the return of the writ, and before the commencement of the action.(5)

7. Action for escape in execution.

7. In an action for the escape of a debtor in execution, whether it be an action on the case by the common law, or an action of debt founded on the stat. 13 Ed. I, ch. 11, and stat. 1 R. II, ch. 12),(6) the plaintiff will

(1) *Blatch v. Archer*, Cowp. 65 ; *Tildar v. Sutton*, Bull. N. P. 66.

(2) *Fairlie v. Birch*, 3 Campb. N. P. C. 397. The return of the sheriffs of London is conclusive against both. *Carlisle v. Parkins*, 3 Stark. N. P. C. 166. The return is also *prima facie* evidence of the capacity of the returning officer. *Tyler v. Duke of Leeds*, 2 Stark. N. P. C. 218.

(3) *Adey v. Bridges*, 2 Starkie N. P. C. 189.

(4) *Hawkins v. Plomer*, 2 Black. 1048. It is a good defence, under the general issue, that bail has been put in, before the expiration of the rule to bring in the body, though no bail bond has been taken. *Pariente v. Plumtree*, 2 Bos. & Pull. 35. See *Moses v. Norris*, 4 Maule & Selw. 397. See further on the evidence in actions for an escape—"Action for escape on execution."

(5) Bull. N. P. 65.

(6) In the former action, the creditor may recover damages for the officer's misconduct, and still

have to prove in ordinary cases, an examined copy of the record of the judgment; the issuing of the writ of *capias ad satisfaciendum*; the delivery of the writ to the sheriff; a legal arrest under the writ; and, lastly, an escape.

With respect to the proof of an examined copy of a record, it will not be necessary to repeat what has been stated on the subject in another place.(1) And as to the proof of the writ, if the writ has been returned, an examined copy of that, and of the sheriff's return indorsed upon it, will be conclusive evidence against the sheriff, of the issuing and delivery of the writ.(2) If there has not been a return, the issuing of the writ is to be proved, and its delivery to the sheriff; and, notice to produce the writ having been duly served on the defendant's attorney, parol evidence of its contents will be admitted.

The proof of the warrant to arrest, in order to connect the defendant with the officer who made the arrest, has been already discussed.(3) As to the arrest itself, it may be observed, that the arrest must be by the authority of the officer named in the warrant; but he need not arrest with his own hand, nor need he be in the presence of the person arrested, or actually in sight, or within any prescribed distance at the time of the arrest.(4) Bare words used by the officer, though they are acquiesced in, will not in general, make an arrest.(5) Where the defendant is in custody, the delivery of the writ to the sheriff is an arrest in law.(6)

Escape.

If a debtor who has been once taken in execution, is afterwards suffered to go at large, it is an escape; if with the knowledge and consent, or by the default of the jailer or sheriff's officer, a voluntary escape; if without his knowledge, a negligent escape. What shall be deemed a going at large, is difficult to be defined as a general proposition. The principle

has a right to recover the debt against the original debtor; in the latter he is entitled to recover at once the sum, for which the prisoner was charged in execution, namely the sum indorsed on the writ and the legal fees of the execution (*Bonafous v. Walker*, 2 T. R. 126; *Hawkins v. Plomer*, 2 Black. 1049); and this is an advantage in the action of debt over the other remedy at common law.

(1) See Vol. II. And with respect to variances in the statement of process, *vide supra*, in this Vol.

(2) *Vide supra*.

(3) *Vide supra*.

(In criminal cases, any person has a right to arrest a person guilty of a felony. *Long v. The State*, 12 Geo. 293.)

(4) *Blatch v. Archer*, Cowp. 65.

(5) *Russen v. Lucas*, 1 Ry. & Mo. 27; *Berry v. Adamson*, 6 Barn. & Cress. 530. *Vide supra*. (See *Jones v. Jones*, 1 Jones' Law, N. C. 491.)

(6) Bull. N. P. 66. And see *Id.* 68, 69, respecting the assignment of prisoner to the succeeding sheriff, and his duty in case of the death of his predecessor.

To make a change of custody, the prisoner must be assigned in the indenture to the new sheriff. *Davidson v. Seymour*, 1 Mo. & M. 34.

seems to be, as laid down by Mr. Justice Buller,(1) that, whenever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, there is an escape. The prisoner must be taken to prison in a convenient time; and what time is convenient, is a question for the determination of the judge, who will admit of any reasonable delay; but if delay is made use of by the officer, as the means of giving more liberty than he ought, he will be liable for an escape.(2) If the sheriff's officer permit the prisoner to go in company with one of his followers, even to his own house, for the purpose of settling his affairs, that also is an escape; for the custody of the follower, after the writ has been once executed, amounts to nothing; he could have no power to detain the prisoner if he should choose to escape; and the warrant would not be any justification to him, if any mischief should ensue.(3) And though the prisoner was at large for the shortest time, even before the return of the writ,(4) and though he afterwards returned into custody, it is still an escape, for which the sheriff is responsible.

Proof of escape.

An admission of the escape by the under-sheriff has been thought to be admissible evidence of that fact against the sheriff himself.(5) To prove a voluntary escape, the party who has escaped, is a competent witness; the reason assigned is, because an escape is a thing of secrecy, a private transaction between the prisoner and jailer;(6) but, on general principles also, he appears to be competent; for he neither gains nor loses by the event of the immediate suit. In an action by the plaintiff for the original debt, he cannot plead in bar, or give in evidence in reduction of damages, the judgment obtained in the action against the sheriff;(7) nor can the verdict be used against him by the defendant, in an action on the case, brought to recover damages sustained in consequence of such an escape.(8) If this is correct, the party is competent either to prove or disprove a voluntary escape. And it should also seem that he is competent to prove a negligent escape, but not to disprove it; for, as an action on the case may be brought against him by the defendant for a negligent

(1) *Benton v. Sutton*, 1 Bos. & Pull. 27. (See *Latham v. Westervelt*, 16 Barb. 421.)

(2) *Heath, J.*, 1 Bos. & Pull. 28.

(3) *Benton v. Sutton*, 1 Bos. & Pull. 27, by Eyre, Ch. J.

(4) *Hawkins v. Plomer*, 2 Black. 1048. If the bailiff of a liberty take the prisoner out of his bailiwick, and deliver him to the sheriff, it is an escape. 2 T. R. 12.

(5) *Vide supra*, p. 684.

(6) *R. v. Ford*, 2 Salk. 689; Bull. N. P. 67; Fitzg. 80.

(7) By Lord Tenterden, 4 Barn. & Ald. 210. And see Bull. N. P. 69.

(8) That the defendant cannot maintain such an action, in the case of a voluntary escape, see *Eyles v. Faikney*, Peake's N. P. C. 143 a; *Pitcher v. Bailey*, 8 East, 171. The principle is, that an officer, guilty of a breach of duty, cannot recover money, which he has paid in consequence of it, though for the benefit of the defendant.

escape,(1) though not for one that is voluntary, he would be speaking against his own interest, if called as a witness for the plaintiff; and for himself if called by the defendant. The plaintiff may give evidence of a negligent escape, under a count for a voluntary escape.(2)

The proof of the debtor's being in custody, and of the escape, is rendered more easy by the provisions of the stat. 8 & 9 W. III, ch. 27; the eighth section of which enacts, that if the marshal of the King's Bench, or warden of the Fleet, or other keepers of any other prison shall, after one day's notice in writing, given for that purpose, refuse to show any prisoner, committed in execution, to the creditor, at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be escape in law. And the ninth section enacts that, if any person, desiring to charge any person, with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputies, or by any other-keeper of any other prison, whether such person be a prisoner in his custody or not, the said marshal or warden, or such other keeper, shall give a true note in writing thereof to any person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or in default thereof, shall forfeit the sum of fifty pounds; and if such marshal or warden, or their respective deputy exercising the said office, or other keeper, shall give a note in writing, that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as sufficient evidence, that such person was at that time a prisoner in actual custody.

The defendant may show, in his defence, that he confined the prisoner in a lock-up house, within his bailiwick, for several days after the arrest; and it is not necessary that he should be taken immediately to the next county jail.(3) The sheriff will not be allowed to prove, in an action for an escape, that he received the money for which a party is taken in execution, and gave him his discharge.(4) And he cannot defend himself by showing that the prisoner was taken upon an erroneous judgment, where the court, in which the judgment was obtained, has cognizance of the cause; but if the court had no jurisdiction, the judgment is void, and the plaintiff cannot recover.(5) He is not justified in dis-

(1) See Fitz. N. B. 130; *Sheriff of Norwich v. Bradshaw*, Cro. El. 53.

(2) *Bonafous v. Walker*, 2 T. R. 126.

(3) *Houlditch v. Birch*, 4 Taunt. 608. The prisoner was detained fourteen days before the writ, in a lock-up house, which did not belong to the arresting officer.

(4) *Slackford v. Austen*, 14 East, 468. See *Crozer v. Pilling*, 4 Barn. & Cress. 31.

(5) Bull. N. P. § 66.

NOTE 1145.—* * S. P., *M'Donald v. Bunn*, 3 Denio, 45, and the cases there cited. And see *De-laplaine v. Hitchcock*, 6 Hill, 14. And he may impeach the plaintiff's judgment by showing that it is founded in fraud (*Pierce v. Jackson*, 5 Mass. 242), but not on any other ground, except want of jurisdiction. *Adams v. Balch*, 5 Greenleaf, 188. And see 2 Gr. Ev. § 591, and notes. * *

(See *Howard v. Crawford*, 15 Geo. 423.)

charging the prisoner, on account of the process having been erroneously awarded; as where a *capias ad satisfaciendum* is issued after the expiration of a year from the time of the judgment.(1)

Plea; of fresh pursuit.

The defendant cannot prove, under the general issue, that the prisoner escaped without his consent, and that he made fresh pursuit, and retook him before the commencement of the action, though this is a good defence if pleaded;(2) the stat. 8 & 9 W. III, ch. 27, § 6, expressly enacting, that the retaking on a fresh pursuit shall not be given in evidence, on the trial of any issue in an action of escape, unless specially pleaded. If the defendant plead, that there was not an escape, he will not be allowed to prove that there was no arrest; for an arrest is admitted by the plea.(3)

Plea of return into custody.

If the defendant pleads the prisoner's return into custody before the bringing of the action, and that he thereupon afterwards kept and detained him in his custody in execution, which is traversed in the replication, the plea will be disproved by showing, that the prisoner after his return escaped again and died out of custody;(4) for though the plea is indefinite as to the period of detention, yet the defendant must be understood to mean that there had been such a detention, as would make the return an answer to the action; in other words, that he had so kept and detained the prisoner, as to be no longer liable for the fresh escape.

It seems that the declarations of the sheriff's officer, made during the time that he has a prisoner in custody, are admissible in evidence against the sheriff, as being part of the act for which the defendant is responsible.(5)

8. Action for extortion of the bailiff.

8. The sheriff is also answerable for the extortion of his officer, which is defined by Lord Coke(6) to be the unlawful taking, by color of his office, any money or valuable thing, either that is not due, or more than is due, or before it be due. It is a general principle, that the act of the bailiff is, for all civil purposes, the act of the sheriff; and where an extortion has been practiced, the sheriff is liable to an action for penalties, or

(1) Bull. N. P. 66; *Weaver v. Clifford*, Cro. Jac. 3; *Burton v. Eyre*, Cro. Jac. 289. The sheriff may justify under an irregular or erroneous judgment, if the writ be not void. See Tidd's Pr. tit. *Execution*.

(2) Roll. Ab. 806, E, pl. 1. See Gilb. Ev. 264, "plea of *nil debet*."

(3) Bull. N. P. 67. (The act of God, or of public enemies, may be shown as an excuse for the escape of a debtor from jail. *The State v. Halford*, 6 Rich. 58. And the escape may be proved *alivunde* the return. *Stone v. Wilson*, 10 Gratt. 529.)

(4) *Chambers v. Jones*, 11 East, 406.

(5) *Bowcher v. Cally*, 1 Campb. N. P. C. 391, n.

(6) Co. Litt. 368 b.

to an action for treble damages, at the suit of the party aggrieved.(1) The general facts to be proved, are, the writ, the warrant, and the misconduct of the officer.(2)

The plaintiff must in this case, as in the others before mentioned, connect the sheriff with the act of the bailiff by proving that the bailiff was acting under his authority at the time of committing the wrong complained of; and whether the sheriff employed this particular officer, will best appear by the production of the warrant.(3) If another person is appointed officer in the warrant, the sheriff will not be liable;(4) he is responsible only for the act of that officer, whom he intrusts with his authority. The return of the sheriff, upon the process directed to him, of his having levied, is conclusive against him, that he adopts the act of the bailiff as his own.(5)

In an action of debt to recover penalties incurred by the extortion of a sheriff's officer in executing a writ of *fieri facias*, if the declaration state the judgment upon which the writ was founded, the judgment must be proved.(6) Here the execution is necessarily tied down by the judgment, and the judgment is therefore made material by the subsequent words which are introduced.(7) The same principle seems to apply where the action is brought by the party aggrieved to recover treble damages; for, in the case of *Crawley v. Blewett*,(8) where, in an action for a false return upon a *fieri facias*, the plaintiff declared on a judgment in the Common Pleas, and the copy of the record produced at the trial omitted to state before whom the plea was held, so that the judgment did not appear to correspond with that stated in the declaration, Lord Holt was of opinion

(1) St. 28 Eliz. c. 4; 32 Geo. II, c. 28. If the statute of Elizabeth is stated to have been passed in the 29th year of her reign, it is a ground for arresting the judgment. *Ramsey v. Tufnel*, 2 Bing. 225. The plaintiff, under this statute, is entitled to three times the full amount of the damages. 4 Barn. & Cress. 154. If the proceeds are not sufficient to satisfy the plaintiff's claim, the sheriff cannot, against him, retain more than the amount of his poundage. *Buckle v. Bewes*, 3 Barn. & Cress. 688. It seems that the stat. 43 G. III, 31, 46, authorizing the levy of the "expenses of execution," includes the expense of *levying*. 2 Bing. 225. In an action on 32 G. II, against the sheriff's officer, the plaintiff must provide a table of fees allowed by the justices. *Martin v. Slade*, 2 N. R. 59; 1 Stark. N. P. C. 417. The statute of Elizabeth does not apply to crown debts. 3 Brod. & Bing. 143.

(2) NOTE 1146.—* * In all or most of the states, the taking of illegal fees is made a misdemeanor by statute. By 2 R. S. N. Y. 741, §§ 5, 6, 7, demanding or receiving illegal fees is declared to be a misdemeanor, and the person guilty thereof is made liable to the aggrieved party in treble damages. See the cases giving a construction to this statute. 15 Wend. 45; *Stevens v. Adams*, 23 Wend. 57; S. C., in error, 26 Id. 451. And see cases, 2 Paige, 475; 6 Cowen, 661. * *

(3) *Vide supra*, p. 682.

(4) *Jones q. t. v. Perchard*, 2 Esp. N. P. C. 507; *George q. t. v. Perring*, 4 Esp. N. P. C. 63.

(5) *Vide supra*, p. 696; *Woodgate v. Knatchbull*, 2 T. R. 154.

(6) *Savage q. t. v. Smith*, 2 Black. 1101. That this averment was unnecessary, see 5 T. R. 498.

(7) By Buller, J., observing on the case of *Savage v. Smith*, 5 T. R. 498.

(8) 12 Mod. 128.

that this was a ground of nonsuit. The averment, therefore, of the judgment was material, and ought to have been proved as stated; for, as Chief Justice De Grey said, in the case of *Savage v. Smith*,⁽¹⁾ Lord Holt would not have nonsuited the plaintiff for an imperfect proof, when no proof at all was necessary.

9. Action for false return.⁽²⁾

9. The plaintiff, in an action for a false return of *mesne process*, will

(1) 2 Black. 1104.

(2) NOTE 1147.—* * The return may be averred to have been made on, though in fact made after the return day. 12 Wend. 587. See *ante*, note 1142, as to when the return is *prima facie*, and when conclusive evidence of the facts it recites. The sheriff is protected by the finding of a jury, on a claim of property, if he have not been offered an indemnity. 1 Burrill's (N. Y.) Practice, p. 297, and the cases there cited. He is not liable for losses on property levied upon, caused by theft, robbery, fire, or other accident, without negligence. *Browning v. Hanford*, 5 Hill, 588 S. C., in error, 7 Hill, 120.

The sheriff is bound to use reasonable diligence in executing process, against the person and against property (10 Wend. 367; *Bank of Rome v. Curtis*, 1 Hill, 275); and where the defendants in the execution owned sufficient property to pay it, he is *prima facie* liable for the whole amount, although they are still able to pay. And see *Weld v. Bartlett*, 10 Mass. R. 474; *Young v. Hosmer*, 11 Id. 89, 90; *Kellogg v. Monroe*, 9 Johns. R. 300, 302; *Patterson v. Westervelt*, 17 Wend. 543. Where he finds property in the hands of the execution debtor, he should levy without delay, and cannot require indemnity; and he is liable if it be afterwards removed beyond his reach. 1 Hall S. C. R. 579. But in a case of reasonable doubt, he may refuse to proceed without an indemnity. *Pierce v. Partridge*, 3 Metc. 44; *Marsh v. Gold*, 2 Pick. 275; *Paley v. Foster*, 9 Mass. 112. In several of the United States, there are statutes prescribing a summary mode of trying disputed claims to property; and when the claim is found adversely to the execution creditor, the sheriff may refuse to proceed until indemnified. 1 Burrill's R. 297, *et seq.* See *Executions in the American note to Twyne's Case*, 1 Smith's L. Cases, as to *dormant* executions; and 2 Kent C. (6th ed.) 515–536, as to the retention of the possession of property mortgaged and sold by execution debtors.

An action on the case for not returning a *fi. fa.* did not lie against the sheriff at common law. The practice was to compel a return, and seek a remedy upon that if false. *Pardee v. Robertson*, 6 Hill, 550; *S. P., Moreland v. Leigh*, 1 Stark. R. 388 and note; *Watson on Sheriff*, 203; *The Commonwealth v. McCoy*, 8 Watts, 153. For the statutory provisions in New York, see 2 R. S. 358, § 80. In an action against the sheriff for not returning the writ, a plea that he had not been ruled to return it is bad. *Corning v. Southland*, 3 Hill, 552. And upon proving his omission to return the writ according to its exigency, the plaintiff is *prima facie* entitled to recover the whole execution debt, with interest. He may show in mitigation that the execution debtor had no property, or not enough to satisfy the writ; but the plaintiff may controvert it, although the declaration do not aver property. *Pardee v. Robertson*, *supra*. The exhibition of an insolvent's discharge, by the execution debtor, will not protect the sheriff for delaying the execution of process, if the discharge be afterwards shown to be void. *Orange County Bank v. Dubois*, 21 Wend. 351. For the form of action and declaration against a sheriff for not returning process, see *Fisher v. Pond*, 1 Hill, 672; 2 Id. 338; *Bank of Rome v. Curtis*, and *Pardee v. Robertson*, *supra*. Where a *fi. fa.* is delivered to a deputy with instructions to depart from his duty in executing it (*e. g.*, to make a levy and do nothing further until instructions are given); the deputy ceases to be the servant of the sheriff, and becomes the agent of the party. The liability of the sheriff can be restored, if at all, only by personal directions to him; and where such directions are not given, he is not liable for a loss of goods levied on after the deputy had been ordered to proceed. And in such a case, only nominal damages can be recovered against

have to prove the cause of action as averred,(1) the writ, and the sheriff's return upon it,(2) and the warrant to the officer; and then he must disprove the fact alleged by the sheriff in his return. The requisite proof of these several points has been before discussed in treating of the evidence necessary in the other actions against the sheriff. In the action for a false return of the writ of *fieri facias*, the plaintiff, besides proving an examined copy of the writ and the return, and the warrant, must prove the judgment, as stated in the declaration.(3) He must also falsify the sheriff's return. If the sheriff, for instance, return "*nulla bona*," the plaintiff ought to show that the debtor had property in the sheriff's bailiwick between the teste and return of the writ.(4)

Defence.

It is a good defence, on a return of *nulla bona*, that the debtor, at the time of the delivery of the writ, was bankrupt, and that a commission had issued against him.(5) The defendant must, in that case, prove all the

him for not returning the *fi. fa.* pursuant to notice. *Mickles v. Hart*, 1 Denio, 548. And see 2 Kent, C. (6th ed.) 519, n. c. * *

(When the sheriff is sued for a false return to an execution, he is liable for the face of the execution, there being sufficient property belonging to the defendant in the execution. *Bacon v. Cropsey*, 3 Selden, 195. The plaintiff must show damage sustained by him. *Nash v. Whitney*, 39 Maine, R. 341.)

(1) *Vide supra*, p. 699. An acknowledgment of the debt by the original debtor is evidence against the sheriff, in an action for a false return. *Kempland v. Macauley*, Peake's N. P. C. 95; 4 T. R. 446, *supra*, p. 700.

(2) *Vide supra*, p. 700, and with respect to variance in the statement of the judgment day process, *supra*, p. 678.

(3) *Crawley v. Blewett*, 12 Mod. p. 128.

(4) Where the plaintiff alleges that several defendants had goods in the sheriff's bailiwick, the allegation is several, and the effect of it is, that there were goods upon which the sheriff might have levied. *Jones v. Clayton*, 4 Maule & Selw. 349. With respect to a false return of *non est inventus*, *vide supra*, p. 691. That an action lies for a false return, though there be a misnomer, after final process, *vide supra*, p. 688. *Reeves v. Slater*, 7 Barn. & Cress. 486. In an action against the sheriff for a false return, where he has omitted to sell joint property, the measure of damages is half the value of the goods. *Tyler v. Duke of Leeds*, 2 Stark. N. P. C. 263.

(Where the sheriff is sued for falsely returning an execution *nulla bona*, the return is *prima facie* evidence of the fact stated in it. *Browning v. Hanford*, 7 Hill R. 120. So that it rests upon the plaintiff to show that the return was false. *Paton v. Westervelt*, 2 Duer. R. 362. If there was a prior execution in the hands of the sheriff, the plaintiff must ordinarily show that there was property enough to satisfy both; but the sheriff cannot defend by showing such prior execution, if that also was returned *nulla bona*. *Id.* A prior execution, which is clearly and undeniably fraudulent and void, to the knowledge of the sheriff, cannot be interposed by the sheriff as a defence. *Imray v. Magnay*, 11 Mees. & Wols. 273. But see *Remmett v. Lawrence*, 1 L. & Eq. 260. So if such prior execution has clearly lost its preference (*Lovich v. Crowder*, 8 Barn. & Cress. 132), the sheriff is not bound to assume the burden of determining and showing that the prior execution was issued on a fraudulent judgment. *Paton v. Westervelt*, *supra*.)

When sued for falsely returning an execution *nulla bona*, the sheriff cannot defend by showing an irregularity in the issuing of the execution, unless the irregularity be such as to render it void. *Bacon v. Cropsey*, 3 Selden R. 195.)

(5) * * See *ante*, notes 1125, 1137. * *

facts necessary to the commission. The sufficiency of the petitioning creditor's debt may, therefore, come into question; and, in order to prove the debt insufficient to support the commission, the plaintiff, in reply, may give in evidence the declaration of the petitioning creditor, one of the assignees (made subsequently to the suing out of the commission, on a settlement of accounts between him and the bankrupt, when he stated what was owing to him at the time of the act of bankruptcy), provided it appear that the assignees are the real parties to the defence.(1)

If the sheriff state, in his return to a writ of *feri facias*, that he has levied a certain sum, out of which he has paid a part to the landlord of the premises for arrears of rent, it will be incumbent upon him, in an action against him for an improper return, to prove this fact of rent in arrear:(2) slight evidence will be sufficient, but some is necessary. The landlord is not a competent witness; because, if the action were to succeed, he would be liable to an action at the suit of the sheriff, in which action this judgment would be evidence of special damage.(3)

When the sheriff defends his return of *nulla bona*, on the ground that the person against whom the writ issued was the domestic servant of an ambassador of a foreign state, it is competent to the plaintiff to prove the appointment colorable and fraudulent.(4) The question, whether the person was liable to have his goods seized, is one, among many other questions, which sheriffs, in the execution of process, must determine at their own peril. In a case of real difficulty, said Lord Ellenborough, sheriffs may call for an indemnity, and the court will enlarge the time for their making their return, till an indemnity is given.

If the sheriff doubts whether goods which are pointed out to him as belonging to the debtor are his property, he may summon a jury in order to satisfy himself upon that question; and this inquisition may, perhaps, be admissible in evidence, where the sheriff is charged with having acted from malice; but it is not admissible, even in mitigation of damages, in an action for a false return.(5)

It has been held, that the defendant may impeach the judgment obtained by the plaintiff, where it is manifestly fraudulent; but that he will not be allowed to go into all the circumstances between the parties from which the existence of some collateral fraud might be inferred.(6)

(1) Dowden v. Fowle, 4 Camp. 38. And see Penn v. Scholey, 5 Esp. 243; Kempland v. Macauley, Peake's N. P. C. 65; Bull. N. P. 41.

(2) Keightley v. Birch, 3 Campb. 521.

(3) Keightley v. Birch, 3 Campb. 521.

(4) Delvalle v. Plomer, 3 Camp. 47.

(5) Glossop v. Pole, 3 Maule & Selw. 175.

(6) Tyler v. Duke of Leeds, 2 Stark. N. P. C. 221; Latch. 222; Penn v. Scholey, 5 Esp. N. P. C. 245, where it was shown, that an execution had been sued out by the original defendant against the plaintiff, a short time before the plaintiff's execution, and an affidavit made by the original defendant, was admitted as a part of the *res gesta*. * * See *ante*, note 1145. * *

It seems that the plaintiff, in answer to a defence that the goods have been assigned before the delivery of the writ to the sheriff, or have been levied under a writ of execution previously delivered, may show that the previous assignment or execution was fraudulent;(1) especially if the defendant, in the case of a writ previously delivered, pays over the money which he levies, after notice from the second execution creditor to retain it, instead of bringing it into court.(2) The plaintiff will be precluded from recovering in an action for a false return, after assenting to the acts of the sheriff, though the possession of the property seized has been given up, in consequence of the claim of another person, which proves to be unfounded;(3) or after accepting the amount levied, with a full knowledge of the circumstances.(4)

If the sheriff make a return of *nulla bona*, after having taken the goods of a debtor in execution at the suit of the plaintiff, a witness who claims property in the goods, and who has, under that claim, taken the goods out of the possession of the sheriff, is competent on the part of the defendant to prove his property in the goods; for he cannot be affected by the verdict. The sheriff, after his return of *nulla bona*, cannot maintain an action against him, having disclaimed all interest in the goods, and being concluded by his return.(5) An assistant to the sheriff's officer, who has been employed by the officer to execute the writ, is a competent witness for the sheriff, without a release from the officer; for the verdict cannot be used against the assistant by the defendant, who has not employed him; and it is no objection to his competency, that another judgment, founded upon that obtained on the suit in question, might affect him.(6) It has been noticed under what circumstances the declarations of the bailiff, to whom a warrant is directed, respecting his reasons for omitting to execute it, are admissible in evidence against the sheriff.(7)

(1) Dewey v. Baynton, 6 East, 527; Kempland v. Macauley, Peake's N. P. C. 95. See War-moll v. Young, 5 Barn. & Cress. 661. It is usual, in such cases, to give notice to the sheriff to produce any bond or agreement for indemnity which he may have received.

(2) Wormall v. Young, 5 Barn. & Cress. 661. See Saunders v. Bridges, 3 Barn. & Ald. 95. (See *supra*, Paton v. Westervelt, 2 Duer R. 362; Imray v. Magnay, 11 Mees. & Wels. 273; Rem-mett v. Lawrence, 1 Law & Eq. 260; Lovich v. Crowder, 8 Barn. & Cress. 132.)

(3) Stewart v. Whitaker, 1 Ry. & Mo. 310.

(4) Beynon v. Garrat, 1 C. & P. 154.

(5) Thomas v. Pearse, 5 Price, 547.

(6) Clarke v. Lucas, 1 Ry. & Mo. 32.

(7) *Vide supra*, p. 692.

CHAPTER IV.

OF EVIDENCE IN ACTIONS AGAINST JUSTICES OF THE PEACE.

THE principal questions to be considered in treating of actions against justices of the peace, relate to the notice which is required previous to suing out the process, to the commencement of the action, and to the effect of convictions and other proceedings as evidence.

If an action is brought against a justice of peace, grounded upon some act done by him in the character of justice, the plaintiff cannot recover a verdict, unless he proves at the trial a notice to the defendant previous to the suing out of the writ.⁽¹⁾ This proof is required by the stat. 24 Geo. II, c. 44, which was introduced for the purpose of rendering justices more secure in the execution of their office; and the first section of which enacts, "that no writ shall be sued out against, nor a copy of any process served on any justice of the peace, for anything done by him in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent of the party who intends to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same, in which notice shall be clearly and explicitly contained the cause of action which such party hath or meaneth to have against such justice of the peace; on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode." And by the fifth section of the act, "no evidence is permitted to be given by the plaintiff of any cause of action, except such as is contained in the notice directed to be given."

The case in which a notice will be necessary is, where the party complains of "something done by the justice in the execution of his office." And it has been observed, that the notice is required for protecting jus-

(1) * * A notice to a justice of the peace not signed by the party is insufficient, though delivered by the party in person, who was known to the justice. *Grimes v. Percival*, 9 Barr, 135, and the cases there cited by counsel, *arguendo*. * *

(In an action against a justice of the peace, the court construes the statute in favor of jurisdiction. *Wright v. Hazen*, 24 Vermont, 143.

When the justice is liable to an action.—Where the justice has jurisdiction, but proceeds erroneously, the remedy is by *certiorari* or by appeal; but when he has no jurisdiction, his proceedings are absolutely void, and he is liable as a trespasser for any property taken on execution issued upon a judgment so rendered (*Colvin v. Luther*, 9 Cowen R. 61); or for the issuing of an attachment by which property is seized without having acquired jurisdiction. *Adkins v. Brewer*, 3 Cowen R. 206; *Vosburgh v. Welch*, 11 Johnson R. 175; 17 Id. 146. But the justice is not liable for false imprisonment in issuing a warrant *without oath*, the statute requiring it, where it appears that he acted in good faith. *Rogers v. Mulliner*, 6 Wendell, 597. See 1 Cowen's Trea. 39, 40, 3d ed.)

tices in those cases where they intend to act within the line of their duty, but, by mistake, exceed it.(1) If, therefore, the subject matter is within the judicial cognizance of the justice, and he intended to act as a magistrate at the time, however erroneously he may have acted, he is within the protection of the statute; though in consequence of his erroneous proceeding, it may be said the act was not done by virtue of his office. Thus in the case of *Weller v. Toke*,(2) in which a single magistrate had committed the mother of a bastard for not fliating the child, whereas jurisdiction in such a matter is expressly given to two justices, who are to exercise it together—in the case of *Briggs v. Sir Fr. Evelyn*,(3) where a magistrate, who was lord of the manor, searched a house and took away a gun (whereas, it was contended magistrates are not empowered personally to enter a house for such a purpose)—in the case of *Prestidge v. Woodman*,(4) where the offence for which the magistrate issued his warrant, was of a nature of which he had cognizance, but was committed in a place beyond the limits of his jurisdiction—in these cases the court determined that the defendant was entitled to a month's notice. Where a magistrate acts in another capacity; in other words when the act done is wholly alien to his jurisdiction, there he acts without the protection of the law, and a notice is unnecessary.(5) Nor is it necessary to give notice previous to an action against the defendant, to recover penalties for acting as a magistrate without a legal qualification.(6)

With respect to the delivery of the notice, it must be proved to have been delivered to the justice, or left at the usual place of his abode, by the attorney or agent for the party, who intends to sue out a writ, or cause the same to be sued out or served, at least one calendar month before the suing out or serving of the same.(7) In computing this month, the day on which the notice is served is to be included; the time runs from the beginning of that day.(8) When the word "month" is used in a statute, without the addition of the word "calendar," or any other words indicating that the legislature meant a calendar month, it is understood to mean a lunar month.(9)

(1) By Lord Kenyon, in *Greenway v. Hurd*, 4 T. R. 555.

(2) 9 East, 364; *Graves v. Arnold*, 3 Campbell N. P. C. 242.

(3) 2 H. Bl. 114.

(4) 1 Barn. & Cress. 12. And see *Bird v. Gunston*, 2 Chitty, 459; *Jones v. Williams*, 1 C. & P. 459.

(5) *Morgan v. Palmer* (2 Barn. & Cress. 729), where the granting of a license was considered within the execution of office, but not the taking of a fee for it; as this was for the personal benefit of the defendant, and it was not equivocal in what capacity the claim was made. And see *Irving v. Wilson*, 4 T. R. 485, *infra*.

(6) *Wright v. Horton*, Holt N. P. C. 458.

(7) Section 1.

(8) *Castle v. Burditt*, 3 T. R. 623.

(9) *Lacon v. Hooper*, 6 T. R. 224.

As to the form of the notice, it must clearly and explicitly contain the cause of action, which the party claims to have against the justice of the peace; and on the back of the notice is to be indorsed the name of the party's attorney or agent, together with the place of his abode.(1) And the plaintiff shall not be permitted, on the trial, to give evidence of any cause of action, except such as is contained in the notice.(2) In stating the cause of action, the object is to inform the defendant substantially of the ground of complaint.(3) The notice must be explicit and precise. It must be a notice of the intended writ of process, and must also specify the cause of action. If only the cause of action is stated, and no mention made of the intended process, the notice will not be conformable to the statute.(4) But the particular form of action which the party intends to adopt need not be specified, though the cause of action must.(5)

The plaintiff, as we have just seen, is not required to give notice of his *form* of action. And though he should give notice of one form of action, and afterwards declare in another, it may, perhaps, be questioned whether this would be a ground of nonsuit, provided the notice is correct as to the cause of action, and the intended writ or process;(6) for, if he gives an

(1) Section 1.

(2) Section 5. If the declaration contains causes of action not specified in the notice, it will vitiate that part of the declaration which is not conformable to the notice. *Robson v. Spearman*, 3 Barn. & Ald. 493.

(3) 5 Barn. & Ald. 844; *Brown v. Tanner*, M'Clell. & Y. 469, where the notice was in the form of a declaration. Where the notice stated a warrant to have been directed to A. B., and it was directed to the constable of H., A. B. not being the constable of H., it was held insufficient. *Aked v. Stocks*, 4 Bing. 509.

(4) *Strickland v. Ward*, 7 T. R. 631, n.; *Lovelace v. Curry*, 7 T. R. 631.

(5) *Sabin v. De Burgh*, 2 Campbell N. P. C. 197.

(6) The point, as stated above, was not finally settled in the case of *Strickland v. Ward*, though Mr. Justice Yates certainly considered it a ground of nonsuit. There are two manuscript notes of this case, in the report of the case of *Lovelace v. Curry* (7 T. R. 631), of which the note supplied by Mr. Justice Yates, who tried the cause, is much the fullest and most satisfactory. The notice in *Strickland v. Ward* was of an action on the case for false imprisonment, whereas the form of action afterwards adopted was trespass; and there was no notice of the writ or process. Several objections were taken; the first, as to the omission of the notice of the writ; the second, that the notice was of another form of action, which would not lie in this case; and the third, that the notice might mislead, for it was so far from apprising the defendant of the writ or process intended to be sued out, that the process in such an action must necessarily be of a nature quite different. Mr. Justice Yates, as the note states, gave his opinion decisively in favor of the objections. The cause was afterwards decided on another ground. The first objection, respecting the omission of the intended process, which was the important objection, was taken in the case of *Lovelace v. Curry*, and adjudged to be decisive against the plaintiff's right to recover. As to the second objection (that the plaintiff had given notice of an *action on the case* for false imprisonment, and afterwards brought an action of *trespass*), Lord Loughborough and Mr. Justice Gould, in the case of *Wood v. Folliott* (3 Bos. & Pull. 552, in note), where this point of the case of *Strickland v. Ward* was referred to, appear to have considered it as of little weight. The former said: "Would it not have been enough to have said *an action*, and was not the rest surplusage?" And Mr. Justice Gould said: "All that the statute

explicit notice of the real cause of action, and of the intended writ or process which is afterwards sued out or served, he does all that the terms of the statute require. Nor does there appear to be much weight in the objection that the defendant, on receiving notice of a form of action, not consistent with the intended process or with the subject matter of complaint, might rely on nonsuiting the plaintiff in such a form of action, and with this view, might have declined to tender amends to the party complaining, as he might otherwise have done; in answer to this objection, it may be said the defendant is not misled with respect to the cause or ground of the plaintiff's action, or as to the intended process, so that he has an opportunity of making a tender of amends before the writ is sued out; or, if he chooses to make no tender, speculating on the chance of the plaintiff's misconceiving his remedy, he has still another opportunity of tendering amends, even after the service of process, by paying money into court;(1) but if he still persists in not making a tender, calculating upon a nonsuit, and speculating *inter apices juris*, he has no just ground to complain of being misled. The question, therefore, is reduced to this: whether the plaintiff ought to be nonsuited, because he has inadvertently given notice of a wrong form of action, when such notice might altogether have been safely omitted, and when the notice itself would enable the defendant to detect the error. Now, the statute of George II requires only that the notice should contain two particulars; first, the writ or process which the plaintiff intends to sue out; and, secondly, the cause of action for which he sues. And though, as Lord Kenyon said in the case of *Lovelace v. Curry*, "the court are bound to decide according to the law as they find it, without considering whether or not the legislature did right in requiring the particular notice," yet, on the other hand, in such a case, they would be unwilling to go beyond the letter of the law, lest actions of this sort should be entirely defeated.(2)

On the back of the notice is to be indorsed the name of the party's attorney or agent, together with the place of his abode. The notice need not be signed at the foot, either by the plaintiff or his attorney.(3) First, as to the indorsement of the name of the attorney. An indorsement of the surname at length, together with the initial letter of the Christian name, will be sufficient.(4) And, with respect to the fact of being an

says, is 'the cause of action.'" See *Robson v. Spearman*, 3 Barn. & Ald. 493; *Aked v. Stocks*, 4 Bing. 509.

(1) See sect. 4.

(2) "I do not disapprove," said Lord Ellenborough, advertg to the case of *Lovelace v. Curry*, "of anything laid down in that case; but I am not disposed to carry it farther, lest actions of this sort should be entirely defeated." *Sabin v. Burgh*, 2 Campbell N. P. C. 198.

(3) See *Crooke v. Curry*, by Thompson, B., Tidd, 27, n.

(4) *Mayhew v. Locke*, 7 Taunt. 63. It seems that the statute does not require the Christian name to be indorsed. By *Holroyd, J.*, 4 Barn. & Cress. 682. And a notice signed T. and W. A. Williams, has been held sufficient, where the names of the parties were T. A. Williams and

attorney, Lord Ellenborough held, in the case of *Sabin v. De Burgh*,⁽¹⁾ where the attorney, whose name was indorsed, being asked whether, at that time, he had taken out his certificate, said he had ordered his clerk to take it out, and had given him money for this purpose, but had never seen it, that this was sufficient evidence of his being qualified to act as an attorney. Secondly, as to the description of the attorney's place of abode; the meaning of the legislature was, that the party should have an opportunity of tendering amends; and the true interpretation of the statute appears to be, that, if the place indorsed upon the notice is the true place of the attorney's abode, it lies on the defendant to show that such a description has not afforded him the opportunity of taking advantage of the statute; (2) the statute does not require such information as precludes the necessity of all inquiry; (3) the description, indeed, should not be quite vague, and perhaps such a place ought to be stated as may be sufficient for a venue. (4) The attorney's name at length, with the description "of Birmingham," has therefore been considered sufficient. (5) In the case of *Taylor v. Fenwick*,⁽⁶⁾ the notice, which was signed by him in these words, "Given under my hand at Durham," was clearly informal; for, though in fact the attorney lived at Durham, yet that was not stated as the place of his residence, with respect to which the statute must be implicitly followed; the objection in this case was, not that the place of abode had been insufficiently described, but that nothing was stated, except merely the place at which the notice was signed. (7)

The contents of the written notice may be proved at the trial by a duplicate original, or an examined copy; (8) and it is not necessary, in this case, to show a previous notice to the defendant to produce the original, which was delivered to him. Or if the plaintiff is not furnished with such a duplicate, or examined copy, notice to produce the original should be regularly served; and, after proof of this notice, parol evidence of the contents of the original will be admitted.

W. A. Williams, the name of the attorney on the record being T. A. Williams; the statute is not to be construed with extreme rigor. *James v. Swift*, 4 Barn. & Cress. 682; S. C., 2 C. & P. 237.

(1) 2 Campbell N. P. C. 198.

(2) *Eyre, C. J.*, in *Osborn v. Gough*, 3 Bos. & Pull. 554.

(3) *Rooke, J.*, Id. 555.

(4) *Chambre, J.*, Id.

(5) *Osborn v. Gough*, 2 Bos. & Pull. 551. See *Crooke v. Curry*, by Thompson, B., Tidd, 27, n., *contra*. In the case of *Stears v. Smith* (6 Esp. 138), the attorney described himself as a place in London; but in fact the place was in Westminster, and Lord Ellenborough held the notice insufficient. See *Wood v. Folliott*, 3 Bos. & Pull. 551.

(6) Cited by Lawrence, J., 7 T. R. 635, and stated in 3 Bos. & Pull. 553, in note.

(7) 3 Bos. & Pull. 554.

(8) See index to Vol. I; Vol. II.

The plaintiff will have to prove, further, unless it appear on the face of the record that the action was commenced within six calendar months after the act committed; the statute of George II enacting that no action shall be brought against any justice of the peace, for anything done in the execution of his office, unless commenced within that time.(1) Where the commencement of this action does not sufficiently appear on the record of *Nisi Prius*, it may be proved by the production of the writ, or of an examined copy of the writ, if the writ be filed.(2) If the act complained of is a continued imprisonment, the magistrate is liable to an action for such part of the imprisonment, suffered under his warrant, as within six calendar months before the commencement of the action;(3) for the whole of the imprisonment is one continued trespass.

The commencement of the action is the suing of the writ: and the suing out of a bill of Middlesex or *latitat* in the King's Bench,(4) or of a *capias quare clausum fregit* in the Common Pleas,(5) is as effectual for this purpose as the suing out of an original writ. And suing out a *testatum capias ad respondendum* is a good commencement of an action by original.(6) The plaintiff must, in fact, take out the writ within the time prescribed. The teste of the writ will not be sufficient proof of the suing out; for, it is the practice of the court to teste *latitats*, taken out in the vacation, as on the last day of the preceding term, and a *latitat* sued out in a term, is usually tested on the first day of that term; wherever, therefore, the true time of suing out a *latitat* is material, it may be shown, notwithstanding the teste.(7) Proof of the delivery of the declaration, within six calendar months after the act committed, will, it seems, be sufficient evidence of the commencement of the action; for it establishes the fact of an existing suit at the time of the delivery.(8) Though the declaration relate *prima facie* to the first day of term, yet that is matter of evidence, and when the writ is produced, the presumption is, that the party declared on the return day of the writ.(9)

If the plaintiff sue out a writ within the six months, but neither the service nor the return of the writ is proved, and afterwards he sues out another writ out of time, which last writ is served, he cannot support his

(1) Section 8.

(2) *Mulhalf v. Palmer*, F. & S. Ir. R. 74.

(3) *Massey v. Johnson*, 12 East, 67; *Pickersgill v. Palmer*, Bull. N. P. 24. See *Weston v. Fournier*, 14 East, 491. The time of limitation has been computed from the original seizure of goods. *Smith v. Wiltshire*, 2 Bro. & Bing. 622; 2 H. Bl. 14; 2 East, 254.

(4) Carth. 233; 2 Lord Raymond, 1441.

(5) 2 Black. 925; Willes, 257, 258.

(6) *Beardmore v. Rattenbury*, 5 Barn. & Ald. 452; *supra*, p. 450.

(7) *Johnson v. Smith*, 2 Burr. 964, 966.

(8) See *Matthews v. Haigh*, 4 Esp. 100; *Harris v. Orme*, 2 Campbell, 497, u.

(9) *Granger v. George*, 5 Barn. & Cress. 151. See further respecting the time of commencement of this action, *supra*, p. 451.

action; as, in the case of *Weston v. Fournier*,⁽¹⁾ where the notice of action was for an imprisonment, which continued up to the time of the notice and afterwards—the writ of *latitat* was sued out about two months after the notice—the next process proved was an *alias* writ, sued out about eleven months after the notice—and the memorandum of the record of *Nisi Prius* was of the same term, in which the *alias* writ issued; here, the notice fixed the plaintiff to a date, from which the subsequent proceedings were to be reckoned; and the suing out of the second writ was at least *prima facie* evidence, that the first had not been served; then the next process was out of time, and no aid could be got from the memorandum of the record of *Nisi Prius*; so that, as the first writ only was in time, it became necessary to prove its return. So in the case of *Stanway, q. t. v. Perry*,⁽²⁾ where, in an action against a sheriff for the extortion of his bailiff (which action must be commenced within a year), the plaintiff gave in evidence two writs, the one a *capias ad respondendum*, the other a *capias per continuance*, both of which issued in the same term—the former was in time, but the latter was out of time, and this last alone was served—the declaration was of the same term: the court held, that, if two writs be issued, one within a year after the offence, and the other not within, it is necessary that the first writ should be returned, in order to connect it with the second, and thereby to make the action appear to have been commenced in due time; for it is the return of the writ, which gives to the court possession of the cause. But if only a single writ has been sued out, and that within the proper time, it will not be necessary to prove the writ returned.⁽³⁾ The mistake, said Lord Kenyon, in the last cited case, proceeds upon the supposition, that the plaintiff could not declare upon that writ after two terms; but, although, if he do not declare, within that time, the defendant may sign judgment of non-pros, yet, if the defendant omit so to do, the plaintiff may declare at any time within a year after suing out his writ.

Action for false imprisonment.

If the plaintiff bring an action against a justice of peace for false imprisonment, he will have to show that the cause of action arose within the county, within which the action is brought:⁽⁴⁾ and if he complains of an act done by a constable, he must prove, that the act complained of was done by the defendant's authority. A notice, therefore, should be served

(1) 14 East, 491.

(2) 2 Bos. & Pull. 157.

(3) *Parsons v. King*, 7 T. R. 6. And see, further, respecting the necessity of proving the return the first writ and the continuance of writs, *supra*, p. 440. *Thistlewood v. Cracroft*, 1 Marshall, 497; *Hutchinson v. Piper*, 4 Taunt. 555; *Taylor v. Hipking*, 5 Barn. & Ald. 489; 6 T. R. 617.

(4) St. 21 Jac. I, c. 12, § 2.

on the defendant, and a writ of *subpœna duces tecum* served on the officer, in order to compel them to produce the warrant; and after proof of such notice, if the warrant is in the hands of the defendant, secondary evidence of the warrant will be admitted.(1) If the constable, after service of the subpœna, delivered his warrant to the defendant, it is not unreasonable, that the defendant shall be called upon at the trial to produce it, although notice has not been given; and, if he does not produce it, that parol evidence of the contents should be admitted.(2)

It is frequently important to prove, in this action, what passed judicially before the magistrate, on the occasion of his issuing the warrant; with this view, notice should be given to the magistrate, to produce the informations and depositions taken before him. If, after proof of such notice, the defendant refuse to produce them, secondary evidence of their contents will be admitted. If the magistrate has returned the depositions, and they have been considered, by the officer receiving them, as useless, secondary evidence will be admitted, after slight proof of their loss.(3) Should the plaintiff not be able to produce any secondary evidence, it will be enough for him to prove the imprisonment under the defendant's warrant, leaving him, if he can, to justify what he has done, by producing the information.

General issue.

The defendant, in any action upon the case, trespass, battery, or false imprisonment, brought against him for anything done by virtue of his office, may plead the general issue, not guilty, and give such special matter in evidence to the jury, as if pleaded, would have been sufficient in law to have discharged the defendant.(4) This only allows the defendant to give that in evidence, which before he must have pleaded.(5)

By the statute of George II, (6) "the justice may, within one calendar

(1) See Vols. I & II.

(2) NOTE 1148.—* * See Index to Vol. II, and the notes, as to the circumstances under which a notice to produce a paper, before secondary evidence is competent, is dispensed with. In trover for a bond, a notice to produce was held to be unnecessary, the nature of the action being sufficient notice. *Hays v. Riddle*, 1 Sandf. Super. C. R. 248; S. P., *People v. Holbrook*, 13 John. R. 90; *Bissel v. Drake*, 19 John. 66. In *Haw v. Hall* (14 East, 274), the ground on which the notice is dispensed with, is thus stated by Le Blanc, J.: "When the contents of a written instrument may be produced as evidence in a cause, and it is uncertain beforehand, whether or not such evidence will be brought forward at the trial, we see the good sense of the rule which requires previous notice to be given to the adverse party to produce it, if it be in his possession, before secondary evidence of its contents can be received, that he may not be taken by surprise; but where the nature of the action gives the defendant notice, that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice." * *

(3) *Freeman v. Arkle*, 2 Barn. & Cress. 496.

(4) St. 7 J. I, c. 5, st. 21 J. I, c. 12, § 3.

(5) Cowp. 647.

(6) St. 24 G. II, c. 44, § 2.

month after such notice given" (that is, the notice of the intended writ, or process and of the cause of action, before mentioned), "tender amends to the complaining party, or to his agent or attorney; and in case, the same is not accepted, may plead the tender in bar to any action brought against him, together with the plea of not guilty; and if, upon issue joined, the jury find the tendered amends to have been sufficient, they shall give a verdict for the defendant." A magistrate, not present at the execution of his warrant, is liable only to the extent of what was done in pursuance of the warrant, and not for any excess committed by the officer without his authority. Where the value of the goods is limited by the notice, a tender, which covers the value specified in the notice, is a bar to the farther prosecution of the action.(1)

Conviction when conclusive.

It is a general principle of law, that where justices of the peace have an authority given to them by act of Parliament, and they appear to have acted within the jurisdiction so given and to have done all that they are required to do, in order to originate their jurisdiction, a conviction drawn up in due form and remaining in force, is a protection, in any action brought against them in consequence of their having so acted.(2) Thus, in

(1) *Stringer v. Mastyn*, 6 Esp. N. P. C. 134.

(2) By Lord Tenterden, in *Basten v. Carew*, 3 B. & C. 653. On this principle, where a person occupies land in a parish, he cannot, in an action of trespass against a justice, try a claim of exemption from statute duty, as he is, *prima facie*, liable to the burden imposed, and therefore the magistrate has jurisdiction. *Fawcett v. Fowles*, 7 B. & C. 394. And, in this respect, the case differs from the decisions where there has been a levy for rates on a person not an occupier within the parish. *Nichols v. Walker*, Cro. Car. 394; *Milward v. Coffin*, 2 Bl. R. 1331; *Lord Amherst v. Lord Somers*, 2 T. R. 372.

NOTE 1149.—* The rule is the same in respect of inferior and superior magistrates, that, where they have jurisdiction of the person, subject matter, and process, they are not liable to be punished for mistakes of judgment. See *Yates v. Lansing*, 5 John. R. 291.

The rule is different, where they act without jurisdiction, or colorably. *Gruman v. Raymond*, 1 Conn. R. (2d ed.) 39, and note on p. 47.

As to the cases in which, and the parties between or in respect of whom, judgments, &c., are conclusive, see the text, Vol. II, and the notes, where numerous authorities are stated. And see the English and American notes to the *Duchess of Kingston's Case*, 2 Smith's Leading Cases; See also, 2 Gr. Ev. §§ 499–556, and notes; title *Imprisonment*, 3 Stephens' N. P. 2017–2047; titles *Officer*, *Constable* and *Sheriff*, in U. S. Dig. and Supp., and in 1 and 2 An. U. S. Dig. And in respect of the process and proceedings of inferior and subordinate jurisdictions, and what facts must appear, and on whom the *onus* lies to show the necessary facts, to make them valid, and give them effect, see generally, *Noble v. Halliday*, in error, 1 Comst. R. 330; S. C., 1 Barb. S. C. R. 137, and the numerous authorities cited by the counsel *arguendo*; *Gruman v. Raymond*, and n., cited *supra*; *Case v. Shepherd*, 2 John. Cas. (2d ed.) 27, and the learned notes on p. 28 *et seq.*; *Percival v. Jones*, Id. 49, and notes, p. 50, *et seq.*; *Cornell v. Barnes*, 7 Hill, 35, and notes; *The People v. Koeber*, Id. 39, and the cases there cited; *The People v. Young*, Id. 44; *Sharp v. Spier*, 4 Hill, 76; *Striker v. Kelly*, 7 Hill, 9, and the cases there cited; *Matter of Bruni*, 1 Barb. S. C. R. 187; *Matter of Prime*, Id. 340; *Corlies v. Waddell*, Id. 355; *Fulton v. Heaton*, Id. 552; 3 Hill, note, subd. 30–39. * *

(The jurisdiction of the justice is given by statute (*Call v. Mitchell*, 39 Maine, 465); and will

the case of *Strickland v. Ward*,⁽¹⁾ tried before Mr. Justice Yates (which was an action of trespass and false imprisonment against the defendant, a justice of the peace), the defendant produced in evidence, under the general issue, a warrant signed by him, reciting a conviction of the plaintiff for unlawfully returning to a parish whence he had been removed, and requiring the keeper of a house of correction to keep the plaintiff to hard labor; he also produced the conviction, referred to in the warrant, regularly drawn up: Mr. Justice Aston upon this, gave his opinion, "that the conviction could not be controverted in evidence; but that, as the justice had a competent jurisdiction of the matter, his judgment was conclusive, till reversed or quashed; and that it could not be set aside at *Nisi Prius*." The plaintiff was accordingly nonsuited.

Conviction conclusive of what.

A conviction by a magistrate is conclusive of the facts constituting the offence of the party convicted, and of the propriety of the inference, drawn by the justice from those facts. Nor will it be permitted to the plaintiff to prove other facts, not brought before the attention of the justice, which might have the effect of showing that the plaintiff was not really guilty of the charge imputed to him.⁽²⁾ A conviction seems to be conclusive, also, of the jurisdiction of the justice, where that appears from facts stated on the face of it.⁽³⁾ And where the justice appears from the facts stated to him, to have jurisdiction over the subject matter, it has been held, that no extrinsic evidence can be given in an action against him, tending to show that he acted without jurisdiction in convicting the plaintiff, where his attention has not been called to all the facts necessary

not be enlarged by implication. *Hersom's Case*, Id. 476. See also, *Coon v. Brook*, 21 Barb. 546. Where the justice's docket is read in evidence, showing a judgment rendered by him, and no objection taken for want of jurisdiction, it will be presumed that the necessary facts were proved before him. *Westbrook v. Douglass*, Id. 602. An entire want of jurisdiction renders the acts of the justice void, and him liable as a trespasser. *Cohon v. Speed*, 2 Jones' Law, N. C. 133.)

(1) 7 T. R. 633, 12 East, 75; *Gray v. Cookson*, 16 East, 21; *Brittain v. Kinnaird*, 1 Bro. & Bing. 437; *Groenvelt v. Burwell*, Salk. 896, S. P. It seems not to be necessary for the magistrate to give in evidence the proceedings prior to the conviction. See *Strickland v. Ward*, 7 T. R. 631; *Fullers v. Fitch*, Holt, 287; *Lowther v. Lord Radnor*, 8 East, 113.

(2) *Vide infra*, p. 721, n. 1.

(3) *Brittain v. Kinnaird*, 1 Bro. & Bing. 432. And see 3 Barn. & Cress. 649; *Wilson v. Weller*, 1 Bro. & Bing. 57. In the case of an *ex parte order*, the justice cannot give himself jurisdiction, by falsely asserting the fact upon which his jurisdiction is founded. *Welsh v. Nash*, 8 East, 436, cited 1 Bro. & Bing. 440; 16 East, 23. In the case of *Hill v. Bateman* (1 Str. 710), extrinsic evidence was admitted to show, that the plaintiff had effects sufficient to answer the penalty incurred, but that the defendant sent him to prison without attempting to levy on them; the terms of the conviction and warrant founded thereon are not stated in the report. In *Terry v. Huntington* (Hardr. 480), where the commissioners of excise had given to themselves jurisdiction by adjudging low wines to be strong wine, the facts on which their jurisdiction was founded were allowed to be controverted. And see *Milward v. Coffin*, 2 Bl. R. 1331; *Lord Armherst v. Lord Somers*, 2 T. R. *supra*, p. 719, n. 2.

to enable him to form a judgment as to the course he ought to have pursued.(1)

Apparent excess of jurisdiction.

Where, upon the face of a conviction, the magistrate appears not to have jurisdiction, he will be liable to an action of trespass, though the conviction has not been reversed or quashed.(2) Thus, in the case of *Groome agt. Forrester & Goodwin*,(3) where an overseer of a parish was convicted under the stat. 17 Geo. II, c. 38, § 2, of neglecting to deliver over to the succeeding overseers a certain book belonging to the parish, particularly described in the information, and for this offence was adjudged to be committed to the common jail, "to be safely kept until he shall have yielded up *all and every the books* concerning his said office of overseer belonging to the said parish," which were also precisely the terms used in the warrant of commitment, the Court of King's Bench held, that this commitment was not authorized by the act of Parliament, and was entirely void; because the warrant of commitment casts upon the jailer the function of inquiring and determining, what were "all and every the books concerning the office of overseer," for the yielding up of which he was to discharge the prisoner, instead of requiring the jailer to detain his prisoner (as it ought to have done) until he should yield up the particular book specified and described in the information; the warrant, therefore, subjected the prisoner to the risk of imprisonment for an indefinite period, namely, until he had complied with a condition of greater extent than was imposed by the act of Parliament; and the jailer had not adequate means of judging, whether the prisoner should have in fact complied with the terms of the condition. The court therefore determined, that the commitment made in pursuance of the adjudication, as well as the adjudication itself in respect of the imprisonment, was clearly an excess of jurisdiction, and that the imprisonment was a trespass in the committing magistrate, for which an action might be maintained.

The judicial character of the justice will be no protection to him, where he has committed the plaintiff to prison, on mere suspicion, without information laid before him;(4) or without summoning, or hearing

(1) *Pike v. Carter*, 3 Bing. 83; *Lowther v. Lord Radnor*, 8 East, 119; *Cookson v. Gray*, 12 East, 81; 16 East, 20, and see *Burley v. Bethune*, *infra*, 723. * * See *ante*, note 1149. * *

(2) * * See *ante*, note 1149. * *

(3) 5 Maule & Selw. 319. See also *Baldwin v. Blackmore*, 1 Burr. 595; *Crepps v. Darden*, Cowp. 640. In the last case, in which the plaintiff had been convicted in several penalties for exercising his trade on a Sunday, incurred on the same day, the excess of jurisdiction appeared from comparing the convictions; as to which, see what was said by Lord Ellenborough in *Gray v. Cookson*, 16 East, 21, 23. If the justice have no jurisdiction, an appeal by the plaintiff does not preclude him from afterwards making the objection. By Lord Ellenborough in *Lowther v. Lord Radnor*, 8 East, 118.

(4) *Morgan v. Hughes*, 2 T. R. 225; *Massey v. Johnson*, 12 East, 82. See *Stanley v. Fielden*, 5 Barn. & Ald. 437. As to the *sufficiency* of the information, see *Mann v. Davies*, 3 Barn. &

the party in his defence.(1) A magistrate cannot justify a commitment for one offence, by a conviction for another and different offence.(2) In such a case he will not be allowed to prove, in bar of an action for false imprisonment brought against him, that the plaintiff was really guilty of the offence for which he was committed; it seems doubtful, also, whether such evidence is admissible, even in mitigation of damages.(3) And where a commitment does not state any offence within the jurisdiction of the justice, he cannot protect himself by showing it to have been so, although the commission may have been regular.(4)

The warrant of commitment ought to set forth the offence with convenient certainty.(5) But the recital of a false fact, in the warrant for apprehension, and in the warrant of commitment as to the party on whose information the warrants were granted, will not be material, provided a regular information was in fact taken previous to the warrant of commitment. Thus, in the case of *Massey* agt. *Johnson*,(6) the warrant to apprehend recited "that J. S. had made information and complaint upon oath," &c.; two days afterwards, the plaintiff being apprehended, the information of another person was taken, upon which the warrant of commitment issued; reciting like the other warrant, the information of J. S.; this recital was disproved by J. S. himself; the conviction was made up formally at a subsequent time, and bore the same date as the warrant of commitment, which was in fact the day when the conviction took place; the Court of King's Bench held, that as a regular information on oath had been laid before the magistrate, the magistrate was warranted in taking cognizance of the charge; and, the party having been heard upon the charge, the magistrate was authorized to commit, if in fact he convicted him of the charge; and the conviction might be drawn up in form at a future time. Mr. Justice Le Blanc added, that the objection would have assumed a very different shape, if there had been no information on the oath of any person, whereon to found the conviction.

The formal instrument of conviction may be drawn up at a future period, subsequent to the time when the conviction took place; even if drawn up after the commitment or levying of the penalty, it may still protect the magistrate, provided its date is warranted by the real time of the conviction.(7) And however proper it may be to inquire into the

Ald. 103; *Elsie v. Smith*, 1 Dow. & Ry. 202. It seems that the plaintiff would be precluded from showing, in contradiction to the statement of a conviction, that no information was taken, *Wilson v. Weller*, 1 Bro. & Bing. 57. *Vide supra*, 720, as to which, see by Le Blanc, J., 12 East, 81.

(1) 12 East, 82; *Harper v. Carr*, 7 T. R. 275; *Stanbury v. Bolt*, Cowp. 642.

(2) *Rogers v. Jones*, 3 Barn. & Cress. 412.

(3) 3 Barn. & Cress. 412. See by Lord Ellenborough in *Gray v. Cookson*, 16 East, 21.

(4) *Winckes v. Clutterbuck*, 2 Bing. 494. * * See *ante*, note 1149. * *

(5) *Vide supra*, n. 4; Hawk. b. 2, c. 16, § 15.

(6) 12 East, 67.

(7) *Massey v. Johnson*, 12 East, 76; *Gray v. Cookson*, 16 East, 20; M'Cle. & Y. 478.

time of drawing up the conviction, if the conviction itself is directly impeached, yet, in a collateral proceeding, such as an action of trespass, the court will give credit to the record of conviction, as having been made at the time when it bears date, and will not admit evidence to prove that in fact it was not drawn up till after the commencement of the action.(1)

If the convicted party, after the conviction of the justice has been quashed, bring an action on the case, complaining of the magistrate's act as malicious, and without reasonable and probable cause,(2) he must prove this averment; he must show, that, upon the hearing before the magistrate, there appeared to be no ground for imputing the crime to him; the question was not whether there was any actual ground for such an imputation, but whether there *appeared* to be any before the magistrate; the plaintiff must prove a want of probable cause for the conviction, which he can only do, by proving what passed upon the hearing before the magistrate, when the conviction took place; for the conviction may have been unfounded, yet not malicious.(3)

CHAPTER V.

OF EVIDENCE IN ACTIONS AGAINST CONSTABLES, EXCISE OFFICERS, AND CUSTOM-HOUSE OFFICERS.

THE next actions to be considered are those against constables, officers of the excise, and custom-house officers.

(1) 12 East, 81; 16 East, 20, 21. * * See *ante*, note 1149. * *

(2) The stat. 43 G. III. c. 141, sect. 1, enacts, "that, in all actions against any justice of the peace, on account of any conviction made by him, or for any act done by him, for the levying of any penalty, apprehending any party, or for the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value and amount of the penalty levied upon him (in case any levy shall have been made), shall not be entitled to recover any greater damages than the sum of two pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action (which action shall be an action upon the case only), that such acts were done maliciously, and without any reasonable and probable cause." The second section of the same statute enacts "that the plaintiff shall not be entitled to recover any penalty, which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial, that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence." In actions of false imprisonment, where a conviction has not been quashed, the form of action must be trespass. *Morgan v. Hughes*, 2 T. R. 225.

(3) *Burley v. Bethune*, 5 Taunt. 583, by Gibbs, Ch. J. The plaintiff, in this case, was nonsuited for not proving at the trial, what had appeared in evidence at the hearing before the magistrate; and the nonsuit was affirmed by the Court of Common Pleas.

* * See *ante*, note 1149. * *

First, as to the actions against constables.

The statute which has before been referred to, in treating of evidence in actions against justices of the peace,(1) applies also to actions against constables. The sixth section of that statute enacts, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for anything done *in obedience to any warrant* under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode, by the party or parties intending to bring such action, or by his, her, or their attorney or agent in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused and neglected for the space of six days after such demand; and in case, after such demand and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, &c., without making the justice or justices, who signed or sealed the said warrant, defendant or defendants, that on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices; and if such action be brought jointly against such justice or justices, and also against such constable, &c., then, on proof of such warrant, the jury shall find for such constable, &c., notwithstanding such defect of jurisdiction as aforesaid."

The object of this clause was the protection of those officers, who, being charged with the execution of magistrate's warrants, were subject to indictment, if they did not execute the warrant directed to them, or to vexatious actions if they did.(2) It has been held, that it protects the officer only in those cases where the justice remains liable, and that it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to the warrant. And, in that case, the statute gives him an absolute protection at whatever time the suit may be brought against him.(3) If the plaintiff, therefore, can prove that the officer has not so acted, as, by showing that he apprehended a different person from that described in the warrant;(4) that, under a warrant of distress, he took the goods out of the limits specified in the warrant;(5) or that he broke into

(1) 24 G. II, c. 44.

(2) By Lawrence, J., 5 East, 448. Churchwardens and overseers taking a distress for poor rates are entitled to the protection of the statute. *Harper v. Carr*, 7 T. R. 271; Bull. N. P. 24. Surveyors of highways, by Lord Kenyon, Id.; *Jailers, Bute v. Newman*, Gow. 97.

(3) By Lord Tenterden in *Parton v. Williams*, 3 Barn. & Ald. 333; *per Cur.* in *Prestidge v. Woodman*, 1 Barn. & Cress. 13. See *Sly v. Stephenson*, 2 C. & P. 464.

(4) *Mooney v. Leach*, 3 Burr. 1742; 2 Maule & Selw. 260.

(5) *Milton v. Green*, 5 East, 237, in which case, the warrant was directed by a justice of Kent to the constables of Kent, to be executed in A., and they executed it in a part of A. which was not in the county of Kent. Lord Ellenborough said, that if the constables had been required, by

the plaintiff's house to take a distress;(1) the case is not within the statute, and the action may be maintained, without making the magistrate a defendant; for, in executing the warrant, the officer has exceeded his authority; and in such a case, therefore, an action of trespass will lie against the constable, without a previous demand of the perusal and copy of the warrant.(2)

An officer may, in many cases, be said to act in obedience to the warrant, though the justice had no jurisdiction, and though the warrant be an absolute nullity. If, for instance, he is commanded by the warrant to take the goods in a place particularly named, and he there takes them, he is protected, though the place may be out of the magistrate's jurisdiction; and though the warrant describes the goods which are to be taken with so much uncertainty, as to be absolutely void, yet the officer will be protected, if he act with as much precision in executing the warrant, as the justice in granting it.(3)

The statute had been considered in several cases as extending only to actions of tort; and it has been held that, in an action against an officer to recover bank money, which had been levied on a conviction by a justice of the peace, the proof of having demanded a copy of the warrant was unnecessary;(4) and that a demand of a copy was unnecessary, previous to the commencement of an action of replevin.(5) But it seems that, at least, where the proceeding is not *in rem*, as in an action of replevin, it is more conformable to the analogy of recent decisions, to consider the officer entitled to the protection of the statute in every species of action brought against him, provided he has acted in the execution of his office.(6)

If the demand of the warrant is made in time, and the officer, whose protection was the principal object of the above-mentioned clause, delay to comply with it, till after the expiration of the six days allowed him, he acts at his peril, and subjects himself in the interval to be sued as any

the terms of the warrant, to execute it out of the magistrate's jurisdiction, they would have been protected. See stat. 5 G. IV, c. 18; 1 Barn. & Cress. 288.

(1) *Bell v. Oakley*, 2 Maule & Selw. 259.

(2) *Morse v. James*, Willes, 122.

(3) See *Price v. Messenger*, 2 Bos. & Pull. 161; by Eyre, Ch. J., 2 Wils. 291; Willes, 122; by Lord Ellenborough in *Milton v. Green*, 5 East, 237. If the constable fails to bring himself within the protection of the statute, it seems, that where the defect of jurisdiction expressly appears, he will not be protected, though acting in obedience to the warrant. Str. 1002; Bac. Abr. tit. Constable, D.

* * See *supra*, Vol. II, and the notes; *ante* notes 1137, 1149, and the cases there cited; *Fulton v. Heaton*, 1 Barb. S. C. R. 552; *Sherry v. Schuyler*, 2 Hill, 204, and note *a*. * *

(4) *Bull. N. P.* 24. And see *Irving v. Wilson*, 4 T. R. 485; by Lord Ellenborough in *Wallace v. Smith*, 5 East, 122; *Umpelby v. Maclean*, 1 Barn. & Ald. 42.

(5) *Fletcher v. Wilkins*, 6 East, 283.

(6) See *Waterhouse v. Keen*, 4 Barn. & Cress. 211; *Morgan v. Palmer*, 2 Barn. & Cress. 729; *Greenway v. Hurd*, 4 T. R. 553.

common person ; but if he complies before an action is commenced, though six days have elapsed, he is still within the protection of the statute.(1)

The contents of the written demand may be proved by a duplicate original, or any examined copy, without proof of a notice to produce the one delivered;(2) or, if there is no such duplicate or examined copy, secondary evidence of the contents will be admitted, after proof of a notice to the defendant to produce the original. The demand of the copy of the warrant, whether proved by a duplicate original, examined copy, or by secondary evidence, must be shown to have been properly signed ; and the statute directs, that it shall be "signed by the party demanding the same." In the construction of this act (which is not to be construed with all the strictness of a penal act), it has been held, that a demand, signed for the plaintiff by his attorney, is within the meaning of the statute a demand signed by the plaintiff.(3)

The 8th section of the stat. 24 Geo. II, provides, "that no action shall be brought against the constable, headborough, or other officer or person, acting as before mentioned, unless commenced within six calendar months after the act committed."(4) The action must be commenced within this limited time, whether the officer has acted within his authority, or has exceeded it; although he has been guilty of excess, and the justice be not liable, the party aggrieved need not demand a copy of the warrant. Thus, in the case of *Theobald v. Crichmore*,(5) in an action of trespass against a constable for breaking into a house to levy a church rate, granted under the authority of the statute 53 G. III, c. 127 (the 12th section of which enacts that an action, brought for anything done in pursuance of the act, shall be commenced within three calendar months after the act committed), it was contended that this would not apply to the case, where the officer had exceeded his authority, and as in such a case a demand of a copy of the warrant would not be necessary within the meaning of the statute 24 G. II, c. 44,(6) so here the action might be commenced after the three months had expired ; but the Court of King's Bench held the contrary : "The object of the legislature," said Lord Ellenborough, "was clearly to protect persons acting illegally, but in supposed pursuance of the statute, and with a *bona fide* intention of discharging their duty under the act of Parliament." And Mr. Justice Bailey said, "The point decided in *Bell v. Oakley* was, that it was not necessary to demand a warrant where the magistrate could not be liable ; but that does not apply to this case."

(1) *Jones v. Vaughan*, 5 East, 447.

(2) *Jory v. Orchard*, 2 Bos. & Pull. 41. The time for proving the demand, is when the defendants begin their justification under the warrant. *Price v. Messenger*, 3 Esp. 96.

(3) 2 Bos. & Pull. 40, 42.

(4) As to proof of commencement of action, *vide supra*; *Clarke v. Davey*, 4 B. Moore, 465.

(5) 1 Barn. & Ald. 227. And see *Graves v. Arnold*, 3 Campb. N. P. C. 242.

(6) 2 Bro. & Bing. 619.

The statute was construed in the same manner in the case of *Smith v. Wiltshire*,⁽¹⁾ where a constable was directed to search a house for black cloth which had been stolen, and finding no black cloth, he took cloth of other colors; the court in this case were of opinion, that the 8th section of the act applied to all cases of constables acting in that capacity. And, in the case of *Parton v. Williams*,⁽²⁾ where a constable, under a warrant, directing him to seize the goods of A., took those of B., believing them to belong to A., the court ruled, that the 8th section of the act was intended to give a protection to the constable, which he was not entitled to under the sixth.

Where the act committed by a constable is of such a nature, that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer.⁽³⁾ Thus, in commenting upon the case of *Postlethwaite v. Gilbert*, Lord Tenterden Ch. J., observes, that the constable (in that case the officer) was charged with the commission of an act, which was no part of his ordinary duty; and that therefore he was not within the protection of the statute.⁽⁴⁾ The distinction is between the extent, and the abuse of the authority.⁽⁵⁾

Actions against constables, headboroughs, and churchwardens and persons aiding and assisting them, are to be laid within the county where the injury complained of has been committed. And they may plead the general issue of not guilty, and give in evidence any special matter, which, if pleaded, would be a good and sufficient discharge and defence to the action.

With respect to the persons entitled to have the action laid in the county where the grievance arose, and to plead the general issue, it appears, from the words of the statute, that persons acting in aid of a peace officer, are equally privileged with the officer himself. A party will not be entitled

(1) 2 Bro. & Bing. 619.

(2) 3 Barn. & Ald. 330. The opinion of Lord Kenyon in *Postlethwaite v. Gibson* (3 Esp. N. P. C. 226), that the constable is not protected under the 8th section, unless he has a warrant, has been questioned. See 3 Barn. & Ald. 334; 2 Bro. & Bing. 622; *Staigt v. Gee*, 2 Stark. N. P. C. 449.

(3) By Lord Kenyon in *Alcock v. Andrews*, 2 Esp. N. P. C. 541.

(4) By Lord Tenterden, 3 Barn. & Ald. 334. It was there said, that it is no part of the ordinary duty of a constable, to arrest a party for felony, upon the order of a private individual. It seems, however, that a constable may justify arresting a party for felony upon a reasonable charge, though in fact no felony has been committed. *M'Cloughan v. Clayton*, Holt's N. P. C. 480; *Samuel v. Payne*, Doug. 359; *White v. Taylor*, 4 Esp. N. P. C. 80; *Ledwith v. Catchpole*, Caldecot's Cases, 291. In *Isaacs v. Brand* (2 Stark. N. P. C. 167), it was considered, that a constable was not justified in apprehending a person as receiver, on the mere assertion of the principal felon. And see *Hill v. Yates*, 2 B. Moore, 80. As to the duty of a constable in breaking open doors, see 2 Barn. & Ald. 292; 6 Taunt. 226; 14 East, 1.

(5) By Lord Kenyon, in *Alcock v. Andrews*, 2 Esp. N. P. C. 541. And see *Coupy v. Henry*, Id. 539.

* * See *ante*, notes 1137, 1149. * * *

to such privilege, where he has been the principal, and the officer has only acted under his directions in seizing the person or property of the plaintiff; this is a question to be determined by the jury.(1) Where a prosecutor, who had obtained a warrant to arrest a party, merely pointed him out to the constables, Lord Ellenborough was of opinion, that he was acting in their aid, within the meaning of the statute.(2) It seems that a peace officer may object to the venue having been laid in the wrong county, where he has arrested the plaintiff on a suspicion of felony, though he has not acted upon a charge of felony, or under a magistrate's warrant, and although the grounds for the arrest are not deemed reasonable.(3) The facts necessary to constitute an arrest and false imprisonment have already been the subject of consideration.(4)

If a joint action is brought against the constable who executed the warrant, and the justice who issued the warrant, and the constable has done the act for which the action is brought, in obedience to the warrant, and without exceeding his authority, the jury, in this case, are directed by the statute, on proof of the warrant, to find their verdict for the constable, headborough, or other person acting in his aid.(5) If, therefore, nothing is proved against the constable, beyond what he was justified in doing under the warrant, and his evidence should be wanted on behalf of the justice or other defendant, it will be competent to the jury, under the direction of the court, when the other evidence for the defendants has been closed, to find their verdict for the constable, and then he will be a competent witness for the other defendants. But the verdict cannot properly be given in his favor, for the purpose of rendering him a competent witness, until the whole of the case of the other defendants, exclusive of the evidence which he may have to give, is entirely finished.(6)

2. Action against excise officer.

Secondly, as to actions against officers of customs or excise.

The statute, before mentioned, relating to constables, did not extend to officers of the excise or customs. The legislature, therefore, by a later statute, has enacted,(7) "that no writ or process shall be sued out against any officer of the customs or excise, or against any person or persons acting by his or their order, in his or their aid, for anything done in the execution, or by reason of that or any other act or acts of Parliament

(1) *Staight v. Gee*, 2 Stark. N. P. C. 445; *McCloughan v. Clayton*, Holt's N. P. C. 478, where the defendant sent for the constable, and gave the plaintiff in charge. And see *Stonehouse v. Elliot*, 6 T. R. 315.

(2) *Nathan v. Cochen*, 3 Campb. N. P. C. 527.

(3) 2 Stark. N. P. C. 445.

(4) *Vide supra*.

(5) *Vide supra*.

(6) *Ward v. Bourne and Others*, Trin. T. 1821, MSS.; *Wright v. Paulin*, 1 Ry. & Mo. 128.

(7) 28 G. III, c. 37, § 25. See 23 G. III, c. 70, a previous act to the same effect.

then in force, or thereafter to be made relating to the said revenues, or either of them, until one calendar month next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode by the attorney or agent of the person who intends to sue out such writ or process as aforesaid, in which notice shall be clearly and explicitly contained in the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said attorney or agent.”(1) And the plaintiff shall not give evidence of any cause of action not contained in the notice. The action is to be commenced within three months next after the cause of action shall arise.(2) And the defendant may plead the general issue, and give the special matter in evidence at the trial.(3)

It has been considered that the officers are only entitled to notice in actions of trespass or tort, and that the statute does not extend to actions of assumpsit.(4) This doctrine, however, has been questioned in subsequent cases, and seems to be incorrect.(5) If the defendant has acted in a manner wholly alien to his official capacity, and not merely under a mistake in the supposed execution of his duty, he will not be entitled to notice.(6) An action against an officer of the customs, for an alleged libel contained in a letter written by him to the commissioners, in answer to one from them, in which they required him to give an account of his conduct in certain transactions relating to the plaintiff, is within the statute, and requires a regular previous notice, the letter having been written by him in discharge of his official duties.(7)

The notice is to contain the place of abode of the person who intends to bring the action, as well as the cause of action. The intention of the legislature was, that the defendant might know where to find the plaintiff, in order to tender him amends on the receipt of the notice; it ought therefore to appear from the notice, where the plaintiff's place of abode is at the time when the notice is given. In the case of *Williams v. Burgess*,(8) where the plaintiff's place of abode, at the time when the cause of action

(1) Sect. 27.

(2) 28 G. IV, c. 37, § 23.

(3) 28 G. III, c. 37, § 23. Amends may be tendered, and may be pleaded together with the general issue, § 26.

(4) *Irving v. Wilson*, 4 T. R. 487; *Wallace v. Smith*, 5 East, 122. See *Umphelby v. Maclean*, 1 Barn. & Ald. 42.

(5) *Greenway v. Hurd*, 4 T. R. 553; by Lord Tenterden, Ch. J., in *Waterhouse v. Keen*, 4 Barn. & Cress. 211.

(6) *Irving v. Wilson*, 4 T. R. 487; *Morgan v. Palmer*, 2 Barn. & Cress. 729; *Daniel v. Wilson*, 5 T. R. 1; *Norton v. Miller*, 2 Chitty, 140; *R. v. Brady*, 1 Bos. & Pull. 187; *Cooper v. Booth*, 3 Esp. N. P. C. 35. See *Oldfield v. Licet*, 2 Bl. R. 1001; as to officers becoming trespassers, *ab initio*.

(7) This point was decided in the case of *Black v. Holmes*, in the Court of King's Bench in Ireland, 1822, Fox & Smith, Rep. 28.

(8) 3 Taunt. 127.

occurred, was sufficiently described, but it did not appear where his place of abode was at the time of giving the notice (which was five weeks after the injury complained of), the Court of Common Pleas held, that the notice was insufficient. A notice of action for seizing a ship of the plaintiffs, describing the ship as "the property of A. B. of Rotherhithe, and of C. D. late of Rotherhithe," is a sufficient description of their places of abode; otherwise, a house of trade with partners abroad could not bring the action.(1)

A judgment of condemnation in the Court of Exchequer where proceedings *in rem* have been instituted, is conclusive evidence in any other court, as to all the world, that the goods were liable to be seized.(2) And a similar condemnation by the commissioners of excise appears to have the same conclusive operation.(2) But a proceeding *in personam*, such as a record of conviction for penalties, has not that conclusive effect, and is admissible only, as any other judicial proceeding.(3)

An action cannot be maintained against officers of the excise or customs, unless it is brought within three months after the original seizure; and this, notwithstanding a suit is instituted in the Court of Exchequer for the condemnation of the goods, which is depending at the expiration of the three months.(4) Though the statute enacts that the officer shall have a calendar month's notice of action, and a calendar month within which to tender amends; yet it has been held, that it requires the action to be commenced within three lunar months from the time that the cause of action arises.(5)

CHAPTER VI.

OF THE EVIDENCE IN ACTIONS AGAINST HUNDREDORS.(6)

THE law in respect to actions against the hundred, has undergone a material change, in consequence of the provisions of the stat. 8 G. IV,

(1) Wood and Others v. Folliott, 3 Bos. & Pull. 522, n. *Vide supra*, p. 713. The month, in a notice, begins with the day on which it is served, 5 T. R. 623.

(2) See Vol. II. And as to the effect of an acquittal in the exchequer, *Id.*

(3) Hart v. M'Namara, 4 Price, 154. See Vol. II.

(4) Godin v. Ferris, 2 H. Bl. 15; Saunders v. Saunders, 2 East, 254; Smith v. Wiltshire, 2 Bro. & Bing. 662.

(5) Crooke v. M'Tavish, 1 Bing. 307.

(6) NOTE 1150.—* * See Blackstone's Com. index, title *Hundred*, for an historical explanation of the meaning of the term hundred. It signifies "a political division or part of a county in England, supposed to have originally contained a hundred families, or a hundred warriors, or a hundred manors; but as the word primarily denotes a *circuit* or *division*, it is not certain that Alfred's divisions had any reference to that number." (Webster.) And see Reeve's Hist. Engl. Law, title *Hundred*, *passim*.

There is no political division in the United States precisely corresponding with the Saxon Hundred, but the divisions of towns, counties, &c., common to England and America, resemble it in many particulars. In respect of the liabilities of those divisions, for the crimes and injuries treated of in the text, see the codes and statutes at large of the several states. For a history of the origin and rise of municipal corporations, see Ang. & Ames on Corporations, pp. 10—19; Wilcox on Municipal Corporations, p. 2, *et seq.* And see Robertson's *Introduct. to History of Charles V, passim.*

Both towns and other political divisions, as counties, hundreds, &c., which are established without an express charter or incorporation, are denominated *quasi* corporations. In the same class of corporate bodies are included overseers of the poor, supervisors of a county, and of a town, loan officers of a county, &c., who are invested with corporate powers *sub modo*, and for a few special and specified purposes only. 1 Kyd on Corp. 63; 2 Kent C. 221; North Hempstead v. Hempstead, 2 Wend. 109; Jansen v. Ostrander, 1 Cowen, 670. Such are the board of commissioners of roads in South Carolina (*Com. Roads v. M'Pherson*, 1 Spear S. C. R. 218); the trustees of the school fund in Mississippi (*Carmichael v. Trustees, &c.*, 3 Howard Miss. R. 84); the trustees of the poor in the same state (*Governor v. Gridley*, Walker Miss. R. 329); and county commissioners in Ohio (*Paine v. Commiss., &c.*, Wright, 417). School districts are embraced in the same class. *Grant v. Fancher*, 5 Cowen R. 309, and the authorities of the different states there cited in the note of the learned reporter; *City of Lexington v. M'Quillan's Heirs*, 9 Dana (Kent.) R. 519; *Inhabitants of 4th School District*, 1 Wood (13 Mass. R.) 192; *Jackson v. Hartwell*, 18 John. R. 422; Ang. & Ames on Corp. pp. 19, 20; 2 Kent C. (6th ed.) 264.

These *quasi* corporations, and other municipal and local corporations, are so numerous in the United States, and come in contact with rights of persons and property in such a great variety of instances, that it may be useful to enumerate some of the cases in relation to them upon points of most general interest. They have capacity to sue and be sued (Ang. & Am. 19; *Jackson v. Hartwell*, *supra*) of succession, and the successor must be sued on contract made by predecessor in the office. *Id.* The superintendents of the poor, in New York, may sue for the wrongful conversion of personal property belonging to the county, either in their corporate name, or in their individual names with the addition of their name of office. *Kendrew v. Johnson*, 3 Denio, 183. But in Ohio, the trustees of a township, must sue in the name of the corporation. A state is a corporation, and may sue in another state. *Delafield v. The State of Illinois*, 2 Hill, 159. They exercise a special and limited power, and their authority must be pursued strictly. *Sharp v. Spier*, 4 Hill, 76—92; 1 N. Y. R. Statutes, p. 600, § 3; 2 Kent C. 298, *et seq.*, and notes.

Quasi corporations created for purposes of public policy are subject to indictment for breach or neglect of duty. *Mower v. Leicester*, 9 Mass. 247; *Riddle v. Locks and Canals*, 7 Mass. 169. See also *Regina v. A. Rail. R. C.*, N. Y. Leg. Obs. Nov. 1846; Ang. & Am. on Corp. pp. 392—394. All corporations, unless prohibited, may issue negotiable paper for a debt contracted in the course of their proper business. *Moss v. Oakley*, 2 Hill, 265; *Kelly v. The Mayor, &c.*, of Brooklyn, 4 Hill, 263. A municipal corporation is not liable for the misfeasance or nonfeasance of one of its officers, in respect of a duty specifically imposed by statute on the officer; but it is otherwise if the duty is imposed absolutely on the corporation, as such (*Martin v. The Mayor, &c.*, of Brooklyn, 1 Hill, 545); or if the officer is the agent of the corporation, and the act or omission relate to its corporate property. *Bailey v. The Mayor, &c.*, of New York, 3 Hill, 531; S. C., in error, 2 Denio, 531. Thus, the corporation of New York was held liable for damages occasioned by its neglect to repair a sewer, but not for the imperfect execution of the work by its agent (*The Mayor, &c. v. Furze*, 3 Hill, 612); for damages caused by the breaking down of a vault, caused by the negligence of a contractor in constructing a sewer for the corporation (*Delmonico v. The Mayor, &c.*, of New York, 1 Sandf. S. C. R. 224); for the negligent and unskillful construction of one of the Croton dams, by the destruction of which the plaintiff's mills were injured. *Bailey v. The Mayor, &c.*, *supra*. And see *Rhodes v. Cleveland*, 10 Ohio, 159; *Thayer v. Boston*, 19 Pick. 511.

The decision in *The Mayor v. Furze* (*supra*), was explained and limited in *Wilson v. The Mayor, &c.* (1 Denio, 595), where it was held, that the corporation were not liable for an omission to construct drains, sewers, &c., where they were clothed with a discretion to construct them or not, even though the neglect were charged to be wilful; nor for injuries done to individuals (caused by overflowing the plaintiff's land), in the exercise of its authority to direct the pitch

c. 31.(1) That statute contains the following clause relative to the liability of the hundred for felonious injuries to property, committed by persons riotously and tumultuously assembled. "If any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection, used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed, or movable, prepared for or employed in any manufacture or in any branch thereof, or any steam engine, or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; in any such case, the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects herein before enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the building or erections aforesaid."(2)

The statute contains the following provision, relative to the conditions which must be complied with, before an action is brought for the recovery of damages against the hundred.

paving and grading of streets. And see *White v. City of Charleston*, 2 Hill S. C. R. 571; *Weckerly v. Ministers, &c.*, 3 Rawle, 172; *Ready v. Tuskaloosa*, 6 Ala. 327; *Boylard v. The City of New York*, 1 Sandf. S. C. R. 27; *Levy v. The City of New York*, Id. 465. In the great case of *Russell v. The Mayor of New York* (2 Denio, 461), it was held by the Court of Errors (affirming the judgment of the Supreme Court in the same case), that the corporation is not liable to an action *at common law*, for compensation for the loss of property destroyed by order of the magistracy, to prevent the spread of a conflagration. See the next note.

In Massachusetts and Connecticut, by immemorial usage, the inhabitants of towns charged by law with the performance of duties, are held to be *individually* liable in their property, though sued by a collective name, as a corporation. *Gaskill v. Dudley*, 6 Metc. 446; *Beardsley v. Smith*, 16 Conn. 368; 2 Kent C. (6th ed.) pp. 274—280, and notes. And see *Russell v. The Men of Devon*, 2 Term R. 667; *Riddle v. Proprietors, &c.*, 7 Mass. 187; *Merchants' Bank v. Cook*, 4 Pick. 414; *Adams v. Wiscasset Bank*, 1 Greenleaf's Rep. 361; *Chase v. Merrimack Bank*, 19 Pick. 569. In the case of *The Attorney-General v. The Corporation of Exeter* (2 Russell's Rep. 63), Lord Eldon held, that if a free farm rent was chargeable on the whole of a city, it might be demanded of any one who holds property in it, and he would be left to obtain contribution from the other inhabitants. 2 Kent C. (6th ed.) 274, n. c. * *

(1) The statute 7 & 8 G. IV, c. 27, repeals the clauses in former acts, which give remedies against the hundred.

(2) Sec. 2. No action will lie against the hundred, where the damage sustained does not exceed £30; the remedy in such case is provided for by sect. 8.

"Provided always, and be it enacted, that no action shall be maintainable by virtue of this act, for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state, upon oath, before such justice, the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders, when apprehended; provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence."(1)

The plaintiff, in this action, will have to show an interest in the property, sufficient to enable him to sue for damages; as, for instance, his possession of the premises; or that he is owner or trustee, having the legal estate; and it seems also, that the bare trustee of a mortgage term, which has been satisfied, may maintain the action.(2)

The plaintiff will have to prove the examination before a justice of the peace, and the entering into the recognizance required by the statute. It seems not to be necessary, that the examination should be taken by the justice who lives nearest to the place, where the robbery was committed; and that although there may be many others living nearer, it will not be

(1) Sec. 3.

(2) *Pritchett v. Waldron*, 5 T. R. 14. See *Duke of Somerset v. Mere*, 4 Barn. & Cress. 171.

NOTE 1151.—* In New York, it is provided by statute (2 R. L. 1812, p. 368, § 81, *et seq.*), that where buildings were destroyed by certain magistrates to prevent the spread of a conflagration, and their destruction not otherwise inevitable, the corporation should pay to the parties interested therein their damages to be assessed, &c. In several actions brought to recover damages, occasioned by the great December fire, in the city of New York, in 1835, this act received a judicial construction. In *Lord v. The Mayor, &c.* (17 Wend. 285, affirmed in 18 Wend.), it was held, that an owner or lessee might recover, in addition to his loss on the building, the amount of his charges and advances as a factor or commission merchant, for which he had a lien on the goods of his principal destroyed. In *The Mayor, &c. v. Stone* (20 Wend. 139, affirmed 25 Id. 157), it was held, that the owner of goods destroyed in a building of which he was not the owner or occupant, could not recover their value under the statute. *S. P., Russell v. The Mayor, &c.*, 2 Denio, 461. In *The City Fire Ins. Co. v. Corlies* (21 Wend. 367), it was held, that the blowing up of a building, covered by a policy, with gunpowder, to check a conflagration, did not exempt the insurers from liability under the clause in the policy against the storing of gunpowder, or the clause exempting from losses occasioned by an *usurpation of the power of government*, although the magistrate ordering the blowing up exceeded his authority; and that the insurers were liable even though the assured had a remedy against the corporation under the act. See the observations of Nelson, Ch. J., 20 Wend. 142–145, relative to the liabilities of the hundred, and the statute Ed. I, commonly called the statute of *Hue and Cry*, 4 Geo. I, called the *Riot Act*, and 9 Geo. I, called the *Black Act*; and the cases cited in *The City Fire Ins. Co. v. Corlies*, *supra*. * *

material.(1) Nor need the examination be taken within the county.(2) All that the statute directs is, that the party shall, within seven days from the commission of the offence, to go before some justice of the peace, residing near, and having jurisdiction over the place where the offence has been committed, and shall make oath before him, and submit to his examination.

Where a servant has the care of premises, it must be proved that he was examined before the justice; and where the premises are under the care of several servants, they ought all to be examined as to their knowledge of the transaction, or it ought to be shown, that they had no means of knowledge.(3) And where the premises injured belong to several partners in trade, who are present when the offence is committed, they ought all to appear before the magistrate, within the time specified by the act.(4)

It must be proved that oath has been made before a justice of the names of the offenders, if known. An affidavit, stating that the person who made it does not know the person or persons concerned in committing the offence, without adding, that he does not know any of them, seems to be insufficient.(5) The affidavit should be positive as to the party's knowledge; it is not sufficient to state merely his suspicions.(6)

The examination, if taken in writing, must be produced, and proved as other examinations before magistrates. The common proof is by proving the handwriting of the magistrate, before whom the examination purports to have been taken. Proof that the person, who took the examination, acts as a justice of the peace, and that the examination was delivered by his clerk to the witness who produces it, seems to be sufficient.(7) The signature of the party examined does not appear to be necessary; and if he signs, it seems unnecessary to prove his signature.

It is the duty of the magistrate to take the examination correctly; and when once taken in writing, it cannot be enlarged or varied by parol evidence. Nor is evidence admissible to show, that the party mentioned other circumstances before the magistrate, omitted in the examination, which are inconsistent with his account at the trial.(8)

A written examination, however, is not required by the statute; and though writing generally is most satisfactory, yet it is not absolutely necessary. If the examination has not been taken in writing, it may be

(1) Bull. N. P. 186; 2 Salk. 614.

(2) *Helier v. Hundred of Benhurst*, Cro. Car. 211.

(3) *Duke of Somerset v. Inhabitants of Mere*, 4 Barn. & Cress. 171.

(4) *Nesham v. Armstrong*, 1 Barn. & Ald. 146.

(5) *Trimmer v. Munford*, 6 D. & R. 10. And see *Thurtell v. Mutford*, 3 East, 400, where the party swore, that he suspected the fact was done by some person or persons to him unknown.

(6) *R. v. Bishop's Sutton*, 2 Str. 1247. And see *Thurtell v. Mutford*, 3 East, 400.

(7) Bull. N. P. 186, citing a case before Parker, Ch. J., in 1722.

(8) Bull. N. P. 186. And see *R. v. Thornton*, Vol. I.

proved by the magistrate appearing at the trial, and deposing to the substance of it.(1)

The plaintiff is entitled to recover damages against the hundred, for any injury done to his fixtures, furniture, or goods, in any of the buildings, which have been feloniously demolished, pulled down, or destroyed, entirely or in part, within the meaning of the act. But where property is taken from the premises of the plaintiff, at the same time that an attempt is made to demolish them, but for the purpose of appropriation, and in the commission of a distinct and substantive felony, it appears that he will have no remedy against the hundred.(2) A compensation, received from an insurance office, for a loss sustained from an injury to premises occasioned by a riot, will not, it seems, preclude the plaintiff from maintaining this action against the hundred.(3)

The action must be commenced within three calendar months of the commission of the offence.(4) To prove that the action has not been commenced too late, the original writ, which is the commencement of this action, ought to be produced, or, if returned, and filed of record, proved by an examined copy. Original writs against hundreds, and in several other cases, are, by the practice of the cursitor's office, tested on the same day on which they are bespoken; and, if the original against the hundred is tested within the proper time, the action is saved, though the writ has not passed the great seal till after the end of the three calendar months.(5)

The late statute contains the following enactment respecting the competency of witnesses: "That in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town or place, as is hereinafter mentioned, no inhabitant thereof shall, by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence, either for the plaintiff or for the defendant."(6)

(1) Bull. N. P. 186.

(2) *Beckwith v. Wood*, 1 Barn. & Ald. 487; *Burrows v. Wright*, 1 East, 615; *Smith v. Bolton*, Holt's N. P. C. 201. Under the former act, which contained the words, "shall begin to demolish," it was held necessary to show, that the object of the mob was totally to demolish the premises. Holt's N. P. C. 203, n.

(3) *Clark v. Inhabitants of Blything*, 2 Barn. & Cress. 254. Burning is included under the term demolishing. *Nesham v. Armstrong*, Holt's N. P. C. 468.

* * See 3 Stephens' N. P. 2079. And the cases cited in the preceding note. * *

(4) Sect. 3. It seems that the day of the commission of the offence is to be included. *Norris v. The Hundred of Gawtry*, Hob. 139.

(5) *Price v. Hundred of Chewton*, 1 P. Wms. 437; 2 Saund, 375 a, n.

(6) Sect. 5.

CHAPTER VII.

OF THE EVIDENCE IN ACTIONS AGAINST COMMISSIONERS OF SEWERS.

WHERE the plaintiff complains of any act done under the authority of the commissioners of sewers, he may bring his action against the persons employed to do the act complained of, without joining the commissioners, or he may make the commissioners parties to the suit. If he adopts the latter course, he will have to prove their warrant, as the means of connecting them with the acts of their agents. And for this purpose, it will be necessary to serve a *subpœna duces tecum*, or to give notice for producing the warrant at the trial, as the case may require.

The defendant, in an action of trespass or other suit, may make a *avowry*, *conusance* or *justification*, that the alleged trespass or distress was by authority of a commission of sewers, for a lot or tax assessed by the commission, according to the tenor and effect of st. 23 H. VIII, c. 5; and upon this the plaintiff may reply, the defendant took the distress or committed the alleged trespass (as the case may be) of his own wrong, and without the cause alleged in the declaration.⁽¹⁾ If the party, instead of pleading this general plea, plead specially, he waives the benefit of the general plea, given by the statute, and must plead a good special plea.⁽²⁾

Persons who have acted in execution of the stat. 22 & 23 Car. II, c. 17 (relating to the sewers in and about the city of London), or in execution of the st. 2 W. & M. sess. 2, c. 8 (relating to the repair of sewers in London and Westminster, and out parishes in the county of Middlesex, and places within the weekly bills of mortality), may plead the general issue, and give the special matter in evidence.⁽³⁾

The most usual defence, which commissioners of sewers, and persons acting under their authority, are called upon to make, is, that the property of the plaintiff has been seized for the purpose of satisfying a rate to which he has been assessed.

Before proceeding to state the requisite proofs in support of such a defence, it will be convenient, in the first place, to mention shortly what

(1) Stat. 25 Hen. VIII, c. 5, § 11. The 12th section of the statute enacts, that after such issue tried (found) for the defendant, or nonsuit of the plaintiff after appearance, the same defendant to recover treble damages, by reason of his vexation in that behalf, with his costs to be assessed by the same jury, or writ to inquire of damages, as the cause shall require.

(2) *Whitley v. Fawsett*, Sty. 12, 13.

(3) 2 W. & M. session 2, c. 8, § 23. Much information respecting the proceedings of commissioners of sewers is to be found in the Report of the Select Committee on Sewers, 10th July, 1823.

authority the commissioners of sewers have to ascertain the extent of grievances, to make rates, and to distrain for rates.(1)

The commission, by letters patent, the form of which is given in the 23 of H. VIII, after setting out the inconveniences arising from defect of sewers, states what the commissioners are to do, by their own survey, and what they are to do by means of an inquisition. The clause referred to is as follows: "We have assigned you and six of you, to be our justices to survey the said walls, streams, ditches, banks, gutters, sewers, &c., and other impediments and annoyances aforesaid, and the same cause to be made, corrected, repaired, put down, or reformed as the case shall require, after your wisdom and discretion; and therein as well to ordain and alter the form and effect of ordinances (then existing), as also to *inquire* by the oaths of honest and lawful men, through whose default the said hurts and damages have happened, or who hath or holdeth lands or tenements, &c., or hath any loss, hurt or disadvantage by any manner of means in the said place, as well near to the said places as dwelling thereabouts, by the said walls, ditches, sewers," &c. Then follows the clause authorizing them to make rates, in these words: "And all those persons and every of them (that is, the persons respecting whom the inquisition is made by the jury) to tax, assess, charge, distrain and punish, after the quantity of their lands, tenements and rents, by the acre, after the rate of every person's portion, tenure or profit, by such ways or means as to you or six of you shall seem most convenient to be done for redress and reformation in the premises."

The clause which gives the power of *distress*, is the following: "And (we ordain you and six of you) to distrain for the arrears of every such collection, tax, and assess, as often as shall be expedient, or otherwise to punish the debtors," &c. The st. of 7 Anne, c. 10, § 3, also authorizes the commissioners, or any six or more of them, by warrant under their hands and seals, to give authority to any person to levy the sums of money (that is, the sums assessed by them or taxed upon the lands, meadows, marshes or grounds chargeable with any taxes or charges under their commission) by distress and sale of the goods of the person who shall not pay, or shall refuse to pay the same."

The defendant, therefore, in the first instance, will be obliged to produce and give in evidence the original assessment and rate of the commissioners, under the signatures, at least, of six of them, which signature must be proved; and also to produce the inquisition or presentment of the jury, on which the rate is founded.(2)

(1) A power of commissioners of sewers for the city of London and its liberties, to make rates, and to distrain, is given by statute 11 G. III, c. 29, §§ 69 and 74.

(2) It seems to have been held in the case of *Fart v. Crisp*, in 2 Barnard. 321 (which was a circuit *Nisi Prius* case), that the inquisition need not be produced. But, it is conceived, there must be an error in the report.

The inquisition must be made by at least twelve jurors upon oath,(1) before the commissioners; and the jurors ought to be summoned from the body of the county.(2) With respect to the subject matter of their inquisition, the directions of the stat. of Hen. VIII, are explicit. They are there instructed to inquire "by whose default the said hurts and defaults have happened" (that is, as well damages for default of reparation of walls, ditches, banks, fences, sewers, gates, gutters, calcies, bridges and streams, and other defences, situate by the coasts of the sea and marsh grounds, and which have been broken or injured by the sea, or by fresh waters having course by divers ways to the sea, as also damages from the interruption of the common passages for ships and boats in rivers and streams, by means of setting up and making of mills, bridges, locks, or other like impediments and annoyances); also to inquire "who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing, or who hath or may have any hurt, loss or disadvantage by any manner of means in the said places, as well near to the said dangers, lets and impediments, as inhabiting or dwelling thereabouts, by the said walls, ditches, banks, sewers, &c., and other the said impediments and annoyances."

It appears, then, that the commissioner ought to inquire by a jury, and not by survey without inquest, by whom annoyances are erected; by whose default a wall, bank or other defence is defective; who are liable to repair by prescription, tenure, &c.; what lands lie within danger, &c.; and who is the owner.(3) So that, without the inquisition of the jury as to these matters of fact, there are no means of knowing whether those persons have been rated who ought to be rated; in other words, whether the rate is legal.(4) And the power of taxing, given to the commissioners, seems limited, by the express words of the statute, to those persons concerning whose liability an inquisition has been found.(5)

The assessment and inquisition together, will show who are rated; in respect of what property they are rated; for what cause they are rated;

(1) An inquest *per sacramentum juratorum* generally, is not good. March, 198. The presenting jury must hear the evidence on oath. R. v. Commissioners of Somerset, 7 East, 71.

(2) A standing jury, composed of the inhabitants of certain interested districts, is illegal. 7 East, 71. The words *place* or *places* in the statute of Hen. VIII, mean *shire* or *shires*. Birkett v. Crozier, 1 Mo. & M. 120. See *Ex parte Owst*, 9 Price, 117.

(3) Callis, 108; Com. Dig. tit. Sewers, c. 5.

(4) *Vide supra*, p. 737.

(5) The party named in the inquisition, and found by the jury to be liable to the rates, may traverse the inquisition. In that case, a precept issues to the sheriff, commanding him to impanel twenty-four persons from the body of the county; and the question, whether the traverser has derived benefit, or avoided damage, by the works specified by the inquisition, may be tried by the jury before the Court of Commissioners. But this is evidently not a desirable mode of trying the question, the presentment having been made in that court. There is another remedy by writ of certiorari, for the purpose of quashing such proceedings of the commissioners, as are upon their face irregular and void.

whether from default or for benefit; and for what object or purpose the rate has been made.

The authority of the defendants to act as commissioners must be regularly proved. This may be proved, either by the production of the commission, or by showing that they have acted as commissioners on former occasions.

It will be necessary to show that the party, on whom the distress has been taken, had notice of the rate, and that a demand was made upon him for payment of his share. Without these previous steps, the distress is not regular.(1)

After demand and refusal the warrant issues; this must be under the hands and seals of at least six commissioners.(2) If the action is against the person who took the distress, the warrant, authorizing him to make the levy, must be produced, on his part, in his justification; and the signatures regularly proved. A warrant to levy the goods, *of all such as refuse to pay*, is too general, and bad.(3)

The bailiff cannot, under a warrant of distress, against the goods of a person therein named, sell the cattle of a *stranger*, which are levant and couchant on the grounds assessed to the repairs; for the stranger is not in default; but he may sell the cattle of an assignee of the person rated, for he is not a stranger, but takes the land *cum onere*.(4) It is clear, that the distress may be taken in any place within the realm.(5)

The defendant ought to show, that the plaintiff was the occupier of property within the level subject to the sewer's rate, if that fact is disputed; and farther, that he has received some benefit, or been saved from some damages, by means of the works, for which the rate is made. It seems, that some evidence, upon this latter point, ought to be produced, in the first instance, by the commissioners; for they are to show, that all thier proceedings are regular; and the commissioners are not justified in rating those who do not receive benefit, or avoid a damage, by means of the sewers or works in question.

The plaintiff, in reply to the case proved on the part of the commissioners, or their bailiff, may show any legal ground for resisting the distress.

(1) *Whitley v. Fawcett*, Sty. 12, 13. So in the case of a poor rate, a demand is necessary before a distress. *Rex v. Benn*, 6 Mo. 198.

(2) See *supra*, p. 737.

(3) *Farr v. Crisp*, 2 Barnard. 521. It seems that a distress for a fine, for not repairing a sewer, is traversable. 2 Keble, 137. See *Callis*, 176.

(4) *Callis*, 185, 192; Sty. 13; March, 161. *Callis* is of opinion that the goods of a *stranger* found on the lands assessed, may legally be taken; though he thinks they cannot legally be sold. *Callis*, 192. The commissioners of sewers may sell a distress. *Aleyn*, 92. But the bailiff of the commissioners cannot sell without a special warrant. *Callis*, 192.

(5) *Callis*, 184. With respect to the right to replevy, see *Callis*, 199; March, 198; *Pritchard v. Stevens*, 6 T. R. 522, in which case several of the rules upon the subject, in *Callis*, were doubted.

He may show that the commissioners have acted without jurisdiction; or that the inquisition, or the rate, or the warrant, is irregular and void.

The jurisdiction and authority of the commissioners are marked out and defined by the statute of Henry the 8th. They are assigned to be justices "to survey the said walls, streams, ditches, banks, gutters, sewers, gates, calcies, bridges" (that is the walls, streams, &c., situate by the coasts of the sea, and by marish ground, which have been derupt, lacerate, and broken by the force of the sea, or by fresh waters having course by divers ways to the sea, &c., and in the reparation of which there has been some default to the loss and inconvenience of the public); also to survey "the said trenches, mills, milldams, floodgates, ponds, locks, hobbing wears, and other impediments, lets, and annoyances aforesaid" (that is, such trenches, &c., as have been set up and made, interrupting the common passages of ships and boats, to the loss and inconvenience of the public); "and to cause the same to be made, corrected, repaired, amended, put down, or reformed, as the case shall require; after their wisdom and discretion" (that is, the walls, streams, ditches, sewers, &c., first above mentioned, which want repair, to be made, corrected, repaired, and amended; and the trenches, mills, and other annoyances, secondly above mentioned, which interrupt the common passage of ships and boats, to be put down or reformed); "also to inquire by the oaths of lawful and honest men, &c., and to assess and tax, &c., and also to reform, repair, and amend the said walls, ditches, banks, sewers, gutters, gates, calcies, bridges, and streams, and other the premises, in all places needful; and the same, as often and where need shall be, to make new, and to cleanse the trenches, sewers, and ditches in all places necessary; and further to reform, amend, prostrate, and overthrow all such mills, streams, ponds, locks, fishgarths, hobbing-wears, and other impediments and annoyances aforesaid, as shall be found by inquisition, or by the surveying and discretions of the commissioners, to be excessive or hurtful."

The commissioners have jurisdiction over ditches, gutters, sewers, &c., by marsh or low lands, into which ditches, gutters, &c., fresh waters descend, and by divers ways have their course to the sea; these are the words of the statute. It appears from the case of *Dore v. Gray*,⁽¹⁾ that where a navigable river ebbs and flows in a sewer used by boats, and other sewers and gutters, not navigable, run through marsh lands into such navigable sewer (whether they run into it below the point where the tide ebbs and flows, or above that point), if they are so connected with that navigable sewer, that unless they are cleansed, the navigation in the main sewer would be impeded and hurt, the commissioners have jurisdiction not only over this main sewer, where it is navigable, but also over

(1) 2 T. R. 558. Callis defines a sewer to be a fresh water trench, compassed on both sides with a bank, and that it is the diminutive of a river.

those other sewers, and gutters, situated above; and may rate the occupier of lands, benefited, or likely to be benefited, by the works of the commissioners in the sewers above or in the sewer below.(1) The criterion, whether sewers, ditches, &c., communicating (whether directly or circuitously) with a navigable sewer or stream which runs into a navigable tide river, are subject to the jurisdiction of the commissioners, seems to depend on the question, whether the cleansing and repairing of such sewers or ditches are necessary for the convenient use of the navigable stream, in other words, necessary or useful for navigation, and so matters of public utility.(2) A drain of which the only use is, in wet seasons, to carry the land waters into the Thames, without which inundations would happen to the inhabitants, and which is not navigable, is not within the jurisdiction of the commissioners of sewers.(3)

The commissioners have not any authority, under these provisions, to make a new river out of the main land,(4) nor can they make a river navigable, which has never yet been used as a navigable river:(5) nor can

(1) *Dore v. Gray*, 2 T. R. 358. As to the point, whether rivers not navigable, but being a common passage for water, are within the jurisdiction of the commissioners, see *Callis*, 79, 87.

(2) See the reasoning of the judges, in *Dore v. Gray*.

(3) *Yeaw v. Holland*, 2 Bl. R. 717, cited 2 T. R. 363. By the Statute 3 Jac. I. c. 14, it is recited, that no drains or sewers are within the St. of H. VIII, unless the same are navigable. This statute is not noticed by *Callis*, but in a marginal note to the 4th Inst., 276, it is called a *good legislative exposition* of the Statute Henry VIII. The 4th Inst. it has been observed, is not of such authority as the second, though even the second was a posthumous work. The Stat. of James makes all streams, ditches, &c., subject to the jurisdiction of the commissioners, though there is no passage of boats along them, provided they are situate within two miles of the city of London.

(4) *Case of Isle of Ely*, 10 Rep. 141. By 2 W. & M. sess. 2, c. 8, § 14 (*supra*, p. 736), an authority is given to commissioners, for making new sewers. *Callis* is of opinion, that the commissioners may make new banks, walls, fences, &c. *Callis*, 103. But the opinion of *Callis*, as to this point, was overruled in the case of *The Inhabitants of Outwell*, *Style*, 192. If an old wall is thrown down, the commissioners may erect a new one, in the form which is most eligible. *March*, 198; 8 T. R. 312.

(5) *Rex v. Inhabitants of Westham*, in *Essex*, 10 Mod. 159. It is said, in this case, that they cannot improve the navigation of a river, or help the navigation by erecting locks or any such artificial methods. It is reported also, in case of *Isle of Ely* (10 Rep. 142 b), as having been resolved, that new inventions (as of an artificial mill, to cast out water, and other the like), are not warranted by the commissioners under the statute of Hen. VIII. Lord Coke adds, "when new inventions are proposed, if they are apparently profitable, no owner of land then will deny to make contribution to his advantage; and then it ought to be made by their voluntary consent and charge." It may be observed with respect to the question, whether commissioners may use such inventions, as artificial mills for casting out water, that this formed not any part of the case before the judges, reported by Lord Coke: and the point is stated rather incidentally, and by way of illustration, than as an express resolution of the judges. Upon the strict letter of the law, it might be argued, that they have such a power; for the words of the statute are very comprehensive, giving a general power "to cleanse and purge the trenches, sewers, and ditches, in all places necessary," not prescribing any particular mode, but leaving that to their discretion. And whatever might have been thought formerly of Lord Coke's argument, "that such new in

they make a charge for work done by them as an expedient to secure something, which has been erected merely for private gain, from becoming a nuisance, for their duty would rather be to abate the nuisance, whenever it might occur.(1) Nor have they any authority to cleanse sewers which are merely for private use and convenience.(2)

Whether the obligation of repairing sea walls be cast upon particular individuals, or upon all the owners of land in the level, must depend upon usage, if any can be established. If no usage can be proved, all these persons are liable who enjoy any benefit from the work. Where an individual is bound by prescription, or otherwise to repair, still, if there be no default on his part, and damage is sustained by extraordinary floods or tempests, the whole level must bear the loss, and be contributory to the repairs.(3)

In cleansing sewers, or making any other works, the commissioners are bound to take all proper precautions for the security of the adjoining property, and will be liable to an action on the case for the omission of reasonable and proper skill.(4)

The great principle upon which the rates imposed by the commissioners of sewers are founded, is the loss or benefit of the persons rated. It was resolved, in the case of the Isle of Ely, before cited,(5) that none could be taxed towards the reparation of the walls, &c., excepting those who had prejudice, damage or disadvantage by the said nuisances or defaults, and who might have benefit and profit by the reformation or removing of such defaults and nuisances. If a sewer is for the draining of the whole level, and so beneficial to the proprietors at large, they are ratable. If works are constructed upon the level, not generally beneficial to the whole level, but only to a certain number of persons, those who derive a benefit from such works are to contribute to the expenses. It is a complete defence,

ventions are in truth seldom or never good for the commonwealth," this would not be much regarded in the present day.

(1) 10 Mod. 159.

(2) *Callis*, 76; *Com. Dig. tit. Sewers*, c. 2. A sewer is common and public in its nature. By *Butler, J.*, in *Dore v. Gray*, 2 T. R. 365; *Callis*, 80. The statute mentions several things which are of a private nature, as drains, gutters, &c. As to these it has been said, that the statute extends them, only when they are useful in navigation. By *Buller, J.*, 2 T. R. 365.

(3) *R. v. Commissioners of Sewers for Essex*, 1 Barn. & Cress. 477. See *Callis*, 223, as to the point whether a person may be discharged by custom. The commissioners may tax the level, for reimbursing the expenses incurred in the reparation of wall, *March*, 198.

* * See 3 Hill, 616, and the cases there cited; 1 Denio, 595; and the cases cited *ante*, note 1150. * *

(4) *Jones v. Bird*, 5 B. & A. 837. Under the circumstances of this case, it was held incumbent on the commissioners to give specific notice to the owner of the adjoining house, of the nature of the injury against which he was to protect himself.

* * See *ante*, note 1150; and especially, *The Mayor, &c. v. Furze*, 3 Hill, 612; *Bailey v. The Mayor, &c.*, Id. 531; *S. C.* in error, 2 Denio, 433; *Delmonico v. The Mayor, &c.*, 1 Sandf. S. C. R. 222; *Wilson v. The Mayor, &c.*, 1 Denio, 595. * *

(5) 10 Rep. 142 b.

therefore, against the distress, to show that the lands on which the charge is made, are not within the level taxed, or so high above the level, that they neither receive, nor are likely to receive, any benefit from the works of the commissioners.(1) And upon this fact, namely, the loss or benefit of the party rated, the presentment of the jury and the decree of the commissioners are by no means conclusive, but evidence will be permitted on behalf of the plaintiff.(2)

If the rate is made upon other persons than those who are found by the inquisition to be benefited, or to be liable, it is not regular; as when the jury find, that certain nuisances within a certain level ought to be removed, and that certain persons, naming them, ought to contribute, but the commissioners impose a rate upon other persons besides those named; or if the jury find that the inhabitants of a certain level are liable to the expense of repairing the sewers in that level, but the rate is towards the repairing of other sewers in other levels, by which sewers the jury have not found the inhabitants to be benefited, such rates are irregular, and may be set aside, in proceedings on a writ of certiorari;(3) or their legality may be disputed in an action of trespass.

The rate ought to be according to the quantity of lands, tenements, and rents of the persons rated, and by the number of acres and perches; and according to the rate of every person's portion, tenure, or profit, or of the quantity of common pasture, or of fishing, or other commodity.(4) And the plaintiff may not only show, that he has not any property in the parish, or that the property, in respect of which he is charged, is not, in its nature, ratable within the statute of sewers; but it will also be competent for him to prove, that others who have ratable property, and are benefited in common with himself, are omitted out of the rate, in consequence of which omission the rate is partial and unequal.(5)

A general rate, upon the inhabitants of a place at large, or upon a vill, has been adjudged to be bad; for the words of the statute are, "*to assess all those and every of them, according to the rate of every person's tenure or profit*;" the rate, therefore, should be upon all *severally*; and the best

(1) Whitley v. Fawcett, Style, 13; Vin. Abr. tit. *Sewer*, p. 427; Callis, 222; Masters v. Scroggs, 3 Maule & Selw. 447.

(2) Stafford v. Hamston, 2 Bro. & Bing. 695.

(3) Case of Hackney Level against Commissioners of Tower Hamlets, K. B. 14th May, 1825. See p. 738, u.

(4) See the words of the statute above cited, and 10 Rep. 143 a; Style, 185.

(5) Rooke's Case, 5 Rep. 99 a; Com. Dig. tit. *Sewers*, E, 2. In the case of Whitney v. Fawcett (Style, 13), one of the exceptions to the special plea of the defendant was, that eight hundred acres of land, in the hands of the king, appeared not to be taxed by the rate, as they ought to have been; and with reference to this exception, one of the judges said, "It appears by the plea, that he (the defendant) has distrained one acre of land for all the tax, which ought not to be." Public property, beneficially occupied by individuals, is subject to the sewer's rate. Ketherton v. Ward, 3 Barn. & Ald. 21.

authorities are to that effect.(1) A rate upon a man *and his assigns*, or upon the land of a certain person *and his assigns*, is bad, being too general, and uncertain with regard to the owner of the land, who is to be distrained, if he refuses to pay.(2)

In actions of trespass brought against persons acting under the authority of the commissioners of sewers, the justifications of the defendants frequently depend on the validity of some law or decree of the commissioners, as for abating of nuisances, and other acts within their jurisdiction, directed to be done by them. Upon this subject, it is to be observed, that the statute 23 H. VIII, directs, that all laws, acts, decrees, and ordinances, made by the commissioners of sewers, shall stand good and be put in execution so long as their commission endureth, and no longer, except the said laws and ordinances be engrossed in parchment, and certified under the seals of the commissioners into chancery, and have the royal assent. And the statute 13 Eliz. c. 9, directs all commissions of sewers to continue in force for ten years, unless sooner determined by supersedeas, or any new commission; and that all laws, ordinances, and constitutions, made by force of such commission, being written in parchment, and under seals, &c., shall, without such certificate or royal assent, continue in force for one year after the expiration of such commission by lapse of ten years from its *teste*. It has been held, upon the construction of these statutes, that the laws, acts, decrees, and ordinances, mentioned in the statute of Henry VIII, mean the same as the laws, ordinances, and constitutions mentioned in the statute of Elizabeth. A decree made by commissioners, therefore, under a commission which had expired by lapse of ten years, could not be enforced by commissioners, under a new commission, issued more than a year after the expiration of the former commission, although such decree were written in parchment, indented and sealed.(3)

Commissioners of sewers have not such a possession of the works executed by them, as is sufficient for maintaining an action of trespass. And, therefore, where the commissioners of sewers had obtained a verdict in an action of trespass against the commissioners of a harbor, for pulling down a dam which they had erected across a navigable stream, the verdict was set aside, and a judgment of nonsuit directed to be entered.(4)

(1) Case of Isle of Ely, 10 Rep. 141; Hetley v. Sir J. Boyer, Cro. Jac. 336, S. C., Bulstr. 198. Callis, in pp. 122, 123, is of a different opinion, but without sufficient authority. And see Bow v. Smith, *ad finem*, 9 Mod. 94, and case of Level of Hull, 2 Str. 1227.

(2) Style, 13; Callis, 127. And see Commissioners of Sewers v. Newburgh, 3 Kel. 287; Com. Dig. tit. *Sewers*, E; Vin. Abr. *Sewers*, B.

* * See Sharp v. Spier, 4 Hill, 76, and the authorities cited *ante*. * *

(3) R. v. Commissioners of Sewers for the County of Somerset, 9 East, 109. See respecting the laws, decrees, and ordinances of commissioners of sewers, Callis, 333, 336; 10 Rep. 140.

(4) Duke of Newcastle v. Clark, 8 Taunt. 602. See Hollis v. Goldfinch, 1 Barn. & Cress. 206. The property of a bank is in the owner of the adjacent land; of a wall, in the person repairing it. Callis, 74.

A P P E N D I X.

SECTION II.

OF THE PROOF OF WILLS.(1)

THE Statute of Frauds enacts,(2) that all devises of lands or tenements, devisable by that statute, or by the Statute of Wills,(3) or by force of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and attested and subscribed (4) in the presence of the said devi-

(1) NOTE 1152.—* * The matter of this Appendix formed the second section of Chap. 8, Vol. I, of the last American edition of the text. In the present edition of the first part of the text, relating to the general rules of evidence, the author has omitted that section. Although the law relating to wills has been modified by various statutes, since that part of the text was written (*vide* Jarman on Wills, Perkins' ed., 1845), it has been deemed advisable to preserve it in connection with the accompanying Notes of Cowen & Hill, into which some of the more important of the recent cases have been incorporated by the editor of this edition. The additions are indicated by being placed between double asterisks. * *

(2) St. 29 Car. II, c. 3, § 5.

(3) St. 32 Hen. VIII, c. 1, explained by st. 34 Hen. VIII, c. 5. The statutes of the 32d and 34th of Henry VIII gave the power of devising to such persons only as held by socage, and had an estate of inheritance in fee simple. But copyholders, not being held by socage tenure, could not be devised under these statutes, nor were they made devisable by any clause in the Statute of Frauds; they were considered to be in their nature not properly the subject of a devise, as not passing by a will merely, as a will, but by will and surrender taken together. The practice used to be, to surrender to the use of the owner's last will, and on this surrender the will would operate as a declaration of the use, and not as a devise of the land itself. A devise therefore of copyhold lands, or of customary lands which pass by surrender and admittance, would not require any attestation; nor would it require a signature, unless a signature were made necessary by the terms of the surrender to the use of the will. *Wagstaff v. Wagstaff*, 2 P. Wms. 258; *Tuffnell v. Page*, 2 Atk. 37; *Carey v. Askew*, 2 Bro. Ch. R. 58; *Doe dem. Cook v. Danvers*, 7 East, 299, 322. But it has been enacted by a late act of Parliament (st. 55 Geo. III, c. 192), that a deposition of copyhold estates by will shall be effectual, without a previous surrender to the uses of the will.

(4) NOTE 1153.—The scrivener or *penner* of the will, who being named executor, therefore writes his name in the clause appointing him such, though actually a witness to all the solemnities of execution by the testator, cannot be deemed a subscribing witness, nor can this act be received as equivalent to subscribing, so as to make him one of three attesting witnesses. *Snel-*

sor by three or four credible witnesses, or else they shall be utterly void and of no effect.(1)

grove v. Snelgrove, 4 Dessaus. Eq. R. 224, 283. At the latter page are some sensible rules for distinguishing who shall be received as a subscribing witness.

(1) NOTE 1154.—The statutes of New York were always the same, in substance, till recently See act of 3d March, 1787, 1 Greenl. 386, 387, § 2; act of 20th February, 1801, 1 R. L. of 1801, 178, § 2; and act of March 5th, 1813, 1 R. L. of 1813, 364, § 2. These statutes continued to 1830, when the number of attesting witnesses was reduced to two or more, which are made necessary, both to wills of real and personal estate, with several modifications in the manner of execution and attestation. 2 R. S. pp. 63 and 64 of 1st, and pp. 7 and 8 of 2d ed. As to the right of devising and bequeathing, see 2 R. S. pp. 56 and 60 of 1st, and pp. 2 and 4 of 2d ed. For the Virginia statutes, see Cabell, J., in *Dudleys v. Dudleys*, 3 Leigh, 442. These and the like matters depend on the statutes of the several states, which, it is presumed, are far from being uniform. In Pennsylvania, the books of reports and other books, down to quite a recent period, show that it was not essential for the testator to sign, or for any witness to attest a will even of lands, nor that it should be formally published. 3 U. S. Law Reg. (by Griffith) 254; *Rossiter v. Simmons*, 6 Serg. & Rawle, 452; *Hight v. Wilson*, 1 Dall. 94. And several cases, therefore, which seem peculiar to that state, arose and were decided, as to what should constitute a valid testamentary disposition, or work a revocation. *Weigel v. Weigel*, 5 Watts, 486; *Walmsley v. Read*, 1 Yeates, 87; *Boudinot v. Bradford*, 2 Id. 170; *Arndt v. Arndt*, 1 Serg. & Rawle, 256; *Plumstead's Appeal*, 4 Id. 545; *Barnet's Appeal*, 3 Rawle, 15; *Mullen v. McKelvy*, 5 Watts, 399; *Stein v. North*, 3 Yeates, 324; *Shield v. Irwin*, Id. 389; *Toner v. Dagart*, 5 Binn. 490. Like peculiarities are also exhibited in Kentucky (*Baker v. Dobins*, 4 Dana, 220, 221), and Tennessee. *Suggett v. Kitchell*, 6 Yerg. 425. In South Carolina, three witnesses were necessary. *Snelgrove v. Snelgrove*, 4 Dessaus. 274. So in Alabama. *Apperson v. Cottrell*, 3 Porter, 51. So in Massachusetts. *Avery v. Pixley*, 4 Mass. R. 460. While Kentucky required only two, and not always any witness. *Baker v. Dobins*, 4 Dana, 221; *Davis v. Mason*, 1 Peters' S. C. R. 503. So Indiana. *Doe ex dem. Knapp v. Pattison*, 2 Blackf. 355. For a sufficient execution to emancipate slaves in Virginia, see *Dunn v. Amey*, 1 Leigh, 465. But this would not be the proper place to pursue the subject, were it practicable, farther than what might respect the mode of attestation, or proof where no attestation is required. Mr. Griffith's United States Law Register, in the answer to his query 61, under the head of each state, gives a probable clew to the local law on this subject, in most of the states, as it stood about the year 1821. We have no means of tracing its changes since that time, which, if the spirit of innovation recently displayed in our own legislation has generally prevailed, must have been very considerable. Nor would such information, could it be obtained, serve as a safe guide perhaps for a longer term than the next annual session of the state legislatures. Under this head of wills, therefore, we shall confine ourselves, hereafter, to such cases as apparently furnish a general rule within what we believe to be the existing and probably continuing features of local statutes, occasionally noticing the legislative provisions of New York.

The Revised Statutes of this state, which took effect in 1830, January 1 (2 R. S. p. 63 of 1st, and p. 7 of the 2d ed., § 40), provides as follows:

Every last will and testament of real or personal property shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.
2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.
3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.
4. There shall be at least two attesting witnesses, each of whom shall sign his name, as a witness at the end of the will, at the request of the testator.

Section 41 requires each attesting witness to write opposite the name his place of residence, under a penalty, though the omission shall not vitiate the will. And the person who signs the testator's

Witness to will.

The credibility or competency of the witnesses (for the term "credible" is here to be construed as synonymous with "competent") (1) must be considered with reference to the time of attestation; so that, if one of three attesting witnesses would have been incompetent to give evidence at the time of his subscribing, as from want of reason, or from conviction

name by his direction must be a subscribing witness. These and many other of our new regulations in respect to the framing, revoking and construction of wills, have doubtless thrown open a vast field of dispute and consequent litigation. Uncertain as these heads of the law were reputed to be, previous to our present statutes, the state may deem itself fortunate if it reach the same degree of certainty under the new provisions, in a century from their enactment. Under the multitude of new directions, especially in regard to the manner of testamentary limitations, it has, already, in less than ten years, come to be thought a lucky hit, with the ablest and most careful lawyer, if he can draw a will distributing a valuable estate in a useful manner, without working destruction to the entire instrument which he sets himself about.

* * For additional statute provisions in New York, in respect of the proof of wills, see Laws of New York, c. 460, of 1837; Id. c. 129, of 1841.

For the construction of the foregoing statutes, see 4 Kent C. 513-520, and notes; 1 Jarman on Wills, pp. 69, 105, and notes by Mr. Perkins; 2 Gr. Ev. § 672, *et seq.* and notes; and the following cases, viz: *Watts v. Public Administrator of New York*, 4 Wend. 168; *Brinckerhoff v. Remsen*, 8 Paige, 489; *S. C. in error*, 26 Wend. 325; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 86; *Rutherford v. Rutherford*, 1 Denio, 33; *Butler v. Benson*, 1 Barb. S. C. R. 528; *Doe v. Roe*, 2 Id. 200; *Seguine v. Seguine*, Id. 385; *Robertson v. Caw*, 3 Id. 410; *Jauncey v. Thorne*, 2 Barb. Ch. R. 424; *Hogan v. Grosvenor*, 10 Metc. 541; *Hays v. Harden*, 6 Barr, 409; *Assay v. Hoover*, 5 Id. 521; *Grabill v. Barr*, Id. 441; *Chisholm v. Ben*, 7 B. Monroe, 408.

It is generally held, that the testator may sign, and the witness attest, by mark; 4 Kent C. (6th ed.) 515, n.; 1 Jarman on Wills, pp. 72, 99, and Mr. Perkins' notes; and see *Brown v. Butchers' and Drovers' Bank*, 443, *passim*; but the rule is not uniform; *Assay v. Hoover*, and *Grabill v. Barr*, *supra*. A marksman may be a witness to a will in Tennessee, 7 Humph. 92. * *

It is proper to say, that very few of the rules which follow either in the text or notes have any application to proving wills of *personalty* in courts of law. With them, as indeed with every other court, wherein the will comes collaterally in question, a shape in which it generally must come after it has been proved according to the ecclesiastical law, the mere production of the probate duly authenticated by a court of competent jurisdiction, is conclusive. This may be seen at large in the past text and notes, with the extent, qualifications and exceptions to the rule, both as it relates to domestic courts of probate, and those of neighboring countries. Vol. II, Chap. I, Sect. 3 of the text, and the accompanying notes.

* * *S. P.*, *Muir v. The Trustees, &c.*, 3 Barb. Ch. 477; *Thompson v. Thompson*, 9 Barr, 234; 2 Gr. Ev. § 672, and *u. c.* But see *Ferguson v. Hunter*, 2 Gilman, 657. For the American cases on the subject of Wills, generally, see the United States Digest, Supplement and Annual Digest by Perkins and others, title *Wills*; and Jarman's excellent Treatise on Wills, with the valuable notes of the learned American editor, Mr. Perkins. * *

(1) NOTE 1155.—*Snelgrove v. Snelgrove*, 1 Dessaus. Eq. Rep. 274; per *Wilde, J.* in *Hawes v. Humphrey*, 9 Pick. 356. And in the last case the converse was held, that in all cases where a witness is *competent*, he shall be held credible within the Statute of Wills. Therefore, though he may be remotely or contingently interested, so as to influence his credibility, this shall not be an objection. See post, notes 1156 and 1161. So of any other objection merely to his credibility. *Amory v. Fellowes*, 5 Mass. Rep. 219, 228, 229. And it belongs to the judge to decide on the competency, and the jury on the credibility of the evidence, as in ordinary cases. See *supra*, Vol. I; *Amory v. Fellowes*, 5 Mass. Rep. 219, 229, *Parsons, C. J.*

of some infamous offence,(1) the will is not duly executed within the Statute of Frauds.(2) Upon this principle it was determined, soon after the passing of the statute, that a devisee could not attest a will under which he took an interest.(3) But an executor, who took nothing under the will, and had no interest in the residue, was always considered a competent attesting witness.(4)

(1) *Pendock v. Mackinder*, Willes's R. 665.

(2) NOTE 1156.—*Allison's Ex'rs v. Allison*, 4 Hawks, 141; *Daniel, J.*, in *Old v. Old*, 4 Dev. Rep. 501; *Hawes v. Humphrey*, 9 Pick. 350, 356; *Amory v. Fellowes*, 5 Mass. Rep. 219, 229, *Parsons, C. J.*; *Snelgrove v. Snelgrove*, 4 Dessau. Eq. Rep. 283. In the last case a devisee was held interested and incompetent, there being then, 1812, it seems, no statute in South Carolina declaring such interest void. In *Curtiss v. Strong* (4 Day, 51), one of the three attesting witnesses being incompetent on account of his religious belief, the will was therefore held void. See *Farnandis v. Henderson*, South Car. Law Jour. 202, S. P. agreed. A witness interested at the time of examination is not competent to prove that he was not so at the time when he attested. *Gill's Will*, 2 Dana, 448. But the witness becoming incompetent afterwards, shall not vitiate the will. Thus, an executor who takes no interest under the will, being competent when he subscribes, the will shall be approved by the other attesting witnesses, or by showing his handwriting, or other secondary evidence, if he be afterwards placed in such a position as to be incompetent (*Daniel, J.*, in *Old v. Old*, 4 Dev. Rep. 501), *e.g.* where he has accepted the trust, or is a party, for that or any other cause. *Sears v. Dillingham*, 12 Mass. Rep. 358; *Crowell v. Kirk*, 3 Dev. Rep. 355, 356; *Old v. Old*, 4 Id. 500, 601, 602. See *post*, note 7. Or the party may, by his own and mutual consent, be sworn as a witness. *Old v. Old*, 4 Dev. 501, per *Daniel, J.*

It was held at an early day in Maryland, that a witness being incompetent at the time, did not vitiate the will, as where the husband of a devisee was a witness, and he was received to prove the will conveying his interest. *Shaffer's Lessee v. Corbett*, 3 Har. & M'Hen, 513, 535, May, 1837, and on appeal, 1799. And see *post*, note 1161. This, too, was under the words of the English Statute of Attestation. And see *Deakins v. Hollis*, 7 Gill & John. 311, 315. The wife of a legatee, who released his interest, was received there to prove a nuncupative will. *Brayfield v. Brayfield*, 3 Har. & John. 208. A like decision was made in Pennsylvania, A. D. 1827, but on the ground that the statute there was not the English statute. *Kerns v. Soxman*, 17 Serg. & Rawle, 315.

Where the attesting witness has become incompetent, the party may resort directly to other proof. He is not bound first to offer the witness, in order that the other party may waive the objection, and so be enabled to take the benefit of objecting to his credibility, and shake his credit by a cross-examination. *Crowell v. Kirk*, 3 Dev. Rep. 355.

(3) *Hilliard v. Jennings*, 1 Lord Raym. 505; S. C., Com. R. 91.

NOTE 1157.—So held under the South Carolina statute, which at the time, contained no provision voiding the interest of the subscribing witness. *Snelgrove v. Snelgrove*, 4 Dessaus. Eq. Rep. 274. And so of a legatee, though it was intimated that, by releasing his interest, he might be received to support the will in favor of the devisee. *Dickson v. Bates*, 2 Bay, 448. *Quere.* The North Carolina statute expressly declares, that a devise shall not be valid, if any one of the witnesses be interested in the devise. Held, that an attestation by a devisee in trust, with a provision for compensation in executing the trust, avoided the will within the statute. *Allison's Ex'rs v. Allison*, 4 Hawks, 141, 175, 176, *et seq.* Otherwise of a witness who is merely presumptive heir. *Old v. Old*, 4 Dev. 500, 501.

(4) *Anon. case*, 1 Mod. 107; *Bettison v. Sir R. Bromley*, 12 East, 250; *Phipps v. Pitcher*, 1 Madd. R. 144; S. C., 6 Taunt. 220.

NOTE 1158.—*Denn ex dem. Snedeker v. Allen*, 1 Penningt. Rep. 35; *Comstock v. Hadlyme Ecclesiastical Society* (8 Conn. Rep. 254), S. P., even though he have accepted the trust as executor, and acted under the will. This, too, was held where the executor was substantially a

Considerable doubts were afterwards entertained whether the competency of such an interested person might not be restored by a release, payment, or extinguishment of all his interest, so as to admit him to prove the execution.(1) In consequence of this difference of opinion the legislature passed an act, which (after reciting, that it had been doubted who were to be deemed legal witnesses within the Statute of Frauds) enacts,(2) that "if any person shall attest the execution of any will or codicil (to whom any beneficial devise, legacy, estate, interest, gift, or appointment affecting any real or personal estate, except charges on land, &c., for payment of debts shall be given), such devise, legacy, &c., shall so far only as concerns such person attesting the execution, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, legacy, &c. And in case any will or codicil shall be charged with any debt, and any creditor, whose debt is so charged, shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act: Provided always, that the credit of every such witness, so attesting the execution of any will or codicil in any of the cases within this act, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of, in like manner as the credit of witnesses in all other cases ought to be con-

party to the suit contesting the validity of the will; for it was agreed that he was not liable to costs. The case of *Hayden v. Loomis*, 2 Root, 350, *contra*, was disregarded. See 8 Conn. Rep. 263. *A fortiori*, where the executor declines the trust. *Hawley v. Brown*, 1 Root, 494. Otherwise where he is a party and liable for costs. *Durant v. Starr*, 11 Mass. Rep. 527; *Sears v. Dillingham*, 12 Id. 358, 360; *Vansant v. Boileau*, 1 Binn. 444. Yet the will is good and may be proved by others. *Sears v. Dillingham*, *supra*. And see *ante*, note 1155. A judge of probate in the district is a competent attesting witness. *M'Lean v. Barnard*, 1 Root, 462. *Ford*, son and heir, &c. 2 Root, 232. So the inhabitant of an incorporated society to which property is devised for the support of a school. *Cornwell v. Isham*, 1 Day, 35. So a witness whose interest under the will is neutralized or overborne by an interest against it, as if he will gain more as an heir, &c., by its defeat, than as devisee by upholding it. *Garland v. Crow's Ex'rs*, 2 Bail. 24; *Allen v. Allen*, 2 Tenn. Rep. 172. And see *post*, note 1161, and *ante*, note 1155; per *Dessaussure*, Ch., in *Snelgrove v. Snelgrove*, 4 Dessaus. Eq. Rep. 282, to the same effect as *Garland v. Crow's Ex'rs*, *supra*. Thus an attesting witness who was objected to by the heir, because the witness held a covenant of warranty against the testator, was held competent; for the land was equally liable to make him good, whether it went to the heir or devisee. *Thompson v. Shoeman*, 1 Bibb, 401. See also *Bacon v. Bacon*, 17 Pick. 134.

(1) See on this subject *Anstey v. Dowling*, 2 Stra. 1253; *Wyndham v. Chetwynd*, 1 Burn. 414; *Hindson v. Keysey*, 4 Burn. Eccl. Law, 88.

NOTE 1159.—The old statute of New York of 1787 (1 Greenl. 388, § 7), expressly provided a mode for restoring the competency of an attesting legatee of any will, made at or previous to the 1st March, 1753.

(2) St. 25 Geo. II, c. 6, §§ 1, 2, 6.

sidered and determined.(1) The former part of this statute restores the competency of the attesting witness, by extinguishing all interest which he would otherwise take under the will. It applies to the case, where the attesting witness is himself the legatee or devisee; and as to him, and any person claiming under him, it makes the devise or legacy absolutely void. It does not extend to the case, where the attesting witness is the husband of a devisee, who takes an estate in remainder under the will: such an attesting witness is not made competent, by the statute, to prove the will.(2)

(1) NOTE 1160.—New York has had a similar statute ever since March 3, 1787, and before. Greenl. 388, § 6; 1 R. L. of 1801, § 12; 1 R. L. of 1813, 367, § 12; 2 R. S. 65 of 1st and 9 of 2d ed. § 50. Though now by the last statute, section 51, where the witness would take anything without the will, so much of that is saved to him under the will as in value shall amount to what the will gives him. A like statute of Kentucky is noticed, 2 Dana, 454, *Gill's Will*. Where the devise, &c., is void by the will, no title can be derived from the devisee. *Jackson ex dem. Denniston v. Denniston*, 4 John. Rep. 311. The statute 25 Geo. II, ch. 6, from which the older New York statutes on the same subject appear to have been substantially transcribed, does not avoid a legacy given to a subscribing witness of a will or codicil which relates exclusively to *personal estate*. It extends to such wills only as are required to be attested by witnesses in order to their validity. *Brett v. Brett*, 3 Ad. Eccl. Rep. 210, affirmed by the delegates; 1 Hag. Eccl. Rep. 58, note a; 3 Russ. 436, note a; *Emanuel v. Constable*, 3 Russ. 436; *Foster v. Banbury*, 3 Sim. 40. The case of *Lees v. Summersgill* (17 Ves. 508) *contra*, is, therefore, overruled. Since the present statute of New York (see *ante*, note 1154), which requires both wills of real and personal estate to be attested in the same way, the law as declared in *Lees v. Summersgill*, would probably be deemed applicable in that state.

(2) *Hatfield v. Thorp*, 5 Barn. & Ald. 589.

NOTE 1161.—But by several cases in New York, the contrary is holden; viz: that a devise, &c., to the husband or wife of the attesting witness is void; and so the witness competent to attest. *Jackson ex dem. Cooder v. Woods*, 1 John. Cas. 163; *Jackson ex dem. Beach v. Durland*, 2 Id. 314. In South Carolina, it was held by Chancellors Mathews and Rutledge, that a bequest to the wife was valid within the Stat. 25 Geo. II; and yet the husband competent. *Woodberry v. Collins*, 1 Dessaus. Rep. 424. This is agreeable to what Lewis, Ch. J., held of the attestation by a wife whose husband was a devisee in *Jackson ex dem. Cooder v. Woods*. In the latter case, he held it sufficient that the attesting witness, though interested at the time of the attestation in consequence of the connubial relation, became competent, if he were without interest at the time of the examination. See *ante* of the text, and note 1156. But in *Woodberry v. Collins*, the competency of the husband seems from the reasoning in the book, to be referable rather to the remote and contingent character of the interest to which he became entitled. And it has been held on much consideration, with good reason, and on very satisfactory authority, that one deriving a remote and contingent interest, *e. g.* a possible relief from taxation, by a devise to a corporate society, is not incompetent. And so where it may tend to his advantage by providing for schools in his neighborhood, and the like. *Hawes v. Humphrey*, 9 Pick. 350, 356. The case is sustained by one of still stronger contingent interest in Connecticut. *Cornwcl. v. Isham*, 1 Day 35, and *vide ante*, notes 1155 and 1158. See also *Nason v. Thatcher*, 7 Mass. R. 398. The same thing was held in *Eustis v. Parker*, 1 N. H. R. 273. Indeed, these and like cases are but additional illustrations of the exceptions considered *ante* in the notes to Vol. I. and other notes of the text, that interests remote, contingent or uncertain, do not disqualify a witness; and that a corporator especially, who as such may be benefited, is yet frequently admitted. *Ante*, note 21, Vol. I, and *ante* in this vol. 624, 656. In *Eustis v. Parker*, the case is expressly put on the ground, that by the law of New Hampshire, a public or municipal corporator is always a witness, though the corporation itself be interested in the event of the suit; and such is the balance of the cases, noticed in various parts of these notes. Yet a witness taking a contingent

Proof of contents of wills.

The best proof of the contents of a will is the original will itself. An exemplification under the great seal is not evidence in an action of ejectment;(1) nor is the probate of a will in the Spiritual Court any proof of a devise of real property; for if the original is in existence, the copy is not evidence; and the seal of the court does not prove it a true copy, unless the suit relate only to the personal estate.(2) But where the contents of a will are given in evidence, not to establish a devise, but merely for the purpose of proving a relationship, as stated in the will, the rolls of the Spiritual Court, which has authority to enroll have been thought admissible;(3) and if the original will has been lost, the register-book, or the ledger-book, in which the will is set out at length, would be good evidence of its contents.(4)

remainder under the will was held incompetent to testify in support of it, on an issue of *devisavit vel non*. This witness had not attested the will. *Harrison v. Rowan*, 3 Wash. C. C. Rep. 581. The heir or devisee of a deceased devisee is not competent to prove the original will, if the witness's share, would be increased by establishing it. *Gill's Will*, 2 Dana, 449. The interest however, must be legal, as in other cases; and not merely ideal or honorary. *Ante*, notes to Vol. I. And accordingly, where a witness was offered to support a will, the bequest in which he had said was to the witness's father for his, the witness's own benefit, he was received notwithstanding, as no agreement of the father was proved to take the bequest in trust for him. At most, the witness's declaration went to his credibility, merely. *Rogers v. Briley*, 1 Hayw. 256. But there was also clearly another answer; viz: that a declaration of the witness as to his interest is merely hearsay. *Ante*, notes 48 to Vol. I, and 569 to Vol. II.

The question of interest is of course the same, so far as it respects competency at the time of examination, whether the witness attested the will or not. One taking an interest under it, therefore, though he did not attest, cannot be received to prove sanity, or any other fact in support of the will. *Harrison v. Rowan*, *supra*; *Tucker v. Sanger*, 1 McClelland, 435. See *Hall v. Hall*, 17 Pick. 373.

But the interest of such a witness may be restored as in other cases; *e. g.*, if he be a legatee, he may assign his legacy without warranty. It is not necessary that he should release it. *Cates v. Wacter*, 2 Hill S. C. 442.

A widow dissenting from her husband's will and taking out of the estate her dower and personal estate, as in case of intestacy, is not interested so as to preclude her testifying against the will. Nor is she incompetent to state declarations of her husband adverse to the fact, that he intended the will to be a complete one, and the like on the ground that they were confidential between husband and wife. *Hester v. Hester*, 4 Dev. 228, 230, 231. *Quere* of this last position.

(1) *Comberb.* 46.

(2) *Bull. N. P.* 246; 1 Lord Raymond, 732.

(3) *Buller N. P.* 246.

(4) *St. Legar v. Adams*, 1 Lord Raymond, 731; *Skinner*, 174.

NOTE 1162.—When the original will is accidentally lost or destroyed, whether before or after the testator's death, the rule admitting secondary evidence of its execution and contents comes in (*Keeling v. Ball*, 2 East, 103; *Trevelyan v. Trevelyan*, 1 Phillimore R. 153; *Bowen v. Idle*, 1 Edw. Ch. R. 148; *S. C.* on appeal, 11 Wendell, 227; *Dan v. Brown*, 4 Cowen, 483; *Jackson ex dem. Schuyler v. Russell*, 4 Wendell, 543; *Jackson ex dem. Bush v. Hasbrouck*, 12 Johnson R. 192, and other cases *infra*; *Payne's Will*, 4 Monroe, 422; *Beauchamp's Will*, Id. 361; *Apperson v. Cottrell*, 3 Porter, 51; *Lane's Will*, 2 Dana, 106; *Cates v. Wacter*, 2 Hill S. C. 442); as in other like cases, it resorts to such expedients for proof as good fortune may have preserved and placed within its reach. A very common one, of course, would be the register of

ties claimed under him. Many cases are stated and considered on this ground, *Ante*, note 104 to Vol. I. And see *Reynolds v. Reynolds*, 16 Serg. & Rawle, 82. But it seems to be quite contrary to the spirit of the statute that the existence of the will should be shown by such declarations alone. At most they can be received as auxiliary to evidence of witnesses who have seen it. *Clark v. Morton*, 5 Rawle, 235. The declarations of the witnesses or draftsman, unsworn, are clearly inadmissible. *Collins v. Elliott*, 1 Har. & John. 1.

In several of the states, as we saw *ante* (note 289 to Vol. II), the probate and registry of a will is made primary evidence of its due execution and contents, as well in respect to the realty as to the personality; sometimes conclusive, and at others only presumptive in its effect. We do not propose to extend our quotations much farther in respect to this mode of proof, the form and effect of which differ with different states, as well as the tribunal before which the probate is to be taken; the power sometimes being conferred on common-law courts, and at others on courts specially devoted to the cognizance of last wills and testaments, and the rights growing out of them. Some few cases additional to those in the note above cited, must finish all we can here do towards sketching the features of this probate system. Its principles seem to have come from the English chancery bill filed to establish a devise. It is of the nature that to bring in the heir, and all others interested to oppose or sustain the will, and thereby to conclude them in respect to real estate, as effectually as a probate before the Ecclesiastical Court, *per testes* and in solemn form, concludes interests in the personality. The frame and object, with the peculiar mode of proof in this chancery suit, may all be collected from *Bootle v. Blundell* (19 Ves. 494 to 534). The summary proceeding, &c., in New York, before the surrogate, is detailed, 2 Revised Statutes (2d ed.), p. 2, sections 7 to 19 inclusive; in North Carolina, in the County Court, by Ruffin, C. J., in *Redmond v. Collins*, 4 Dev. R. 436, *et seq.*

In Massachusetts, a will of real estate cannot be received in evidence on a trial at law till it has passed the Probate Court and been allowed there (*Shumway v. Holbrook*, 1 Pick. 114); and when so allowed, the probate is conclusive on the trial at law. *Id.* So in North Carolina. *Den ex dem. Sasser v. Herring*, 3 Dev. R. 341. And such appears to be the law of Kentucky. *Carmichael v. Elmendorff*, 4 Bibb, 484; *Morgan's Devises v. Gaines*, 3 A. K. Marsh. 613; *Davis v. Mason*, 1 Peters, 508. As to receiving wills of land there on probate of a neighboring state, see *Hood v. Mathers*, 2 A. K. Marsh. 555; *Bowman v. Bartlett*, 3 Id. 89; *Elmendorff v. Carmichael*, 3 Litt. Rep. 479. See also *Slack v. Walcott*, 3 Mason, 508. As to Ohio, see *Wilson's Ex'rs v. Tappan*, 6 Ham. 174. In Pennsylvania, while it is conclusive as to the personality, it is no more than *prima facie* evidence as to the realty, either for or against the will. *Miller v. Carothers*, 6 Serg. & Rawle, 223; *Dornick v. Reichenback*, 10 Id. 84; *Smith v. Bonsall*, 5 Rawle, 80. And whether this be not so as to Rhode Island, *quere*. *Smith v. Fenner*, 1 Gall. 170, 174. In North Carolina, the probate is conclusive except as to fraud or irregularity. *Stanley et ux. v. —*, 2 Hayw. 75. But the certificate of probate must, to make it admissible, state certain facts, as that all the witnesses were sworn, &c. *Blount v. Patton*, 2 Hawks, 237. The law of Tennessee appears to be the same. *Howell v. Whitchurch*, 4 Hayw. 49. But probate of a will of lands in another state is not evidence in respect to land in Tennessee. *Darby's Lessee v. Mayer*, 10 Wheat. 465. In Virginia the probate is one mode of proof, but not essential. *Bagswell v. Elliott*, 2 Rand. 190. In Maryland, as in England, probate is no proof of a will of real estate. *Smith's Lessee v. Steele*, 1 Harr. & McHen. 419; *Darby's Lessee v. Mayer*, 10 Wheat. 470. So, it seems, of South Carolina. *Howell v. House*, 2 Rep. Const. Ct. 80. As to Connecticut, *quere*. *Avery v. Chappel*, 6 Conn. Rep. 270, 276. In Maine, *semble*, the probate concludes. *Mellen, C. J.*, in *Small v. Small*, 4 Greenl. 225. So in Alabama. *Tarver v. Tarver*, 9 Peters, 174, 180; *Darrington v. Borland*, 4 Porter, 11, 38. The jurisdiction of the Orphan's Court being complete, it may allow probate of a lost will, and thus bind the courts of law. The correction of error can be by a direct proceeding only. *Apperson v. Cottrell*, 4 Porter, 51. To what extent the probate of a will of real estate shall conclude in North Carolina, see the case of *Den ex dem. Sasser v. Herring*, 3 Dev. Rep. 341, and especially *Redmond v. Collins*, 4 Id. 430 to 449, which contains much learning on the practice and effect of propounding and proving wills in general; and the distinction as to the effect of probate, or denial of probate between cases of personal and real estate.

A will of lands was admitted to probate in Virginia, on a simple proof of a probate in Louisiana, which showed affirmatively that it was proved there in the same manner as it must have

Proof of execution by subscribing witness.

The execution of a will is to be proved by the subscribing witnesses, if they are alive and can be produced. On a trial at common law, all the circumstances may be proved by a single witness; that is, upon the supposition, that there are two others, who would be allowed to give the same testimony.(1) If the opposite party disputes the regularity of the execution, he may call any of the other witnesses; but a devisee will not be obliged to call the rest, if one alone can prove all the requisites to establish the validity of the will. This is the rule in courts of common law.(2) But on a bill filed in chancery to establish a will, the rule is,

been to entitle it to be received and registered in the Probate Court of Virginia. *Ex parte Povall*, 3 Leigh, 816. But the proceeding was sanctioned as within the meaning of the statute of Virginia regulating the probate of wills there. See the statute, 3 Leigh, 816, note. But independent of the statute, *quere* (*Darby's Lessee v. Mayer*, 10 Wheat. 470, 474); for the foreign court can hardly be said to have jurisdiction of domestic lands, the disposition of which is governed by the *lex loci rei sitæ*. *Id.* 469. Though a probate be essential to give effect to a will of land, it need not be made previous to a suit by the devisee to recover the land. Probate pending the suit relates back to the death of the testator. *Poole v. Feeger*, 11 Pet. Rep. 185, 211.

The statutes of New York on the subject of proving and recording wills of real estate and certifying the proof, which till lately confined the power to the courts of common law, will be mostly found by the following references to different editions. 1 Greenl. 26; 2 *Id.* 235; 1 R. of L. 101, p. 178, act of April 5, 1803, sess. 236, ch. 99; 1 R. L. of 1813, p. 364; 2 R. S. of 1830, (2d ed.) p. 2, *et seq.* See also *Jackson ex dem. Colden v. Walsh*, 14 John. Rep. 407, in which several old statutes are collated and applied. None of these statutes make the probate more than *prima facie* evidence; and to this see *Jackson ex dem. Woodhull v. Rumsey*, 3 John. Cas. 233. For the method of proceeding to probate under the old statute, see case of *Lawrence's Will*, 2 Wend. 237. Common-law proof is always admissible.

(1) By *Lee C. J.*, in *Anstey v. Dowsing*, 1 Stra. 1254; Bull. N. P. 264.

(2) NOTE 1163.—*Post*, of the text, S. P., with additional cases, and see *post*, note 1165, and the cases there cited from the Kentucky Reports. Proof of all the circumstances necessary to the execution of a valid will, by one of the subscribing witnesses, is sufficient in a court of common law, without calling the rest. If the adverse party would impeach the will, he may examine the others. *Howell et al. v. House*, 2 Rep. Const. Ct. 80; *Turnipseed v. Hawkins*, 1 M'Cord, 272; *Lindsay's Heirs v. M'Cormack*, 2 A. K. Marsh. R. 229, 230; *Turner v. Turner*, 1 Litt. 103, 104; *Hight v. Wilson*, 1 Dallas, 94; *Trustees v. Blount*, 2 Tayl. 13; *Denn v. Allen*, 1 Penningt. R. 35; *Allen v. Allen*, 2 Tenn. R. 172; *Jackson ex dem. Le Grange v. Le Grange*, 19 John. R. 386; *Hock v. Hock*, 6 Serg. & Rawle, 47; *Jackson ex dem. Kellogg v. Vickory*, 1 Wend. 406; *Dan v. Brown*, 4 Cowen's R. 483; *Davis v. Mason*, 1 Peters' R. 503; *Blount v. Patton*, 2 Hawks, 237; *Elmendorff v. Carmichael*, 3 Litt. 479; *Den ex dem. Compton v. Mitton*, 7 Halst. 70; *Wright v. Doe ex dem. Tatham*, 1 Adolph. & El. 3. And where a witness to a lost will proved its due attestation by three witnesses, but had forgotten the name of one of them, having no doubt, however, that he was a competent witness, this was holden sufficient. *Dan v. Brown*, 4 Cowen's Rep. 483; *Jackson ex dem. Brown v. Betts*, 6 Cowen's Rep. 377. Proof by a subscribing witness that he, with two others, saw executed, and witnessed a will of land which he had seen in the surrogate's office, and which was identified with the one produced on the trial; though the witness was too dim of sight to see it at the trial, was held sufficient proof of execution on a trial at law. *Jackson ex dem. Henry v. Thompson*, 6 Cowen's R. 178.

* * For a further elucidation of the subject, see *Nelson v. M'Giffert*, 3 Barb. Ch. R. 159; *Grant v. Grant*, 1 Sandf. Ch. R. 235; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 86; *Remsen v. Brinckerhoof*, 26 Wend. 325; *Hogan v. Grosvenor*, 10 Motc. 54. And see *supra*, note. * *

Where one witness was called and proved the signature of himself and the two other subscrib-

that all the witnesses ought to be examined by the plaintiff. "It is the invariable practice in chancery," said Lord Camden, in the case of *Hindson v. Kersey*,⁽¹⁾ "never to establish a will, unless all the witnesses are examined, because the heir has a right to proof of sanity from every one of those whom the statute has placed about his ancestor."⁽²⁾ And on the

ing witnesses, and stated that he could not remember particularly whether the other witnesses subscribed in the presence of the testator; but presumed they all did so, as he would not have subscribed his name as a witness unless the requisites of the statute had been complied with, it appearing that the other witnesses were living and within the jurisdiction of the court; *held*, that though such evidence would have been sufficient, if the other witnesses had been dead, to authorize a jury to believe that all the formalities had been observed, yet, in this case, it was not sufficient. *Jackson ex dem. Kellogg v. Vickory*, 1 Wend. 406. And see *Doe ex dem. Harborne v. Lewis*, 7 Carr. & Payne, 574. That the case might have gone to the jury, had the other witnesses been dead, see *Fetherley v. Waggoner*, 11 Wend. 599.

In New Jersey, a will purporting to be signed by *three* witnesses, but proved by *two* only, *who said nothing with regard to the third*, was ruled to be sufficiently proved to go to the jury. *Jackson ex dem. Tenbroke v. Van Dyke*, 1 Cox, 28. The act of the legislature of New Jersey requires the testator to execute his will in the presence of *three* witnesses. *Patterson's Laws of N. J.* 5. And the principle of the last case is directly at variance with every adjudication on this subject. See note *b* to the above case; and the text.

The attesting witness could not remember in the particular case, that the testator acknowledged his signature; but said his invariable practice was not to attest a paper without the party's acknowledging the signature to be his. Held sufficient, as to him. *Quinn v. Radford*, 2 Litt. Rep. 137. So as to the fact of signing, or acknowledging, or both. *Cabell, J.*, in *Dudleys v. Dudleys*, 3 Leigh, 443. But the due attestation by all three of the witnesses, must be shown directly or circumstantially, by one or all of them. *Jackson ex dem. Le Grange v. Le Grange*, 19 John. 386. One witness only being produced, he should be credible, and his testimony direct and positive. His "impressions" and statements "according to the best of his recollection," were, standing alone, held not to be sufficient. *Carrico v. Neal*, 1 Dana, 162, 163. And where the deposition stated generally, that the testator *executed* the will in his and the other witnesses' presence (who were dead and their hands proved) Lord Chancellor Hart refused to allow it, because nothing was said of *attesting in the testator's presence*. *Holton v. Lloyd*, 1 Moll. 31, 32.

(1) 4 Burn Eccl. Law, 93; *Ogle v. Cook*, 1 Ves. 177; *Townsend v. Ives*, 1 Wils. 216, S. P.

(2) NOTE 1164.—Witnesses are called upon not merely to attest the fact of signing; but to determine whether the testator is *sane* at the time of executing the will. *Chase v. Lincoln*, 3 Mass. R. 236; *Poole v. Richardson*, 3 Mass. R. 330; *Heyward v. Hazard*, 1 Bay, 335. And they were received to be inquired of generally as to their opinion on this point, though that was denied to those who were neither subscribing witnesses nor physicians. * *Poole v. Richardson*, 3 Mass. Rep. 530. And see *Hamblett v. Hamblett*, 6 N. H. R. 333, 349. *Quere*, and see per *Washington, J.*, in *Harrison v. Rowan*, 3 Wash. C. C. R. 587; per *Daniel, J.*, in *Crowel v. Kirk*, 3 Dev. 355; *Spence v. Spence*, 4 Watts, 165. No person should attest, till he is satisfied the testator is of sound and disposing mind, and acts understandingly, and with a full knowledge of the contents of the will. *Scribner v. Crane*, 2 Paige, 147.

The duty of attesting witnesses, who are admissible to testify as to facts which tend for or against the will (*Hampton v. Garland*, 2 Hayw. 147), may be collected from the various cases in respect to the requisite sanity and fairness, the whole of which we cannot pretend to give. The following contain the general rules; and, with the books to which they refer, will furnish a good many illustrations. *Dew v. Clarke*, 5 Russ. 163; *Dornick v. Reichenback*, 10 Serg. & Rawle, 84; *Rambler v. Tryon*, 7 Id. 92, 93, 95; *Starrett v. Douglass*, 2 Yeates, 48; *Ware v. Ware*, 8 Greenl. 42; *Small v. Small*, 4 Id. 220; *Williams, J.*, in *Kinne v. Kinne*, 9 Conn. R. 102; *Harrison v. Rowan*, 3 Wash. C. C. R. 585, 586, &c.; *Stevens v. Van Cleave*, 4 Id. 265; *M'Daniel's Will*, 2 J. J. Marsh. 337; *Cochran's Will*, 1 Monroe, 263; *Howard's Will*, 5 Monroe,

trial of an issue directed by the Court of Chancery, to examine the validity of a will, all the attesting witness ought to be examined; for the issue is part of the proceedings of the court. When the court sends an issue to be tried, it reserves to itself the review of all that passes; and there would be an inconsistency in requiring that all the three witnesses should be examined in the Court of Chancery, yet dispensing with their examination on the trial of an issue at law.(1)

202, 203, 204; *Hathorn v. King*, 8 Mass. R. 371; *Chandler v. Ferris*, 1 Harringt. R. 454; *Stone v. Damon*, 12 Mass. R. 488; *Buckminster v. Perry*, 4 Id. 593; *Brooks v. Barrett*, 7 Pick. 94, 99; *Clarke v. Fisher*, 1 Paige, 171; *Tomkins v. Tomkins*, 1 Bail. 92; *Kindleside v. Harrison*, 2 Phillim. R. 461; *Mackenzie v. Handasyde*, 2 Hagg. Eccl. R. 211; *Van Alst v. Hunter*, 5 John. Ch. R. 158; *Carrico v. Neal*, 1 Dana, 163, 164; *Seeman v. Seeman*, 1 Phillim. R. Judgm. Sir Geo. Lee, 180; *Griffin v. Griffin*, R. M. Charlt. R. 217. But this matter is treated of by our author in Volume III, under the head of ejectment between the heir and devisee; and which is the proper place to notice the later cases more at large.

* * As to the testamentary incapacity of the testator, by reason of idiocy, lunacy, extreme age, and mental imbecility, &c., see 4 Kent C. (6th ed.) 509, *et seq.* and cases cited in the notes; 1 Jarman on Wills, pp. 27-32, and Mr. Perkins' notes; 2 Gr. Ev. §§ 689, 691, and notes. And see *Blanchard v. Nestle*, 3 Denio, 37; *Clarke v. Sawyer*, 3 Sandf. Ch. R. 352; *Howard v. Coke*, 7 B. Monroe, 655; *James v. Langdon*, Id. 193; 7 Humphrey, 92; *Stewart's Executor v. Lisenard*, 26 Wend. 256; *Grabill v. Barr*, 5 Barr, 441; *Aurand v. Wilt*, 9 Barr, 54. * *

(7) *Boote v. Blundell*, 1 Cooper Ch. R. 136.

NOTE 1165.—On proving a will in chancery, all the subscribing witnesses must be produced in the first instance (*Burwell v. Corbin*, 1 Rand. 131, 141); and every important requisite of the statute must be proved by each witness (Id. 141, per Coulter, J.); but their absence may be accounted for as in other cases, which lets in secondary proof. *James v. Parnell*, Turn. & Russ. 417. And see *Bomford v. Wilme*, 1 Beat. 252; *Concannon v. Cruise*, 2 Moll. 332. And this rule has been extended, sometimes, to proof in a court of probate. *Apperson v. Cottrell*, 3 Porter, 51; *Chase v. Lincoln*, 3 Mass. Rep. 236. Yet on the probate coming in question collaterally, though on its face it shows no notice, and two witnesses only appear to have been examined, the court will intend that all parties had notice, and that there was a legal excuse for not examining the third witness. *Brown v. Wood*, 17 Mass. Rep. 68. Some rules of proof peculiar to Pennsylvania, arise out of the Statute of Wills there. *Hight v. Wilson*, 1 Dall. 94; *Lewis v. Mairs*, 1 Dall. 278; *Hayard v. Davis*, 2 Binn. 414; *Hock v. Hock*, 6 Serg. & Rawle, 47; *Miller v. Carothers*, Id. 215; *Estes v. Young*, 3 Yeates, 511; *Rohrer v. Stehman*, 1 Watts, 442; *Reynolds v. Reynolds*, 16 Serg. & Rawle, 82; *Hoylton v. Brown*, 1 Wash. C. C. Rep. 298; *Musser v. Curry*, 3 Wash. C. C. Rep. 481; *Lewis v. Lewis*, 6 Serg. & Rawle, 489. So in Virginia. *Burwell v. Corbin*, 1 Rand. 131.

In Kentucky, the will, though of land, is admitted to probate on proof by one witness, as on a trial at common law (*ante*, note 1162), provided he is able to speak to all the requisite solemnities. *Overall v. Overall*, Litt. Sel. Cas. 503; *Hall v. Sims*, 2 J. J. Marsh. 511. See *Turner v. Turner*, 1 Litt. Rep. 101; *Harper v. Wilson*, 2 A. K. Marsh. 467. In Virginia, *semble*, all are required *prima facie*, though secondary proof may come in, as in all courts, where the witnesses are abroad, &c. *Nalle's Representatives v. Fenwick*, 4 Rand. 585. In Maryland, as to a will of real estate, *Quere*. *Deakins v. Hollis*, 7 Gill & John. 311, 316. The common-law rule as to the number of witnesses required on a probate, *per testes*, of a will of personal property, was examined in *Worsham's Adm'r v. Worsham's Ex'r* (5 Leigh, 589); and the conclusion was, that though two are necessary in England, only one was requisite in Virginia, till a late statute there.

And the rule which, *prima facie*, requires all three of the witnesses in chancery, applies, even in that court, only on a bill filed with the direct object of establishing (or making probate of) the will. But for other purposes, as where the will comes in question in a chancery suit not insti-

The facts to be proved by the subscribing witnesses are, that the deviser signed the will, or that another person signed in his presence and by his express direction, and that the witness and two others attested and subscribed in the presence of the deviser. First, as to the signing by the testator, it is not material in what part of the will he makes his signature. The statute prescribes no particular form, and does not require him to subscribe, but simply to sign. It was therefore determined, in a case soon after the passing of the statute, that if the testator writes his name at the beginning or on the side, the signing is sufficient.(1) But where a will consisted of several distinct sheets, some of which the testator signed, and intended to sign the rest, but was not able, Lord Mansfield thought this was not a signing of the whole will.(2) According to Freeman's report of the case of *Lemayne v. Stanley*,(3) the court said: "It is not necessary to write; for some cannot write, and their mark is then a sufficient signing; others have their name on a stamp, and that is good enough." In that case also, three judges held, that, if the testator had put his seal, that would have been of itself a sufficient signing within the statute; but Levinz, Justice, doubted, on the authority of a case in Rolle's Abridgment, where the court held, that an award which by the submission ought to have been signed by the arbitrator, was not good in law, because it had been only sealed.(4) Lord Raymond ruled in a case at Nisi Prius,(5) and Lord Holt is also reported to have said,(6) that sealing was a signing within the statute. But later authorities appear to have considerably shaken this doctrine;(7) and now the established rule seems to be, that sealing without signing is not a sufficient execution of the will. A bare sealing certainly cannot answer the purposes which the legislature had in view; it cannot identify the instrument, nor does it bear, like writing, any peculiar character. "The statute," says Lord Hardwicke, in one of the cases upon this subject,(8) "by requiring the will to be signed, undoubtedly meant some evidence to arise from the handwriting; then how can it be

tuted with that object, and in all cases where the proof does not look to a decree and establishing the will generally, but is introduced merely for the purpose of reading it in evidence as a legal instrument, it may always be proved by a single witness, the same as in a court of law. *Concannon v. Cruise*, 2 Moll. Rep. 332.

* * *Vide supra*, Vol. I. And see 2 R. S. 131, § 78; 2 Paige, 214, 429; 7 Id. 185. * *

(1) *Lemayne v. Stanley*, 3 Lev. 1; *Hilton v. King*, 3 Lev. 86; 9 Ves. 248.

* * See *post* notes 1166, 1167.

(2) Right dem. *Cater v. Price*, 1 Doug. 241; 9 Ves. 249; *Walker v. Walker*, 1 Merivale, 503.

(3) P. 538. See also *Hindson v. Kersey*, 4 Burn Eccl. Law, 92, S. P., by Pratt, C. J.

(4) See Vol. II, Chap. 7.

(5) *Warneford v. Warneford*, 2 Stra. 764.

(6) *Lee v. Libb*, 1 Show. 68.

(7) *Smith v. Evans*, 1 Wils. 313, by Parker, C. B., and the two other barons present. *Grayson v. Atkinson*, by Lord Hardwicke, 2 Ves. 459; *Ellis v. Smith*, 1 Ves. jun. 11, by Parker, C. B., Willes, C. J., and Sir J. Strange. See also, 17 Ves. 458; 18 Ves. 175.

(8) 2 Ves. 459.

said that putting a seal to it, would be a sufficient signing? for any one may put a seal. No particular evidence arises from sealing; common seals are alike; no certainty or guard arises from thence."

In a late case, where it appeared that the testator was blind, the Court of Common Pleas determined, that it was not necessary to read over the will previous to the execution, in the presence of the attesting witness.(1) "The Statute of Frauds," said Mr. Justice Heath, on that occasion, "only requires, that the testator shall execute the will in the presence of the attesting witnesses, and, in ordinary cases, when that is done, all is done that is necessary. In the case of a blind man, stronger evidence would be required than the mere attestation of signature; but in this case there was that stronger evidence which the peculiarity of the case seems to call for. Sufficient attention," continued Mr. Justice Heath, "has not been paid, in the course of the argument, to the distinction between what shall be deemed a literal compliance with the provisions of the statute, and what sufficient proof to rebut any imputation of fraud. The question of fraud is for the jury entirely, and there they found the will to be a valid will."(2)

Attestation.

The subscribing witnesses are to attest the signing; but the statute does not direct that they shall see the testator sign, or that he should sign in their presence. It requires only an attestation of the signing. Now, at the time of making that act of Parliament, and ever since, if a bond or deed had been signed by the party, who afterwards acknowledged it to be

(1) Longchamp v. Fish, 2 New Rep. 415.

(2) NOTE 1166.—The statute of New Jersey directs that all wills shall be in writing, "*signed and published by the testator.*" Where the testator's hand was, by his own consent, guided by another in executing his will, and the will was afterwards acknowledged by him, it was held to be strictly a legal signing by the testator, within the sense of the statute. Den ex dem. Stevens v. Van Cleve, 4 Wash. C. C. R. 262. See 2 R. S. of New York, (2d ed.) pp. 7, 8, § 41. In New York, the name must be subscribed *at the end* of the will. Id. § 40; Wattes v. The Public Administrator of the city of New York, 4 Wend. 168. The testator need not seal the will or a revocation. Doe ex dem. Knapp v. Pattison, 2 Blackf. 355; Avery v. Pixley, 4 Mass. Rep. 460, 462; Williams' Lessee v. Burnet, 1 Wright, 53. A neighbor wrote the testator's will thus: "I, S. M., &c., do make this my will," &c. and ending "in ratification, &c., I have, &c., set my hand and seal," which she published and had witnessed, but could not sign, nor was her name fixed at the bottom. Held a good will. Sarah Mile's Will, 2 Dana, 13. It is sufficient if the testator write his name in the body of the will, or elsewhere upon the paper, if that be intended as a signature, and the signing, wherever it be, may be done by the testator or another. And publication and attestation, where there was no intention to subscribe, is sufficient. Sarah Mile's Will, 1 Dana, 1 to 4; Dudleys v. Dudleys, 3 Leigh, 436. And see Vidal's Heirs v. Duplantier, 7 Lou. Rep. (Curry) 37, 45. Otherwise if there be an intention to subscribe, whether it be defeated by sudden disability (Id.), or the signing be omitted, though the will be acknowledged to the first witness, and signed when the other attests. Burwell v. Corbin, 1 Rand. 131. But this last case was questioned in some of its features by Dudleys v. Dudleys, 3 Leigh, 436. Where a will is written on several sheets of paper, it has never been determined that the testator must sign them all. Pearson v. Wightman, 1 Rep. Const. Court, 345. See Cheeves, J., remarks in this case, on Right dem. Cater v. Price, cited in the text.

his handwriting before witnesses, that was always considered to be evidence of the signing by the person executing, and a sufficient attestation by the subscribing witnesses:(1) and the rule is precisely the same, where a note or declaration of trust, or any other instrument which requires a bare signing, is acknowledged before witnesses. From analogy to these cases, it has been determined in the case of wills, that the subscribing witness need not see the act of signing, but that it will be sufficient if the testator has acknowledged to them, either to each separately or to all at the same time, that the will is his, or that the signature is his handwriting.(2) And the subscribing witnesses need not express in their attestation, that they subscribed their names in the presence of the testator; but whether they did so subscribe, is a question for the consideration of the jury, to be determined upon the evidence.(3)

The statute requires the witnesses to attest the signing and to subscribe, but does not direct that they shall be all present at the same time; and although an attestation and subscription by all the witnesses at the same time would be the best security against fraud and imposition, by making each a check upon the other, yet in the interpretation of the statute, courts of law early determined, and it is now an established rule of property, that the witness may subscribe at several times.(4)

An attestation by a mark has been adjudged to be a sufficient subscription within the meaning of the statute.(5)

It is not necessary that the testator should declare the instrument, executed by him, to be his will, or that the witnesses should attest every page, or that every page should be particularly shown to them.(6) The whole will, however, ought to be present at the time of attestation; for if a person makes a will on several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the will, this is not a sufficient execution.(7) But unless there is positive proof that the entire will was not in the room, the question, whether it was so or not, is a question of fact to be left, with all the particular circumstances of the case, to the consideration of the jury.(8)

Presence of testator.

The witnesses are to attest and subscribe in the presence of the testator;

(1) 2 Ves. 457.

(2) *Stonehouse v. Evelyn*, 3 P. Wms. 53; *Grayson v. Atkinson*, 2 Ves. 454; *Ellis v. Smith*, 1 Ves. jun. 11; *Addy v. Grix*, 8 Ves. 504; *Westbeeche v. Kennedy*, 1 Ves. & Beam. 362.

(3) *Brice v. Smith*, Willes, 1; 4 Taunt. 217. As to execution under powers, see Vol. II, Chap. 7.

(4) *Cook v. Parsons*, Prec. in Chan. 185; *Jones v. Lake*, 2 Atk. 177, in note, S. P. Admitted in 2 Ves. 458, and in 1 Ves. jun. 14.

(5) *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, Id. 504.

(6) *Bond v. Seawell*, 3 Burr. 1775; 1 Black. Rep. 407, 422, 454.

(7) *Lea v. Libb*, 3 Mod. 262; S. P., 1 Eq. Cas. Ab. 403.

(8) *Bond v. Seawell*, 3 Burr. 1773.

and, as the object of this provision was to guard against fraud and prevent the substitution of a false will in the place of the true one, the obvious meaning the statute must be that the testator should be in such a state of mind, and in such a situation, as to be capable of seeing the witnesses in the act of subscribing. It will not be a good execution, if the testator was in a state of insensibility,(1) or if it was impossible for him to see the witness subscribe. "It is enough, if the testator might see; it is not necessary that he should actually see them signing; for, at that rate, if a man should turn his head back, or look off, that would vitiate the will." (2) But, if the jury find the fact that the testator might have seen what was passing at the time of the subscribing, then it will be presumed in favor of the attestation that the testator actually saw what he might have seen. In one case, the testator was sick in bed, and the witnesses withdrew into a gallery, and there subscribed it; between which gallery and the bedchamber where the testator lay, there was a lobby with glass doors, and part of the glass was broken.(3) In another case, the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that and the door of the testator's room were open.(4) In a third case, the testatrix sat in her carriage opposite the window of her attorney's office, in which office the witnesses subscribed their names.(5) In all these cases (and in others, which might be mentioned to the same effect, differing only in their peculiar circumstances), the execution was held to be sufficient, the material fact being proved, that the testator might have seen the attestation if he had chosen to look.

If one of the subscribing witnesses can prove the execution (as, that the testator signed in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them, and that each of the witnesses subscribed in his presence), this will be a sufficient proof of the will without calling the others. But if the witness, who is called, can only prove his own share in the transaction, as must happen where the testator acknowledged his signing to the witnesses separately, the other witnesses ought in that case to be called. If they are dead or insane, their handwriting and the handwriting of the testator ought to be proved; it will then be a question for the jury, whether, under the circumstances

(1) *Cater v. Price*, 1 Doug. 241.

(2) *Shires v. Glascock*, 2 Salk. 687.

(3) *Sir G. Sheer's Case*, cited Carth. 81.

(4) *Davy and another v. Smith*, 3 Salk. 395.

(5) *Cosson v. Dade*, 1 Brown Ch. C. 99. See also *Doe dem. Wright and others v. Manifold*, 1 Maule & Selw. 294.

of the case, it is probable that all the formalities of the statute were regularly observed.(1)

Form of attestation.

The cause of attestation generally expresses, that the witnesses subscribed in the presence of the testator; but such a statement is not absolutely necessary; and though it is entirely omitted, the omission will not conclude the jury from finding, that the will was so subscribed. In the case of *Croft v. Pawlett*, (2) the attestation was, that the will had been signed, sealed, published, and declared as his last will, in the presence of the subscribing witnesses; the witnesses being dead, and their signatures proved in the common way, it was objected, that this was not an execution according to the Statute of Frauds; for the signatures of the witnesses could only stand as to the facts to which they had subscribed, and signing in the presence of the testator was not one; but the court were of opinion, that this was a matter of evidence to be left to the jury, and they gave a verdict in favor of the will.(3)

(1) *Hands v. James*, 2 Comyn's Rep. 530; *Croft v. Pawlett*, 2 Stra. 1109; *Brice v. Smith*, Willes's Rep. 1, S. P.; *Lord Rancilff v. Parkyns*, 6 Dow, 202.

(2) 2 Str. 1109.

(3) NOTE 1167.—The will need not be read, even to a blind or illiterate testator, in the presence of the witnesses, though it be drawn by one who takes under it, and executed *in extremis*. Upon proving the other formalities of execution, the law presumes he had knowledge of its contents; though, that it was not read to such a testator, may go to the jury as a circumstance in proof of incapacity, undue influence, or fraud. *Hemphill v. Hemphill*, 2 Dev. 291; *Boyd v. Cook*, 3 Leigh, 32; *Shanks v. Christopher*, 3 A. K. Marsh. 145; *Lewis v. Lewis*, 6 Serg. & Rawle, 489, 494, 495, 496; *Harrison v. Rowan*, 3 Wash. C. C. Report, 580; *Tucker v. Calvert*, 6 Call, 90; *Downey v. Murphy*, 1 Dev. and Batt. 82; *Carr v. McCamm*, Id. 276. Nor need the witness be privy to the contents (*Lewis v. Lewis*, 6 Serg. & Rawle, 489, 495; *Roane, J.*, in *Burwell v. Corbin*, 1 Randells, 167); though under the peculiar statute of Pennsylvania, if the will be neither signed by the testator, nor in his proper hand, it is essential to prove by two witnesses that he knew the contents. *Lewis v. Lewis*, 6 Sergeant and Rawle, 496. So in any case, if the testator's instructions for the draft have been departed from, it must appear that the departure was in some way explained to him. *Chandler v. Ferris*, 1 Harringt. 454. It is well settled that the witnesses may subscribe at several times, and not in the presence of each other. *Roane, J.*, in *Burwell v. Corbin*, 1 Rand. 156; *Wright v. Wright*, 5 Mo. & Payne, 316; *S. C.*, 7 Bing. 457; *The British Museum v. White*, 3 Mo. & Payne, 689; *S. C.*, 6 Bing. 310; *Dudleys v. Dudleys*, 3 Leigh, 436. The testator need not expressly acknowledge it to be his will, if he do what is equivalent (*Small v. Small*, 4 Greenl. 220); nor need the witnesses see his signature nor understand the nature of the instrument. *Id.* But see 2 R. S. of N. Y. (2d. ed.) p. 7, sub. 3. The testator may acknowledge merely (*Roane, J.*, in *Burwell v. Corbin*, 1 Rand. 163), though the paper lie at a distance. *Eelbeck v. Granberry*, 2 Hayw. 232. And it is perfectly well settled that he need not subscribe in presence of the witnesses. His acknowledgment is enough. *Dudleys v. Dudleys*, 3 Leigh, 436; *Shanks v. Christopher*, *supra*; *Reynolds' Lessees v. Shirley*, 7 Hañ. pt. 2, 48; *Hall v. Hall*, 17 Pick. 373. And a will or codicil imperfectly attested, may become operative by a distinct codicil referring to and adopting it, though the attesting witnesses did not see the former. But the reference must be explicit. *Utterton v. Robins*, 1 Adol. & Ellis, 423; *S. C.*, 2 Nev. & Mann. 819. A will executed in presence of two subscribing witnesses, one of the latter being different from the former two, although the codicil refer to the will, and affirm it, will not give effect to a devise. *Dunlap v.*

Witness abroad.

If a subscribing witness is abroad, who ought to be called if he could be produced, his handwriting may be proved in the case of a will, as in cases on the execution of a deed; and the rule appears to be the same in courts of equity. Thus, where a question arose, whether it was necessary to send out a commission to examine one of the witnesses, who was in Jamaica, Lord Alvanley, then master of the Rolls, held, that it was not necessary to have his examination, but that the case was the same as if the witness were dead; (1) the heir at law, he observed, did not make a

Dunlap, 4 Dessaus. Eq. Rep. 305. But a codicil with three competent witnesses, may operate as a republication, or rather an execution of an original will, which was void. And where a devisee attested an original will which avoided the devise as to him, a codicil afterwards indorsed and attested by indifferent witnesses, was held to give effect to the first will in respect to the void legacy. *Mooers v. White*, 6 John. Ch. Rep. 360, 374, 375. And see *Haven v. Foster*, 14 Pick. 534, and the cases there cited.

A clause of attestation being annexed to a paper not attested; held that, *prima facie*, it was not intended to operate even as to personal property; but the presumption was not conclusive. *Jones v. Kea*, 3 Dev. 301.

Acknowledgment alone is not enough in New Jersey, on the words of the statute there, which requires the will to be signed in presence of the witnesses. *Den ex dem. Compton v. Mitton*, 7 Halst. 70.

The witnesses must attest in the presence of the testator. *Holton v. Lloyd*, 1 Moll. 31, 32. The attestation clause need not say expressly "in presence of the testator." *Jackson ex dem. Bowman v. Christman*, 4 Wend. 377; *Croft v. Paulet*, 2 Str. 1109; S. C., 8 Vin. Abr. 128, pl. 4; *Hands v. James*, Com. Rep. 531; Bull. N. P. 264. The witness may attest by merely signing his initials (*Adams v. Chaplin*, 1 Hill's South Car. Eq. Rep. 266), or making his mark, if he cannot write his name. *Den ex dem. Compton v. Mitton*, 7 Halst. 70; *Jackson ex dem. Van Dusen v. Van Dusen*, 5 John. R. 144. And see *Vidal's Heirs v. Duplantier*, 7 Lou. Rep. (Curry), 37, 45. A formal publication in fact is not necessary. Writing, signing and attesting are, of themselves, a sufficient publication. *Ray v. Walton*, 2 A. K. Marsh. 73. If it be apparent that the testator intended to execute a will, that is a sufficient publication of it. *Swift v. Boardman*, 1 Mass. Rep. 258; *Roane, J.*, in *Burwell v. Corbin*, 1 Rand. 159 *et seq.* And per *Gibbs, C. J.*, in *Modie v. Reid*, 7 Taunt. 361, 362: "If the act of the testatrix in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also, because they attest that by which she publishes it. I called on the bar to say what publication was; I do not wonder that I had no answer; for though the parties use the term publication, it is a term, in this sense, unknown to the law. I know what publication is, if spoken of many things; as for instance of a libel. I know what an uttering is; if a man puts forth base money in certain cases, it is an uttering; but I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will." And see *Coalter, J.*, in *Burwell v. Corbin*, 1 Rand. 142.

For various circumstances which bring the case within or without the rule as to the presence of the testator, and that it is sufficient if he *may*, though he do not, in fact, see the witnesses attest, the following cases are valuable. *Todd v. Winchelsea*, 1 Mood. & Malk. 12; S. C., 2 Carr. & Payne, 488; *Neil v. Neil*, 1 Leigh, 6; *Russell v. Falls*, 3 Har. & McHenry, 457, 465, 466, 467, *et seq.*; *Mason v. Harrison*, 5 Har. & John. 480; *Edelen v. Hardy's Lessee*, 7 Id. 61; *Howard's Will*, 5 Monroe, 202.

The testator's presence may be proved by others, as well as the subscribing witnesses. *Gwinn v. Radford*, 2 Lit. 137.

The law does not require that the witnesses' names should appear in any particular part of the will. It is sufficient that they sign. *Chardon's Heirs v. Bongue*, 9 Lou. Rep. (Curry), 458.

(1) *Ld. Carrington v. Payne*, 5 Ves. 411.

point of it, but submitted it to the court; and he cited a case, where it was thought not only unnecessary, but very dangerous to send the will abroad. And in another case, where it was objected that one of the witnesses was abroad, Lord Chancellor Thurlow said, he doubted whether the rule had ever been laid down so largely, as that the will could not be proved without examining all the witnesses, although that had been the practice.(1)

(1) *Powel v. Cleaver*, 2 Brown Ch. C. 504. See *Grayson v. Atkinson*, 2 Ves. 460.

NOTE 1168.—The text speaks of various grounds for dispensing with the personal examination of witnesses, such as death, insanity, absence from the kingdom, &c. See pp. 501, 502, 503. These are but illustrations of the general rule, that whenever the subscribing witnesses, the primary testimony, are placed beyond the reach of the party, he becomes entitled to the secondary. *Chase v. Lincoln*, 3 Mass. 236. Other instances are, the attested witness becoming interested or infamous. *Sears v. Dillingham*, 12 Mass. Rep. 358. A witness interested must be excluded, though he acquired his interest after the will was published. *Gill's Will*, 2 Dana, 449. In these cases their handwriting may be proved, or the handwriting of the testator, or both. But all the witnesses must be first accounted for. *Miller v. Miller*, 2 Bing. N. C. 76. If any one is within the party's power, the hand of others alone cannot be relied upon; for as yet the party has higher evidence, because *direct* to the regular execution; whereas the handwriting is but *circumstantial*. Per Tindal, C. J., in *Wright v. Doe ex dem. Tatham*, 1 Adol. & El. 3, a distinction in the degrees of evidence, which we before adverted to more at large, *ante*, in the notes to the 1st volume.

It will be perceived by the text, that the English cases incline strongly that, in such a case, both the handwriting of the witnesses and the testator should be shown (*Hopkins v. Graffenreid*, 2 Bay, 187; *Collins v. Elliott*, 1 Har. & John. 1; *Jackson ex dem. Hunt v. Luquere*, 5 Cowen's Rep. 221, 223, 224, S. P.) if such evidence be attainable; though if the party fail in either, as must often be the case where the will is ancient, either the one or the other must, of course, give way to still inferior proof according to the circumstances. See *Miller v. Caruthers*, 6 Serg. & Rawle, 215; *Hall v. Gittings*, 2 Har. & John. 112. Where the witnesses were all dead, and no proof of their handwriting could be found, proof of the testator's handwriting was received as sufficient. *Duncan v. Beard*, 2 Nott & McCord, 400. In respect to similar proof of deeds, see *ante*, notes to the first and second volumes. It is material in the United States, where courts of record have generally the power of examining witnesses abroad, by commission or otherwise, that this does not vary the rule which lets in the inferior testimony. Text, 502. It is in the option of the party, to take his commission, &c., or resort to the secondary proof on the ground that the primary is beyond the jurisdiction of the court. *Turner v. Turner*, 1 Litt. Rep. 100, 104.

The mode of proving death, absence, insanity or other disqualification, is the same as in other cases.

The fact of absence lying at a distance, and being too, a kind of negative, usually presents the greatest difficulty, as in the proof of other instruments. Diligent inquiry at the proper places is usually sufficient, as at the place where the witness was engaged as clerk, though even that must be dispensed with, if the proper place be not known to the party. This was so in *Miller v. Miller* (2 Bing. N. C. 76); and proof of handwriting was received, on showing that the witness had been advertised for a week before the trial in three London newspapers. *Id.* An inquiry of the witness's nephew was proved, who replied that nothing had been heard of him for a number of years; and though no inquiry had been made of the absent witness's family, the reason given was that it was not known who his relations were, whereupon proof of his hand was received even in chancery, on a bill filed to establish the will. *James v. Parnell*, Turn. & Russ. 417. In Tennessee, a statute provides that the return of absence by the officer holding a subpoena for the witness, shall let in secondary evidence. The statute was acted on for the purpose of proving a will in *McDonald v. McDonald* (5 Yerg. 307).

The fact being once established which lets in the proof of handwriting, a single witness may prove the handwriting of all. *Hopkins v. Graffenreid*, 2 Bay, 187. And see *Sampson*

Witness denying.

If a subscribing witness should deny the execution of the will, he may be contradicted, as to that fact, by another subscribing witness; and even if they all swear that the will was not duly executed, the devisee would be allowed to go into circumstantial evidence to prove the due execution.(1) If one of the subscribing witnesses impeach the validity of the will on the ground of fraud, and accuse other witnesses who are dead, of being accomplices in the fraud, the devisee may give evidence of their general good character.(2)

Proof of old wills.

When the subscribing witnesses are dead, and no proof of their handwriting can be obtained, as must frequently happen in the case of old

v. White, 1 M'Cord, 74. All the cases agree that handwriting may be proved. Sampson v. White, 1 M'Cord, 74. Absence from the state is the same, for this purpose, as death. Engles v. Bruington, 4 Yeates, 345; Bowman v. Bartlett, 3 A. K. Marsh. 90. The handwriting of all the witnesses must be proved, unless such proof be shown to be beyond reach of the party. Jackson ex dem. Hunt v. Luquere, 5 Cowen's Rep. 221, 223, 224; Hopkins v. Albertson, 2 Bay, 484. All the witnesses being dead, and the handwriting of two proved, the other having signed his initials, and the testator's mark being signed; on very slight proof of the witness's initials and that he had affixed the testator's mark, with possession under the will, and the declaration of an attesting witness in his lifetime that the will had been properly executed, it was received as evidence to the jury. Note, this declaration came out incidentally, on examining a witness for the defendant, who resisted the will. Jackson ex dem. Van Dusen v. Van Dusen, 5 John. Rep. 144, 154. The testimony of a deceased attesting witness, sworn on a former trial, was received under an order of chancery, on trying an ejectment; and held, it being full, sufficient proof of the will, though another attesting witness was alive and in court. Wright v. Doe ex dem. Tatham, 1 Adol. & Ellis, 3. The court expressed an opinion that the testimony of the deceased witness thus given, was equal in degree with that of the living witness. In one case, a mere exemplification from a court of probate, though the certificate as to the proof of execution was imperfect, the will appearing to be ancient, was received as proof both of the execution and contents. Hall v. Gittings, 2 Harr. & John. 112, 121, 122. Not one of the witnesses appears to have been sworn, or their absence otherwise accounted for, than by inference from the great lapse of time since the apparent date of the will, which might lead to the presumption of their death.

(1) Austin v. Willes, Bull. N. P. 264; Pike v. Badmering, cited 2 Stra. 1096; Low v. Joliffe, 1 Black. Rep. 365.

NOTE 1169.—In Jackson ex dem. Bowman v. Christman (4 Wend. 277, 283), Sutherland, J., delivering the opinion of the court, says, "If the subscribing witnesses all swear that the will was not duly executed, the devisee may notwithstanding go into circumstantial evidence to prove its due execution." "And what circumstances would justify a stronger presumption in favor of the validity of a will than the fact that the devisees, who had all the means of knowledge in their power, treated it as a valid will, entered upon and divided the estate according to its provisions, and continued so to hold and enjoy their respective portions for more than forty years?" Pearson v. Wightman, 1 Const. Rep. 336, S. P. But where the witnesses either so deny or fail to prove their attestation, the counter proof must be very clear to support the will. *Id.* See Handy v. The State, 7 Harr. & John. 42. So witnesses swearing in support of the will may be contradicted. Spencer v. Moore, 4 Call, 423.

(2) *Vide* Vol. II, Chap. 11.

NOTE 1170.—Provis v. Reed, 5 Bing. 435, S. P. The same case is more fully reported in 3 Moore & Payne, 4, upon the same point. Doe ex dem. Reed v. Harris, 7 Carr. & Payne, 330 S. P.

wills, it will be sufficient to prove the signature of the testator alone. In a case(1) where the handwriting of two subscribing witnesses was proved, and no account could be given of the third, the will being above thirty years old, and the testator having been dead for twenty years, an objection was made to the proof of the will; but the master of the Rolls said, he could not see any distinction in this respect between a will and a deed, except that the former, not having effect till the death, wants a kind of authentication, which the other has; that is, from the nature of the subject; but in this case, he added, I think the proof sufficient; for in a late case in the Court of King's Bench (*Cunliff v. Sefton*), (2) an inquiry of the same kind was held sufficient. The master of the Rolls therefore held, that the execution of the will had been sufficiently proved.

In the case of *Calthorpe v. Gough* and others, at the Rolls, (3) a will thirty years old (reckoned from the date of the will, not from the testator's death), was not proved by witnesses; and it was said at the bar, that the proof was not necessary on account of the age of the will; and, in support of this, a case of *Mackery v. Newbolt* was cited, in which Sir Lloyd Kenyon, then master of the Rolls, is said to have decided, that a will above thirty years old should be read without proof, although the testator had died very recently. That point, however, was not decided in the case of *Calthorpe v. Gough*, because the plaintiff, the heir at law, admitted the will, and claimed under it. In the late case of *Lord Ranccliffe v. Parkyns*, (4) the Lord Chancellor is reported to have expressed an opinion, that a will, thirty years old, if there has been possession under it, proves itself, when the attestation records the fact of the signing of the witnesses in the testator's presence; and, if the signing is not sufficiently recorded, yet that the fact of possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing by the witnesses. (5) The general rule seems to be, that a will thirty years old, unless there has been possession under it, ought to be proved like any other will. (6)

(1) *M'Kenzie v. Fraser*, 9 Ves. 5.

(2) 2 East, 183.

(3) 4 Term Rep. 707, n. a, 709, n. (†).

(4) 6 Dow, 202.

(5) 6 Dow, 202.

(6) NOTE 1171.—Per Lord Manners, in *Concannon v. Cruise*, 2 Moll. 332. The general doctrine of the text, that a paper appearing on its face to be an original will thirty years old, shall be received without the usual proof by witnesses, or accounting for their absence, and showing their or the testator's handwriting, has been adopted in the various courts of the United States, as far as they appear to have spoken to the point. *Jackson ex dem. Lewis v. Laroway*, 3 John. Cas. 283, 286. The amount of the doctrine seems to be, that, in such a case of apparent age, the law draws the inference that the ordinary proof, both direct and circumstantial, is all lost, and lets in such grounds of presumption as are more remote but of a more enduring character. This presumption is conclusive, and though the witnesses appear to be alive and within reach of process, that will not preclude the inferior proof. *Doe ex dem. Oldham v. Wolley*, 8 Barn. & Cress. 22;

Doe ex dem. Oldnall v. Deakin 3 Carr. & Payne, 402; S. C., 2 Mann. & Ryl. 195; Jackson ex dem. Bowman v. Christman, 4 Wend. 277, 282, and the cases cited at the latter page by Sutherland, J.; per Spencer, J., and Kent, C. J., in Jackson ex dem. Burhans v. Blanshan, 3 John. Rep. 292, 295, 297, 298. The rule is put by Nelson, J., in Featherley v. Waggoner (11 Wend. 603), that the will which comes to prove itself, must appear, on its face, to have been regularly executed; but Jackson ex dem. Bowman v. Christman (*supra*), holds that among those marks of regularity, it is not essential that the attestation clause should mention the formalities of execution, as that the witness subscribed in the presence of the testator. 4 Wend. 282.

The more material difference between the English and American cases (we speak of a majority of the latter), lies in the date from which the thirty years are to be computed. In England, it is by the more recent cases, entirely settled that this is the date of the will, however recent the possession, for the presumption that the witness is dead or absent governs. Doe ex dem. Oldham v. Wolley, 8 Barn. & Cress. 22; S. C. by title of Doe ex dem. Oldnall v. Deakin, 3 Carr. & Payne, 402, and 2 Mann. & Ryl. 195. Spencer, J., stated the same principle and was in favor of the same rule in Jackson ex dem. Burhans v. Blanshan (3 John. Rep. 292); but was overruled by Kent, C. J., and Van Ness, J.; the other two judges giving no opinion. The Supreme Court of New York, with which the Supreme Court in Pennsylvania concurred, in Shaller v. Brand (6 Binn. 435, 439), maintaining a more strict analogy to the principle of presumption in favor of ancient deeds and other writings, therefore reckon from the time when the will appears to have taken effect in possession. Jackson ex dem. Hunt v. Luquere, 5 Cowen's Rep. 221, 224; Nelson, J., in Hewlett v. Cook, 7 Wend. 374, and in Featherley v. Waggoner, 11 Id. 602. In either view, it seems the will is to be first read, as evidence from its face, and then possession shown under it. Doe ex dem. Lloyd v. Passingham, 2 Carr. & Payne, 209. This is obviously, however, but a discretionary matter upon the order of evidence. For the purpose of showing a corresponding enjoyment, the acts and declarations of third persons in possession are admissible. Jackson ex dem. Van Dusen v. Van Dusen, 5 John. Rep. 144. Possession of all the land devised is not essential. It is enough that part has gone according to the will, and been enjoyed under it. Jackson ex dem. Hunt v. Luquere, 5 Cowen's Rep. 221, 227; Jackson ex dem. Van Schaick v. Davis, Id. 23, S. P. as to an ancient deed; Bradstreet v. Clark, 12 Wend. 602, 677. Other acts of ownership in respect to the land devised, beside direct possession, are admissible as auxiliary proof in support of an ancient will. Jackson ex dem. Hunt v. Luquere, 5 Cowen's Rep. 221. And in some cases, where there could be no actual possession, the land lying wild and uncultivated, acts of ownership, or other evidence of the authenticity of the will, may come in place of possession; *e. g.* where there are certificates of its having been executed and recorded, there being proof of the age of the certificates, &c. Jackson ex dem. Lewis v. Laroway, 3 John. Cas. 283. So where it had been regularly proved and deposited in a proper office in England. Bradstreet v. Clarke, 12 Wend. 602, 677. In one case the proof by witnesses being deficient, but the will thirty years old, it was received as proved, merely because it came from the proper depository, the prerogative office. By Lord Chancellor Hart, in Holton v. Lloyd, 1 Moll. 32. In another case, on a very ancient probate, though that was imperfect, a mere exemplification, without the original will, was received. Hall v. Gittings, 2 Har. & John. 112, 121, 122.

We conclude this head of the proof of wills, with a notice of some few decisions not immediately ranging themselves under propositions in the text.

The *onus probandi* of the will lies with the party appealing from the original court of probate. Comstock v. Hadlyme, 8 Conn. Rep. 254; Buckminster v. Perry, 4 Mass. Rep. 593; Brooks v. Barret, 7 Pick. 94.

Declarations of the testator at the time of tearing his will, replacing it in parts, were received to show that he meant to stop *in medio*, and not effect a revocation. Doe ex dem. Perkes v. Perkes, 3 Barn. & Ald. 489.

It is well settled, that a will of lands or other real estate, made in a foreign country or neighboring state of the Union, must be executed according to the forms required by the *lex loci rei sitæ*. The following are a few of the authorities to that effect. Kerr v. Moun's Devises, 9 Wheat. 565; Darby's Lessee v. Mayer, 10 Id. 465; Weston, J., in Crofton v. Ilsley, 4 Greenl. 138; Calloway v. Doe ex dem. Joyce, 1 Blackf. 372; Robertson v. Barbour, 6 Monroe, 527.

And as to a will of lands lying in one state, its courts are not concluded, though the will be declared void by the court of another. *Rice v. Jones*, 4 Call, 89.

Though a will be formally proved, one witness may establish a fraud which will overthrow it, *e. g.* a substitution of one paper for another. So one witness to rebut a fraud may prevail over several. *Lewis v. Lewis*, 6 Serg. & Rawle, 497, per Duncan, J. As to weighing the credit of subscribing witnesses, where in their evidence they hesitate, &c. See *Mullen v. M'Kevley*, 5 Watts, 399.

On the trial of an issue of *devisavit vel non*, it was held not competent in attacking the will, to prove that the testator had a dislike to one of the subscribing witnesses, when such fact does not otherwise appear to be relevant. Nor can a subscribing witness be asked whether he would have attested the will had he known the dispositions contained in it, with a view to show fraud or imbecility. *Spence v. Spence*, 4 Watts, 165. The declaration of one of several devisees, that the will was unduly obtained, was received as evidence on the trial of such an issue, especially to avoid the devise in his own favor. *Brown v. Moore*, 6 Yerger, 272.

* * In *Northrop v. Wright* (7 Hill, 478), it was held by the Court of Errors (overruling the judgment of the Supreme Court, in the same case, 24 Wend. 221), that to entitle a will of real estate to be read in evidence, after thirty years, without proof of its authenticity, possession must appear to have been held in accordance with its provisions. That after the lapse of sixty years from the date of the will, its execution may be established without any effort to procure the attendance of the subscribing witnesses, as they may be presumed to be dead; but it will not be presumed without some evidence of effectual inquiry, that there are no persons living who can testify to the handwriting of the subscribing witnesses. * *

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